

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 *AMICI CURIAE* OF SERVICES AND
ADVOCACY FOR GLBT ELDERS (“SAGE”)
AND 25 OTHER ORGANIZATIONS SERVING
OLDER AND DISABLED INDIVIDUALS IN
SUPPORT OF RESPONDENTS**

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TABLE OF CONTENTS

INTEREST OF <i>AMICI CURIAE</i>	1
SUMMARY OF THE ARGUMENT	11
ARGUMENT	12
I. Older Adults and People with Disabilities Are At-Risk Populations Who Need Non- Discriminatory Access to Services And Supports In Order To Live With Dignity	12
A. The unique physical, financial, and social conditions faced by older adults and people with disabilities make them particularly vulnerable to the effects of discrimination	14
B. LGBTQ older adults and people with disabilities are particularly vulnerable to discrimination	18
II. Older Adults and People with Disabilities Necessarily Rely on Government Contractors to Provide Critical Services and Supports	24

III.	Allowing Government Contractors to Discriminate Against Older Adults and People with Disabilities on the Basis of Protected Characteristics Violates Our Nation’s Core Stated Values and Policies, and Would Cause Significant Harm	29
CONCLUSION.....		34

TABLE OF AUTHORITIES

	Page(s)
Cases	
<i>Bragdon v. Abbott</i> , 524 U.S. 624 (1998).....	32
<i>Stevens v. Optimum Health Inst.</i> , 810 F. Supp. 2d 1074 (S.D. Cal. 2011)	32
<i>Stormans, Inc. v. Selecky</i> , 586 F.3d 1109 (9th Cir. 2009).....	32
Statutes	
42 U.S.C. § 12101 (2018).....	31
Other Authorities	
Admin. for Cmty. Living, <i>Annual Report on Centers for Independent Living</i> (2020).....	24
Admin. on Aging, Admin. for Cmty. Living, <i>2019 Profile of Older Americans</i> (2020) ..	12, 13, 14, 15, 16, 25
Am. Psychol. Ass’n, <i>Older Adults’ Health and Age- Related Changes: Reality Versus Myth</i> (2017)....	13, 14, 16
<i>Americans with Disabilities Act of 1988: Joint Hearing on S. 2345 Before the Subcomm. on the Handicapped of the S. Comm. on Lab. & Hum. Res. & the Subcomm. on Select Educ. of the H. Comm. on Educ. & Lab.</i> , 100th Cong. (1988) (statement of Rep. Tony Coelho).....	32
Angela Houghton, <i>Maintaining Dignity: A Survey of LGBT Adults Age 45 and Older</i> , AARP Res. (Mar. 2018)	21, 34

<i>Area Agencies on Aging</i> , Admin. for Cmty. Living (last updated Apr. 29, 2017).....	25
<i>Budget</i> , Admin. for Cmty. Living (last updated June 9, 2020).....	24
Ctrs. for Disease Control & Prevention (CDC), <i>Disability Impacts All of Us</i> (last updated Sept. 9, 2019)	13, 15
Disability Rts. Educ. & Def. Fund (DREDF), <i>Health Disparities at the Intersection of Disability and Gender Identity: A Framework and Literature Review</i> (2018).....	22
<i>Eldercare Locator: Services Available</i> , Admin. on Aging	26
Erin Fitzgerald, Nat'l Gay & Lesbian Task Force, <i>No Golden Years at the End of the Rainbow: How a Lifetime of Discrimination Compounds Economic and Health Disparities for LGBT Older Adults</i> (2013)	18
Exec. Order No. 9,346, 8 Fed. Reg. 7183 (May 27, 1943).....	30
Exec. Order No. 10,925, 26 Fed. Reg. 1977 (Mar. 6, 1961)	30
Exec. Order No. 13,672, 79 Fed. Reg. 42971 (July 21, 2014).....	30
<i>Foster and Adoption Laws</i> , Movement Advancement Project (MAP) (last updated Aug. 18, 2020)	20
Hum. Rts. Campaign (HRC) & Servs. & Advoc. for GLBT Elders (SAGE), <i>COVID-19 & LGBTQ Older People</i> (2020)	33
Ilan H. Meyer, <i>Prejudice, Social Stress, and Mental Health in Lesbian, Gay, and Bisexual Populations:</i>	

<i>Conceptual Issues and Research Evidence</i> , 129 Psychol. Bull. 674 (2003).....	33
Ilan H. Meyer & Soon Kyu Choi, Williams Inst., <i>Vulnerabilities to COVID-19 among Older LGBT Adults in California</i> (2020)	23
Jeffrey M. Jones, <i>In U.S., 10.2% of LGBT Adults Now Married to Same-Sex Spouse</i> , Gallup (June 22, 2017)	20
Leonard Z. Breen, <i>The Aging Individual</i> , in Handbook of Soc. Gerontology 145 (Clark Tibbitts ed., 1960)	31
<i>LGBTQI</i> , Nat'l Alliance on Mental Illness (2020) ..	19
<i>Mayor's Commission on Aging: Partners and Providers</i> , City of Philadelphia (last updated Oct. 23, 2018)	25
MetLife Mature Mkt. Inst. & Am. Soc'y on Aging, <i>Still Out, Still Aging: The MetLife Study of Lesbian, Gay, Bisexual, and Transgender Baby Boomers</i> (2010)	21
Michael Adams, <i>Pushing for Equality: LGBT Elders Need Discrimination-Free Access to Care in Community</i> , Aging Today (2019)	27
Movement Advancement Project (MAP) et al., <i>LGBT Older Adults and Health Disparities</i> (2010).....	19
Movement Advancement Project (MAP) & Servs. & Advoc. for GLBT Elders (SAGE), <i>Improving the Lives of LGBT Older Adults</i> (2010).....	21
Movement Advancement Project (MAP) & Servs. & Advoc. for GLBT Elders (SAGE), <i>Understanding Issues Facing LGBT Older Adults</i> (2017).....	20

Movement Advancement Project (MAP), Servs. & Advoc. for GLBT Elders (SAGE), & Ctr. for Am. Progress, <i>LGBT Older People & COVID-19: Addressing Higher Risk, Social Isolation, and Discrimination</i> (2020).....	23
Nat'l Council on Disability, <i>Highlighting Disability / Poverty Connection, NCD Urges Congress to Alter Federal Policies that Disadvantage People with Disabilities</i> (Oct. 26, 2017)	15
Nat'l Inst. on Aging, U.S. Dep't of Health & Hum. Servs., <i>Social isolation, loneliness in older people pose health risks</i> (Apr. 23, 2019)	16
<i>Older Adults</i> , Ctrs. for Disease Control & Prevention (CDC) (last updated Aug. 16, 2020)	17
<i>People with Disabilities</i> , Ctrs. for Disease Control & Prevention (CDC) (last updated Apr. 7, 2020)	17
Press Release, <i>Elderly Services moves to mobile meal delivery amid pandemic</i> , Archdiocese of Miami (Mar. 16, 2020).....	28
Press Release, <i>HHS Announces Nearly \$1 Billion in CARES Act Grants to Support Older Adults and People with Disabilities in the Community During the COVID-19 Emergency</i> , U.S. Dep't of Health & Hum. Servs. (Apr. 21, 2020).....	27, 28
<i>Programs and Servs.</i> , W. Res. Area Agency on Aging.....	26
<i>Request for Information from the Center for Faith-Based and Neighborhood Partnerships, Office of Intergovernmental and External Affairs, HHS, Admin. for Cmty. Living</i> (last updated May 7, 2020).....	26

Richard G. Wight et al., <i>Same-Sex Legal Marriage and Psychological Well-Being: Findings from the California Health Interview Survey</i> , 103 Am. J. Pub. Health 339 (2013).....	19
Servs. & Advoc. for GLBT Elders (SAGE), <i>Aging and the LGBT Community</i> (2019).....	20, 33
Servs. & Advoc. for GLBT Elders (SAGE), <i>Out & Visible: The Experiences and Attitudes of Lesbian, Gay, Bisexual and Transgender Older Adults, Ages 45–75</i> (2014)	21
Soon Kyu Choi & Ilan H. Meyer, Williams Inst., <i>LGBT Aging: A Review of Research Findings, Needs, and Policy Implications</i> (2016).....	21, 33
<i>When LGBT Elders Have No Place to Call Home</i> , SAGE Newsroom (June 14, 2018).....	27, 32

INTEREST OF *AMICI CURIAE*¹

This case presents the question of whether private agencies—funded with taxpayer dollars to provide essential public services for at-risk segments of the population—should be allowed to discriminate on the basis of protected characteristics, notwithstanding government prohibitions on such discrimination. *Amici* are organizations representing older adults and people with disabilities, who are particularly reliant on services and supports provided by government contractors, and who will be adversely affected by Petitioners’ position.

Services and Advocacy for GLBT Elders (“SAGE”) is the country’s oldest and largest organization dedicated to improving the lives of lesbian, gay, bisexual, and transgender (“LGBT”) older adults. In conjunction with 30 affiliated organizations in 22 states and Puerto Rico, SAGE offers supportive services and resources to LGBT older adults and their caregivers, advocates for public policy changes that address the needs of LGBT older people, and provides training for organizations that serve LGBT older adults. As part of its mission, SAGE provides services to LGBT older adults who face discrimination when they seek access to care.

Founded in 1954, the American Society on Aging (“ASA”) is a nonprofit association of diverse individuals bound by a common goal: to support the

¹ No counsel for a party authored this brief in whole or in part, and no person or entity, other than *amici curiae*, their members, and their counsel, made a monetary contribution to the preparation or submission of this brief. All parties have given their written consent to this filing.

commitment and enhance the knowledge and skills of those who seek to improve the quality of life of older adults and their families. Because ASA's members wish to enhance the quality of life of all older adults, and because discrimination of any kind erodes quality of life, ASA has an interest in opposing all forms of discrimination, including discrimination against LGBTQ older adults.

Justice in Aging's principal mission is to protect the rights of low-income older adults. Through advocacy, litigation, and the education and counseling of legal aid attorneys and other local advocates, Justice in Aging seeks to ensure the health and economic security of older adults who have limited income and resources. Since 1972, Justice in Aging has worked to promote the independence and well-being of low-income elderly and persons with disabilities, especially women, members of the LGBTQ community, people of color, and people with limited English proficiency. Justice in Aging works to ensure access to benefits programs that allow low-income older adults to live with dignity and independence.

The National Asian Pacific Center on Aging ("NAPCA") is the only national nonprofit organization with the mission to preserve and promote the dignity, well-being, and quality of life of Asian Americans and Pacific Islanders ("AAPI") as they age. AAPI older adults experience unique challenges, including a history of discrimination and prejudice. NAPCA has been their advocate for the past 40 years and continues its commitment to supporting AAPI and diverse older adults in overcoming barriers.

The National Council on Aging (“NCOA”) is a trusted national leader working to ensure that every person can age well, regardless of race, color, national origin, sex, gender identity, sexual orientation, or disability. Since 1950, our mission has not changed: Improve the lives of millions of older adults, especially those who are struggling. NCOA empowers people with the best solutions to improve their own health and economic security—and we strengthen government programs that we all depend on as we age. Our work seeks to remove inequities and keep all older adults healthy and safe.

The National Hispanic Council on Aging (“NHCOA”) is the leading national organization working to improve the lives of Hispanic older adults, their families, and their caregivers. Headquartered in Washington, D.C., NHCOA has been a strong voice dedicated to promoting, educating, and advocating for research, policy, and practice in the areas of economic security, health, and housing for more than 50 years.

The National Indian Council on Aging, Inc. (“NICOA”) is a 501(c)(3) nonprofit organization founded in 1976 by members of the National Tribal Chairmen’s Association who called for a national organization focused on the needs of aging American Indian and Alaska Native elders. The mission of NICOA is to advocate for improved comprehensive health, social services, and economic well-being for American Indian and Alaska Native elders.

Southeast Asia Resource Action Center (“SEARAC”) is a national civil rights organization that empowers Cambodian, Laotian, and Vietnamese American communities to create a socially just and equitable society. As representatives of the largest

refugee community ever resettled in the United States, SEARAC stands together with other refugee communities, communities of color, and social justice movements in pursuit of social equity. Because many in SEARAC's communities, especially elders, suffer from a variety of challenges and barriers to accessing essential services and support, SEARAC has an interest in opposing all forms of discrimination.

The Disability & Aging Justice Clinic ("DAJC") of the City University of New York School of Law represents low-income individuals with disabilities and older adults in a variety of civil legal matters, including discrimination in access to programs and services, parental rights, prisoners' rights, access to healthcare, alternatives to guardianship, and enhancing due process protections in areas that include guardianship. The mission of the DAJC is to promote and protect the civil rights, personhood, and self-determination of individuals with disabilities and older adults.

Access Living, founded in 1980, is one of the nation's largest, most experienced, and most prominent disability rights organizations governed and staffed by people with disabilities. As a Center for Independent Living ("CIL") established under the federal Rehabilitation Act, Access Living's statutorily-mandated mission includes advocacy to ensure the independence, integration, and full citizenship of people with disabilities. In furtherance of its mission, Access Living protects and advances—through litigation and policy advocacy—the civil rights of people with disabilities.

The American Association of People with Disabilities ("AAPD") works to increase the political

and economic power of people with disabilities, and to advance their rights. A national cross-disability organization, AAPD advocates for full recognition of the rights of over 60 million Americans with disabilities.

Founded in 1950, The Arc of the United States is the nation's largest community-based organization of and for people with intellectual and developmental disabilities ("I/DD"), with over 600 chapters nationwide. The Arc promotes and protects the human and civil rights of people with I/DD and actively supports their full inclusion and participation in the community throughout their lifetimes. The Arc has a vital interest in ensuring that all individuals with I/DD receive appropriate protections and supports to which they are entitled by law.

The mission of the Association of Late-Deafened Adults ("ALDA") is to support the empowerment of deafened people. Late-Deafened Adults are people who have lost the ability to understand speech, with or without hearing aids, after acquiring spoken language. ALDA is committed to providing a support network and a sense of belonging by sharing our unique experiences, challenges, and coping strategies, helping one another find practical solutions and emotional support, and working together with other organizations and service providers for our common good.

The Autistic Self Advocacy Network ("ASAN") is a national, private, nonprofit organization, run by and for autistic individuals. ASAN provides public education and promotes public policies that benefit autistic individuals and others with developmental or other disabilities, a disproportionate number of whom

are LGBTQ and/or do not meet typical gendered expectations. ASAN's advocacy activities include combating stigma, discrimination, and violence against autistic people and others with disabilities, including in the workplace.

The Center for Public Representation ("CPR") is a public interest law firm that has assisted people with disabilities for more than 40 years. CPR uses legal strategies, systemic reform initiatives, and policy advocacy to enforce civil rights and empower people with disabilities to exercise choice in all aspects of their lives. CPR is both a statewide and a nationwide legal backup center that provides assistance and support to attorneys representing people with disabilities, and to federally-funded protection and advocacy programs. CPR has litigated cases on behalf of persons with disabilities in more than 20 states and submitted *amici* briefs to the United States Supreme Court and many courts of appeals in order to enforce the constitutional and statutory rights of persons with disabilities, including the right to be free from discrimination under federal law.

The Civil Rights Education and Enforcement Center ("CREEC") is a national nonprofit membership organization whose mission is to defend human and civil rights secured by law and to ensure that everyone can fully and independently participate in our nation's civic life without discrimination based on race, gender, disability, religion, national origin, age, sexual orientation, or gender identity. CREEC promotes its mission through education, advocacy, and litigation nationwide on a broad array of civil rights issues. A major focus of CREEC's work is ensuring that people with disabilities have access to

all programs, services, and benefits of public entities, and that laws protecting the rights of people with disabilities are effectively enforced to ensure equal access and independence.

Disability Rights Advocates (“DRA”) is a nonprofit, public interest law firm that specializes in high impact civil rights litigation and other advocacy on behalf of persons with disabilities throughout the United States. DRA works to end discrimination in areas such as access to public accommodations, public services, employment, transportation, education, and housing. DRA’s clients, staff, and board of directors include people with various types of disabilities. With offices in New York City and Berkeley, California, DRA strives to protect the civil rights of people with all types of disabilities nationwide.

The Disability Rights Education & Defense Fund (“DREDF”), based in Berkeley, California, is a national nonprofit law and policy center dedicated to advancing and protecting the civil and human rights of people with disabilities. Founded in 1979 by people with disabilities and parents of children with disabilities, DREDF remains board- and staff-led by members of the communities for whom we advocate. DREDF pursues its mission through education, advocacy, and law reform efforts. DREDF is nationally recognized for its expertise in the interpretation of federal disability civil rights laws, and has participated as *amicus* in numerous high court matters involving those laws. Consistent with its civil rights mission, DREDF supports legal protections for all diversity and minority communities, including the intersectional interests of

people within those communities who also have disabilities.

Founded in 1972 as the Mental Health Law Project, the Judge David L. Bazelon Center for Mental Health Law (“Bazelon Center”) is a national nonprofit advocacy organization that provides legal assistance to individuals with mental disabilities. Through litigation, public policy advocacy, education, and training, the Bazelon Center works to advance the rights and dignity of individuals with mental disabilities in all aspects of life, including community living, employment, education, healthcare, housing, voting, parental and family rights, and other areas.

Little Lobbyists is a family-led national organization founded in 2017 that advocates for children with complex medical needs and disabilities to have access to the healthcare, education, and community inclusion they need to survive and thrive. Little Lobbyists believes no family should be denied access to healthcare, housing, or services as a result of their disabilities, race, religion, or sexual identity and orientation.

Mental Health America (“MHA”)—founded in 1909—is the nation’s leading community-based nonprofit dedicated to addressing the needs of those living with mental illness and to promoting the overall mental health of all Americans. MHA’s work is driven by our commitment to promote mental health as a critical part of overall wellness. MHA has advocated throughout its history for the rights of all individuals, including those who may identify as LGBTQ, to have access to the effective mental health services and related supports they need without discrimination.

The National Association of the Deaf (“NAD”), founded in 1880 by deaf and hard of hearing leaders, is the oldest national civil rights organization in the United States. The NAD’s mission is to preserve, protect, and promote the civil, human, and linguistic rights of 48 million deaf and hard of hearing people in this country. The NAD is supported by affiliated state organizations in 49 states and Washington, D.C., as well as affiliated nonprofits serving various demographics within the deaf and hard of hearing community. The NAD is dedicated to ensuring equal access in every aspect of life.

The National Coalition for Latinxs with Disabilities (Coalición Nacional para Latinxs con Discapacidades, or “CNLD”) was established in 2017 as a volunteer national organization made up of disabled Latinxs and allies who work toward a seamless society in which the human rights of Latinxs with disabilities are upheld and all their intersecting identities are embraced—including disabled LGBTQ+ older adults. CNLD works in solidarity to affirm, celebrate, and collectively uplift Latinxs with disabilities.

National Council on Independent Living (“NCIL”) advances independent living and the rights of people with disabilities. NCIL envisions a world in which people with disabilities are valued equally and participate fully.

National Disability Institute (“NDI”) was established in 2005 to address the deep economic disparity that exists between people with and without disabilities. NDI is dedicated exclusively to the economic empowerment of people with disabilities. Its mission is to collaborate and innovate to build a

better financial future for people with disabilities and their families. NDI envisions a society in which people with disabilities have the same opportunities to achieve financial stability and independence as people without disabilities.

The National Federation of the Blind (“NFB”) is the oldest and largest organization of blind and low-vision people in the United States. Founded in 1940, the NFB has grown to over 50,000 members. The organization consists of affiliates and local chapters in every state, the District of Columbia, and Puerto Rico. The NFB devotes significant resources to advocacy, education, research, and development of programs to integrate the blind into society on terms of equality and independence. The NFB actively engages in litigation to protect the civil rights of the blind under our nation’s laws.

A ruling that private agencies accepting public funds must be allowed to discriminate on the basis of any number of characteristics, including sexual orientation, gender identity, religion, race, national origin, sex, age, or disability, would violate the core stated values of our country and undermine the dignity and independence of older adults and people with disabilities. Given *amici*’s interest in protecting the rights and dignity of people who are older and/or disabled, and who require access to the services and supports provided by government contractors, *amici* respectfully submit this brief in support of Respondent City of Philadelphia.

SUMMARY OF THE ARGUMENT

Older adults and people with disabilities—including those who identify as LGBTQ—need non-discriminatory access to social services in order to live in the community with dignity and respect. These individuals are particularly reliant on services and supports from government contractors, which provide community-based programming, healthcare, meals, transportation, housing, and other resources.

Older and disabled persons have faced significant obstacles when attempting to access these vital services and supports. They are often susceptible to discrimination not only because of their age or disability, but also due to other factors, like their race, sex, or religion. Indeed, disabled and older people identifying as LGBTQ confront particularly heightened discrimination in access to care.

The ruling below should remain undisturbed. Should the Court rule otherwise, organizations providing important services to older adults and people with disabilities would be given free rein to refuse care, to disrupt services and supports, and to otherwise discriminate based on their religious views, causing severe physical, emotional, and psychological harm to disabled people and older adults.

The relief that Petitioners seek would add insult to injury to segments of the American population who have already been subjected to discrimination and isolation, and who are especially reliant on services and supports delivered through government contracts. This is especially so in the midst of the COVID-19 pandemic, which finds older adults and people with disabilities fighting on dual fronts—

fighting for basic care, on the one hand, as they fight for their lives, on the other. Allowing publicly-funded organizations and agencies to shun people based on religious objections to serving particular individuals will jeopardize the well-being, health, and even lives of older and disabled persons.

The ruling Petitioners seek would strip away access to services and supports from those who need them the most. For these reasons, the lower court's decision should be affirmed.

ARGUMENT

I. Older Adults and People with Disabilities Are At-Risk Populations Who Need Non-Discriminatory Access to Services And Supports In Order To Live With Dignity.

Government-funded discrimination will harm older and/or disabled persons—a large segment of the American population that relies on government contractors for much-needed services and supports. Older adults and persons with disabilities who are LGBTQ, and especially in need of such social services and supports, would be particularly harmed.

In the United States, the population age 65 and older numbered 52.4 million in 2018 (the most recent year for which data are available), representing more than one in every seven Americans.² Further, 61 million adults in the United States—approximately

² Admin. on Aging, Admin. for Cmty. Living, *2019 Profile of Older Americans* 3 (2020) [hereinafter ACL, *2019 Profile of Older Americans*], available at <https://acl.gov/sites/default/files/Aging%20and%20Disability%20in%20America/2019ProfileOlderAmericans508.pdf>.

one-fourth of the adult population—have a disability, and an even greater percentage (34%) of older adults report having a disability of some form, whether difficulty in vision, hearing, cognition, ambulation, self-care, or independent living.³

Not surprisingly, the need for services and supports increases with age.⁴ People with disabilities, moreover, similarly require assistance as they continue living in their homes and communities.⁵ Older adults and people with disabilities thus rely on the government and government contractors to provide critical home- and community-based services, including food and meal delivery services, affordable housing, senior-center programming, transportation, in-home support services, and in-home nursing care.

³ *Id.* at 19; Ctrs. for Disease Control & Prevention (CDC), *Disability Impacts All of Us* (last updated Sept. 9, 2019) [hereinafter CDC, *Disability Impacts All of Us*], <https://www.cdc.gov/ncbddd/disabilityandhealth/infographic-disability-impacts-all.html#:~:text=61%20million%20adults%20in%20the,is%20highest%20in%20the%20South>.

⁴ ACL, *2019 Profile of Older Americans*, *supra* note 2, at 4. While fewer than 20% of older adults between ages 65 and 74 need assistance with daily activities, such as bathing or eating, this number increases to 53% of women and 40% of men over age 85 who need such assistance. Am. Psychol. Ass'n, *Older Adults' Health and Age-Related Changes: Reality Versus Myth* 3 (2017) [hereinafter APA, *Older Adults' Health and Age-Related Changes*], available at <https://www.apa.org/pi/aging/resources/guides/myth-reality.pdf>.

⁵ See CDC, *Disability Impacts All of Us*, *supra* note 3.

A. The unique physical, financial, and social conditions faced by older adults and people with disabilities make them particularly vulnerable to the effects of discrimination.

When compared to the rest of the American population, older and disabled persons frequently have poorer physical and mental health, higher rates of poverty, and weaker social support networks, all of which make them particularly reliant on services and supports from government contractors. That reliance, in turn, makes them especially susceptible to the negative effects of government contractor discrimination.

Almost all older persons have at least one chronic condition, and the vast majority have multiple conditions.⁶ Leading chronic conditions among adults age 65 and older include heart disease, diabetes, cancer, stroke, and arthritis.⁷

⁶ Specifically, 92% of all older persons have a chronic condition, and 77% have multiple conditions. APA, *Older Adults' Health and Age-Related Changes*, *supra* note 4, at 2.

⁷ ACL, *2019 Profile of Older Americans*, *supra* note 2, at 17. In light of these chronic health issues, it comes as no surprise that, in 2018, 8.5 million people age 65 and older stayed overnight in a hospital at least one night during the year—approximately double the number of overnight hospital stays as those age 45 to 64. *Id.*

Functional disabilities also affect a large segment of the American population.⁸ The prevalence of such disabilities increases with age.⁹

Many disabled and older persons also live in extreme poverty. In 2018, nearly one in ten older adults lived below the poverty level.¹⁰ And studies have shown that people with disabilities are often destined to live in poverty and experience high unemployment.¹¹ In fact, people with disabilities live in poverty at more than twice the rate of people without disabilities.¹²

Making matters worse, disabled and older Americans frequently have weaker social support

⁸ For example, of those who have a disability: 13.7% have a mobility disability, with serious difficulty walking or climbing stairs; 10.8% have a cognition disability with serious difficulty concentrating, remembering, or making decisions; 6.8% have an independent living disability, making it difficult for them to do errands alone; 5.9% are deaf or has serious difficulty hearing; 4.6% have a vision disability, as evidenced by blindness or serious difficulty seeing even when wearing glasses; and 3.6% have a self-care disability, with difficulty dressing or bathing themselves. CDC, *Disability Impacts All of Us*, *supra* note 3.

⁹ In 2018, 49% of people age 75 and older reported a difficulty in physical functioning. ACL, *2019 Profile of Older Americans*, *supra* note 2, at 19. This percentage is more than twice as large as for the age group 45 to 64 (19%). *Id.*

¹⁰ *Id.* at 14.

¹¹ Nat'l Council on Disability, *Highlighting Disability / Poverty Connection, NCD Urges Congress to Alter Federal Policies that Disadvantage People with Disabilities* (Oct. 26, 2017), <https://ncd.gov/newsroom/2017/disability-poverty-connection-2017-progress-report-release>.

¹² Only 32% of working-age people with disabilities are employed, compared with 73% of those without disabilities. *Id.* And more than 65% of the 17.9 million working-age adults with disabilities participate in at least one safety net or income support program. *Id.*

networks. As people age, many find themselves alone more often than when they were younger. Approximately 28 percent of older adults in the United States, or 14.7 million people, live completely alone.¹³ Older adults find themselves unexpectedly alone due to the death of a spouse or partner, separation from friends or family, retirement, loss of mobility, or loss of transportation. The resultant social isolation and loneliness frequently trigger a decline in physical and mental health. As a result, older adults living alone are at a higher risk of a variety of health conditions, including clinical depression, anxiety, cognitive decline, Alzheimer’s disease, and even death.¹⁴

Newly-acquired disabilities can also augment issues of social isolation and loneliness. Hearing impairment, which is widespread among older adults—affecting almost 50 percent of those aged 75 and older—can be an impediment to social interaction.¹⁵ Vision changes among aging adults, which can result in difficulty driving and other issues, likewise lead to isolation.¹⁶

¹³ ACL, *2019 Profile of Older Americans*, *supra* note 2, at 7. The proportion living alone increases with advanced age for both men and women, with, for example, 44% of women age 75 and older living alone. *Id.*

¹⁴ Nat’l Inst. on Aging, U.S. Dep’t of Health & Hum. Servs., *Social isolation, loneliness in older people pose health risks* (Apr. 23, 2019), <https://www.nia.nih.gov/news/social-isolation-loneliness-older-people-pose-health-risks#:~:text=Research%20has%20linked%20social%20isolation,Alzheimer's%20disease%2C%20and%20even%20death>.

¹⁵ APA, *Older Adults’ Health and Age-Related Changes*, *supra* note 4, at 2-3.

¹⁶ *See id.* at 3.

Social distancing and shelter-in-place orders in response to the COVID-19 pandemic have only heightened these issues of social isolation and loneliness among older and disabled persons. And that's not to mention people who are older and/or disabled often face severe health issues stemming from the disease itself.

Research from the CDC indicates that older people are at a greater risk for severe illness due to COVID-19. In fact, eight out of ten COVID-19 related deaths reported in the United States have been among adults aged 65 years and older.¹⁷ Many of these older adults lived in congregate care facilities, such as nursing homes, long-term care facilities, or senior living communities, where they had an increased risk of contracting COVID-19.

People with disabilities also face unique health risks during the COVID-19 pandemic. Underlying medical conditions are prevalent among those with disabilities.¹⁸ And the CDC has warned that the following groups are at an increased risk of becoming infected with COVID-19: (1) people who have limited mobility or who cannot avoid coming into close contact with others who may be infected, such as direct

¹⁷ *Older Adults*, Ctrs. for Disease Control & Prevention (CDC) (last updated Aug. 16, 2020), https://www.cdc.gov/coronavirus/2019-ncov/need-extra-precautions/older-adults.html?CDC_AA_refVal=https%3A%2F%2Fwww.cdc.gov%2Fcoronavirus%2F2019-ncov%2Fspecific-groups%2Fhigh-risk-complications%2Folder-adults.html.

¹⁸ Adults with disabilities are three times more likely than adults without disabilities to have heart disease, stroke, diabetes, or cancer. *People with Disabilities*, Ctrs. for Disease Control & Prevention (CDC) (last updated Apr. 7, 2020), <https://www.cdc.gov/coronavirus/2019-ncov/need-extra-precautions/people-with-disabilities.html>.

support providers and family members; (2) people who have trouble understanding information or practicing preventive measures, such as hand washing and social distancing; and (3) people who may not be able to communicate symptoms of illness.¹⁹

As a result of the increased risk of disease, in conjunction with fewer financial resources and weaker social support networks (which are further weakened by stay-at-home orders), disabled persons and older adults are even more reliant than usual on services and supports provided by government contractors. And that means they are especially susceptible to any attendant discrimination during these trying times.

B. LGBTQ older adults and people with disabilities are particularly vulnerable to discrimination.

The threat of discrimination that older and disabled persons generally face is compounded for those who identify as LGBTQ, and whose physical, mental, financial, and social status makes them even more reliant on social services supports from government contractors.

LGBTQ older adults tend to be in poorer physical health than their peers. Studies have found “higher rates of diabetes, hypertension, [and] disability . . . among aging gay men, lesbians, and bisexual people than among older straight adults.”²⁰ Other “[s]tudies

¹⁹ *Id.*

²⁰ Erin Fitzgerald, Nat’l Gay & Lesbian Task Force, *No Golden Years at the End of the Rainbow: How a Lifetime of Discrimination Compounds Economic and Health Disparities for LGBT Older Adults* 12 (2013), available at

suggest higher levels of chronic and other health problems among LGBT older adults, including asthma, diabetes, HIV/AIDS, obesity, rheumatoid arthritis and . . . cancer.”²¹

LGBTQ older adults also tend to “have worse mental health outcomes than their heterosexual counterparts.”²² Indeed, according to one study, when compared to others, LGB adults are two times more likely, and transgender adults are nearly four times as likely to have a mental health condition during their lifetime.²³ This reflects the fact that LGBTQ people have endured “stressors and challenges not experienced by heterosexuals,” such as discrimination, rejection, difficulty accepting their sexual orientation, and the need to conceal their orientation from others.²⁴

The problems of poor physical and mental health are compounded by the fact that LGBTQ older adults typically have fewer financial resources than other

<https://static1.squarespace.com/static/566c7f0c2399a3bdabb57553/t/566caf4f841abafcc8e7ff22/1449963343350/2013-TF-No-Golden-Years.pdf>.

²¹ Movement Advancement Project (MAP) et al., *LGBT Older Adults and Health Disparities 2* (2010), available at <https://www.sageusa.org/wp-content/uploads/2018/06/2010-lgbt-older-adults-and-health-disparities.pdf>.

²² Richard G. Wight et al., *Same-Sex Legal Marriage and Psychological Well-Being: Findings from the California Health Interview Survey*, 103 Am. J. Pub. Health 339, 339 (2013), available at www.ncbi.nlm.nih.gov/pmc/articles/PMC3558785/pdf/AJPH.2012.301113.pdf.

²³ *LGBTQI*, Nat’l Alliance on Mental Illness (2020), www.nami.org/Find-Support/LGBTQ.

²⁴ Wight et al., *supra* note 22, at 339.

older adults. LGBTQ older people have average household incomes that are much lower than their heterosexual and cisgender counterparts.²⁵ Indeed, a recent study found that nearly one-third of LGBTQ older adults aged 65 or older, and 48 percent of transgender older adults, have incomes at or below 200 percent of the federal poverty line, compared to one-quarter of all non-LGBTQ older adults.²⁶

The lingering effects of past discrimination further increase older LGBTQ adults' reliance on government contractors for social services. Many heterosexual older adults, for example, can rely on family members, especially spouses and children, for assistance with their medical and financial matters. Yet, for LGBTQ adults, who were long excluded from the institution of marriage, only about 10 percent are married.²⁷ Moreover, many states have long engaged in practices that impede the ability of same-sex couples to create families with children, including restricting the ability of LGBTQ people to adopt.²⁸ Many LGBTQ

²⁵ Servs. & Advoc. for GLBT Elders (SAGE), *Aging and the LGBT Community 2* (2019), available at <https://www.sageusa.org/wp-content/uploads/2019/03/aging-and-the-lgbt-community.pdf>.

²⁶ Movement Advancement Project (MAP) & Servs. & Advoc. for GLBT Elders (SAGE), *Understanding Issues Facing LGBT Older Adults 10* (2017), available at www.lgbtmap.org/file/understanding-issues-facing-lgbt-older-adults.pdf.

²⁷ Jeffrey M. Jones, *In U.S., 10.2% of LGBT Adults Now Married to Same-Sex Spouse*, Gallup (June 22, 2017), news.gallup.com/poll/212702/lgbt-adults-married-sex-spouse.aspx.

²⁸ *Foster and Adoption Laws*, Movement Advancement Project (MAP) (last updated Aug. 18, 2020), www.lgbtmap.org/equality-maps/foster_and_adoption_laws.

elders also remain estranged from their families of origin.²⁹

As a result, LGBTQ elders are twice as likely as their contemporaries to live alone, half as likely to have close relatives to call for help, and four times less likely to have children to assist them.³⁰ A survey of older LGBTQ people by AARP found that three in four respondents were concerned about having enough support from family and friends as they age.³¹ And heartbreakingly, in another study, nearly one-quarter of LGBTQ older adults reported that they have “no one” to rely on when they are ill.³²

²⁹ Soon Kyu Choi & Ilan H. Meyer, Williams Inst., *LGBT Aging: A Review of Research Findings, Needs, and Policy Implications* 8 (2016) [hereinafter *Williams LGBT Aging Report*] (citing Movement Advancement Project (MAP) & Servs. & Advoc. for GLBT Elders (SAGE), *Improving the Lives of LGBT Older Adults* (2010) [hereinafter MAP & SAGE, *Improving the Lives of LGBT Older Adults*], available at www.lgbtmap.org/file/improving-the-lives-of-lgbt-older-adults.pdf), available at williamsinstitute.law.ucla.edu/wp-content/uploads/LGBT-Aging-Aug-2016.pdf.

³⁰ See MAP & SAGE, *Improving the Lives of LGBT Older Adults*, *supra* note 29, at 6-7; see also Servs. & Advoc. for GLBT Elders (SAGE), *Out & Visible: The Experiences and Attitudes of Lesbian, Gay, Bisexual and Transgender Older Adults, Ages 45-75*, at 17-18 (2014), available at <https://www.sageusa.org/wp-content/uploads/2018/05/sageusa-out-visible-lgbt-market-research-full-report.pdf> (collecting statistics comparing isolation experienced by LGBT and non-LGBT older adults).

³¹ Angela Houghton, *Maintaining Dignity: A Survey of LGBT Adults Age 45 and Older*, AARP Res. (Mar. 2018), www.aarp.org/research/topics/life/info-2018/maintaining-dignity-lgbt.html.

³² MetLife Mature Mkt. Inst. & Am. Soc’y on Aging, *Still Out, Still Aging: The MetLife Study of Lesbian, Gay, Bisexual, and Transgender Baby Boomers* 15 (2010), available at

LGBTQ disabled persons, who are marginalized on at least two fronts, likewise experience great disparities in health, economic, and social outcomes. For instance, in a comprehensive 2015 survey conducted by the National Center for Transgender Equality (“NCTE”), transgender people with disabilities were more likely to experience discrimination in healthcare and social services settings.³³ Transgender respondents with disabilities were also nearly twice as likely to “currently experience psychological distress,” as compared to those without disabilities.³⁴ And transgender people with disabilities experienced heightened economic instability, with 45 percent living in poverty, compared to 12 percent of the U.S. population as a whole.³⁵ The confluence of these factors is a social determinant of health, particularly for individuals who also face rejection from family members because of their disability and gender identities.

The COVID-19 pandemic further threatens LGBTQ disabled and older adult communities. LGBTQ older adults and disabled persons experience physical health disparities and preexisting conditions that make them more susceptible to complications

<https://www.sageusa.org/wp-content/uploads/2018/05/sageusa-still-out-still-aging.pdf>.

³³ Disability Rts. Educ. & Def. Fund (DREDF), *Health Disparities at the Intersection of Disability and Gender Identity: A Framework and Literature Review* 5 (2018), available at <https://dredf.org/wp-content/uploads/2018/07/Health-Disparities-at-the-Intersection-of-Disability-and-Gender-Identity.pdf>.

³⁴ *Id.* at 4.

³⁵ *Id.* at 6.

from COVID-19.³⁶ Recent data indicate that approximately one-third of LGBTQ people age 65 and older are in poor or fair health, with many experiencing asthma, diabetes, heart disease, and other complications that make them more vulnerable to serious COVID-19-related complications.³⁷

LGBTQ older adults and people with disabilities also fear or experience discrimination by healthcare providers and caregivers in ways that make them more vulnerable during this crisis. And severe social isolation—already a challenge for some LGBTQ older adults and disabled persons—has increased as a result of shelter-in-place orders and quarantine rules. While these public health and social distancing efforts are designed to slow the spread of COVID-19, they often equate to social isolation for LGBTQ older adults and disabled persons, who may “have literally nobody to reach out to for connection and support.”³⁸

³⁶ Movement Advancement Project (MAP), Servs. & Advoc. for GLBT Elders (SAGE), & Ctr. for Am. Progress, *LGBT Older People & COVID-19: Addressing Higher Risk, Social Isolation, and Discrimination 2* (2020) [hereinafter MAP & SAGE, *LGBT Older People & COVID-19*], available at <https://www.sageusa.org/wp-content/uploads/2020/05/2020-lgbtq-older-adults-covid.pdf>.

³⁷ Ilan H. Meyer & Soon Kyu Choi, Williams Inst., *Vulnerabilities to COVID-19 among Older LGBT Adults in California 1-2* (2020), available at <https://williamsinstitute.law.ucla.edu/wp-content/uploads/Older-LGB-COVID-CA-Apr-2020.pdf>.

³⁸ MAP & SAGE, *LGBT Older People & COVID-19*, *supra* note 36, at 3.

II. Older Adults and People with Disabilities Necessarily Rely on Government Contractors to Provide Critical Services and Supports.

Older adults and people with disabilities, including those who may identify as LGBTQ, are particularly reliant on government contractors to meet their basic needs. At the federal, state, and local levels, government contractors, using taxpayer dollars, spend a substantial amount of money on social services support, including food, healthcare, chore assistance, transportation, and other resources that are vitally important to the health and well-being of older adults and disabled persons. Because many government contractors have religious affiliations, older adults and disabled persons are susceptible to discriminatory policies these government contractors choose to adopt.

By way of background, the Department of Health and Human Services (“HHS”) devotes millions of dollars’ worth of critical services and supports to millions of disabled people and older adults across the country through the Administration for Community Living (“ACL”).³⁹ ACL, in turn, administers programs through its Administration on Aging (“AoA”).⁴⁰ The

³⁹ See generally *Budget*, Admin. for Cmty. Living (last updated June 9, 2020), <https://acl.gov/about-acl/budget>.

⁴⁰ Through the Independent Living Services (“ILS”) program, ACL also administers grants to support disabled people. More than \$25.3 million was provided to states and territories in 2019 “to provide, improve, and expand statewide independent living services.” Admin. for Cmty. Living, *Annual Report on Centers for Independent Living 2* (2020), available at <https://acl.gov/sites/default/files/programs/2020-04/AnnualReportCILsFinal%202018.pdf>.

AoA “helps states develop comprehensive service systems which are administered by a national network of 56 state agencies on aging, 629 area agencies on aging, [and] nearly 20,000 service providers.”⁴¹

Increasingly, these aging and disability networks are working together at the state and local levels. The area agencies on aging (“AAA”), in particular, often contract with private organizations, hiring or funding them to provide services and resources at the regional and local levels to help older adults thrive and remain independent. AAAs are primarily responsible for a geographic area that is either a city, a single county, or a multi-county district.⁴²

Local and municipal governments provide additional funding and support for older and disabled persons by partnering with the AAAs and contracting with local service providers to ensure the availability of support services.⁴³ The resultant network of aging and disability organizations provides resources and

And through the Centers for Independent Living (“CIL”) program, direct funding was provided for grants to 284 CILs, which are private nonprofit agencies providing services for significantly disabled individuals. *Id.* In 2019, appropriations for the CIL program amounted to \$90.8 million. *Id.*

⁴¹ ACL, *2019 Profile of Older Americans*, *supra* note 2, at 2.

⁴² *Area Agencies on Aging*, Admin. for Cmty. Living (last updated Apr. 29, 2017), <https://acl.gov/programs/aging-and-disability-networks/area-agencies-aging>.

⁴³ *See, e.g., Mayor’s Commission on Aging: Partners and Providers*, City of Philadelphia (last updated Oct. 23, 2018), <https://www.phila.gov/departments/mayors-commission-on-aging/partners-and-providers/>.

services in virtually every area of older adults' and disabled people's lives.⁴⁴

Notably, many of the private organizations that receive government funding through this network are faith-based organizations. As ACL has publicized: "Religious and faith-based organizations are important partners with unique expertise that is crucial to advancing HHS's mission of protecting and enhancing the health and well-being of Americans."⁴⁵

Although the prevalence of faith-based organizations providing services to older or disabled persons is not always readily visible to the public because many providers have adopted secular names to attract a broader market, a majority of organizations making arrangements for community

⁴⁴ AAAs and local service providers offer, for instance, home-delivered meals, nutrition education, farmers' market coupons, home- and community-based alternatives to long-term care facilities, senior center programming, personal care (such as help bathing, dressing, shopping, walking, housekeeping, and eating), home health services (such as changing wound dressings, checking vital signs, cleaning catheters, and providing tube feedings), adult daycare, home repair and modifications, adaptive and assistive devices, transportation, emergency response systems, legal assistance, financial assistance, insurance counseling, and wellness programs. *Eldercare Locator: Services Available*, Admin. on Aging, https://eldercare.acl.gov/Public/About/Aging_Network/Services.aspx; see also *Programs and Servs.*, W. Res. Area Agency on Aging, <https://www.areaagingsolutions.org/programs-services/>.

⁴⁵ *Request for Information from the Center for Faith-Based and Neighborhood Partnerships, Office of Intergovernmental and External Affairs, HHS*, Admin. for Cmty. Living (last updated May 7, 2020), <https://acl.gov/news-and-events/announcements/request-information-center-faith-based-and-neighborhood-partnerships>.

programming, meals, healthcare, and housing are religiously-affiliated organizations.⁴⁶ For example, approximately 85 percent of nonprofit continuing-care retirement communities are affiliated with a religion.⁴⁷ And faith-based facilities provide the greatest number of affordable housing units serving low-income seniors.⁴⁸

Older adults and people with disabilities rely on the services those religiously-affiliated contractors provide, and all the more so now because of COVID-19. Aging and Disability Resource Centers nationwide report “unprecedented demand” for care and supports.⁴⁹ As of May 2020, HHS had allocated \$955 million in grants through ACL “to help meet the needs of older adults and people with disabilities as communities implement measures to prevent the

⁴⁶ See Michael Adams, *Pushing for Equality: LGBT Elders Need Discrimination-Free Access to Care in Community*, Aging Today (2019), available at https://www.lgbtagingcenter.org/resources/pdfs/Pushing%20for%20Equality_LGBTElders%20need%20discrimination-free%20access%20to%20care%20in%20community.pdf.

⁴⁷ See, e.g., *When LGBT Elders Have No Place to Call Home*, SAGE Newsroom (June 14, 2018) [hereinafter SAGE, *When LGBT Elders Have No Place to Call Home*], <https://www.sageusa.org/news-posts/when-lgbt-elders-have-no-place-to-call-home/>.

⁴⁸ *Id.*

⁴⁹ Press Release, *HHS Announces Nearly \$1 Billion in CARES Act Grants to Support Older Adults and People with Disabilities in the Community During the COVID-19 Emergency*, U.S. Dep’t of Health & Hum. Servs. (Apr. 21, 2020) [hereinafter HHS Press Release], <https://www.hhs.gov/about/news/2020/04/21/hhs-announces-nearly-1-billion-cares-act-grants-support-older-adults-people-with-disabilities-community-during-covid-19-emergency.html>.

spread of COVID-19.”⁵⁰ The programs funded include those provided by “faith-based organizations.”⁵¹

For example, faith-based contractors are offering mobile meal delivery programs that allow disabled and older adults to receive food safely in their homes rather than having to go to grocery stores.⁵² Such programs have the added benefit of preventing older and disabled persons from needing to seek such services from nursing homes or congregate care facilities, where they may be more susceptible to COVID-19.⁵³

Whether facing a global pandemic, or otherwise simply seeking to live in their homes and communities

⁵⁰ *Id.*

⁵¹ *Id.* The ACL’s CARES Act funding includes \$200 million for Home and Community Based Services, including personal care assistance, help with household chores and grocery shopping, transportation to essential services (such as grocery stores, banks, or doctors), and case management; \$480 million for home-delivered meals for older adults; \$85 million for CILs to provide direct and immediate support and services to individuals with disabilities who are experiencing disruptions to their independent, community-based living due to the COVID-19 pandemic; \$20 million for nutrition and related services for Native American Programs; \$100 million for the National Family Caregiver Support Program to expand a range of services that help family and informal caregivers provide support for their loved ones at home; \$20 million to support State Long-term Care Ombudsman programs in providing consumer advocacy services for residents of long-term care facilities; and \$50 million for Aging and Disability Resource Centers. *Id.*

⁵² See, e.g., Press Release, *Elderly Services moves to mobile meal delivery amid pandemic*, Archdiocese of Miami (Mar. 16, 2020), https://www.miamiarch.org/CatholicDiocese.php?op=Article_elderly-services-moves-to-mobile-meal-delivery-amid-pandemic.

⁵³ See *id.*

with dignity and respect, older adults and disabled people throughout the United States who rely on vital services and supports from religiously-affiliated contractors must be guaranteed access to them without fear that they will be excluded or discriminated against because of who they are.

III. Allowing Government Contractors to Discriminate Against Older Adults and People with Disabilities on the Basis of Protected Characteristics Violates Our Nation’s Core Stated Values and Policies, and Would Cause Significant Harm.

Publicly-funded services should be available to any older adult or disabled person in need. But the ruling that Petitioners seek here would allow contractors to raise religious objections to fulfilling the basic needs of these populations—all while they continue to accept taxpayer funds. This violates fundamental principles of non-discrimination in government contracting, many of which were designed specifically to aid older adults and disabled people. It would also decrease the total amount of services and supports available to older and disabled persons. In short, ruling for Petitioners would authorize government-funded discrimination and create a scenario where some seniors and disabled citizens have nowhere to obtain the services and supports they need.

For decades, the federal government has maintained a firm, stated policy that it will not award contracts, funded by taxpayer dollars, to government

contractors who discriminate. At the federal level, a series of statutes, regulations, and policies provide important nondiscrimination requirements for federally-funded programs administered by HHS. The Civil Rights Act of 1964 prohibits discrimination in all federally-funded services based on race, color, and national origin; Title IX protects individuals from discrimination based on sex in federally-funded educational institutions; Section 504 of the Rehabilitation Act of 1973 prohibits discrimination based on disability by organizations receiving federal funding; and the Age Discrimination Act of 1975 prohibits discrimination based on age in programs and activities receiving federal financial assistance.

Likewise, beginning with President Franklin D. Roosevelt, the Executive Branch has maintained that it will not buy goods and services from, and will not pay taxpayer dollars to, contractors that discriminate.⁵⁴ By Executive Orders dating back to the Kennedy era, contractors must, as a condition of doing business with the government, agree to refrain from discrimination.⁵⁵ While initially focused on discrimination on the basis of race, creed, color, and national origin, these efforts to promote equality have expanded in modern times. In 2014, for example, President Obama ordered that any business wishing to contract with the federal government would be required to agree not to discriminate on the basis of sexual orientation or gender identity.⁵⁶

These policies and laws reflect the nation's core stated values, which are designed to ensure equality

⁵⁴ See Exec. Order No. 9,346, 8 Fed. Reg. 7183 (May 27, 1943).

⁵⁵ See Exec. Order No. 10,925, 26 Fed. Reg. 1977 (Mar. 6, 1961).

⁵⁶ See Exec. Order No. 13,672, 79 Fed. Reg. 42971 (July 21, 2014).

for older adults and people with disabilities. Older adults particularly need services and supports from government contractors, as they are an identifiable minority group that has been subjected to various forms of discrimination. As one author concisely recognized:

In many respects the aged show characteristics of a minority group. They are subject to categorical discrimination, they have relatively high visibility, and, in many parts of our society, they constitute a functioning subgroup. Stereotypes are held about the group, and individuals are judged thereby. Prejudice is not uncommon⁵⁷

Similarly, with respect to disabled people, “historically, society has tended to isolate and segregate individuals with disabilities, and, despite some improvements, such forms of discrimination against individuals with disabilities continue to be a serious and pervasive social problem.”⁵⁸

If the lower court’s decision is overturned, providers of important services and supports for older and disabled persons, many of which are run by religious nonprofit organizations, would be given broad license to discriminate in a range of ways—including disability discrimination,⁵⁹ age

⁵⁷ Leonard Z. Breen, *The Aging Individual*, in *Handbook of Soc. Gerontology* 145, 157 (Clark Tibbitts ed., 1960).

⁵⁸ 42 U.S.C. § 12101(a)(2) (2018).

⁵⁹ People with disabilities have long faced discrimination motivated by religious beliefs. United States Representative Anthony Coelho, the principal sponsor of the ADA and a person with epilepsy, personally faced religiously-based discrimination

discrimination, discrimination on the basis of sexual orientation and gender identity, discrimination against religious minorities, discrimination against people from particular countries, and discrimination on the basis of race. In this manner, older and disabled individuals would be prevented access to the services and supports they need. Indeed, permitting government contractors to discriminate could mean that some older and disabled persons—and especially those who identify as LGBTQ—would have nowhere else to obtain essential services.⁶⁰

The physical, psychological, and emotional toll that such government-funded discrimination would exert on older adults and people with disabilities would have lasting, damaging effects. Studies have shown that people who experience discrimination may

due to his disability. *Americans with Disabilities Act of 1988: Joint Hearing on S. 2345 Before the Subcomm. on the Handicapped of the S. Comm. on Lab. & Hum. Res. & the Subcomm. on Select Educ. of the H. Comm. on Educ. & Lab.*, 100th Cong. 940 (1988) (statement of Rep. Tony Coelho) (“I was not able to become a Catholic priest, because my church did not, at the time, permit epileptics to be priests.”). Business establishments operated by religious groups have refused service to blind people based on religious beliefs. *Stevens v. Optimum Health Inst.*, 810 F. Supp. 2d 1074, 1081, 1089 (S.D. Cal. 2011) (health institute operated by religious organization excluded blind woman and her guide dog because she “posed an unacceptable risk of disrupting the spiritual path of others in attendance” and because “OHI’s grounds are sacred but [guide dogs] are not”). Further, while being HIV positive is a disability under the ADA, some have used religious beliefs to justify discrimination against HIV-positive individuals. *E.g.*, *Bragdon v. Abbott*, 524 U.S. 624, 641 (1998); *Stormans, Inc. v. Selecky*, 586 F.3d 1109, 1118 n.7 (9th Cir. 2009).

⁶⁰ See, e.g., SAGE, *When LGBT Elders Have No Place to Call Home*, *supra* note 47.

not even seek the services and supports they need, out of fear of rejection.⁶¹

The experiences of LGBTQ older adults are a prime example. As a result of actual or feared discrimination, LGBTQ older people access essential services much less frequently than the general aging population, including services such as visiting nurses, food stamps, senior centers, and meal programs. Because they shy away from services that could otherwise be helpful, they receive diminished social support, which, in turn, has been correlated with health problems, substance abuse, necessary institutionalization, and even early death.⁶²

For some LGBTQ elders, the intersection of their sexual orientation/gender identity and other characteristics can heighten actual or perceived discrimination. For example, when compared to white LGBTQ older people, African American and Hispanic LGBTQ older people show even greater fear of discrimination and stigma, expressing serious concerns about being treated unfairly when seeking access to care and services.⁶³ They also worry about how their identities could negatively impact the quality of services and supports they receive. LGBTQ people of color thus face discrimination stemming not

⁶¹ Williams *LGBT Aging Report*, *supra* note 29, at 36; see generally Ian H. Meyer, *Prejudice, Social Stress, and Mental Health in Lesbian, Gay, and Bisexual Populations: Conceptual Issues and Research Evidence*, 129 *Psychol. Bull.* 674, 680-81 (2003).

⁶² SAGE, *Aging and the LGBT Community*, *supra* note 25, at 2.

⁶³ Hum. Rts. Campaign (HRC) & Servs. & Advoc. for GLBT Elders (SAGE), *COVID-19 & LGBTQ Older People* 1 (2020), available at <https://www.sageusa.org/wp-content/uploads/2020/04/covid19-elder-issuebrief-032720b-1-1.pdf>.

only from their sexual orientation and gender identity, but from their racial or ethnic identity as well.⁶⁴

Older and disabled persons of every color, creed, sexual orientation, and gender identity have a heightened need for services and supports, especially in the era of COVID-19. And although there is never a *right* time to grant government contractors and service providers a broad license to discriminate, a global pandemic that disproportionately affects older adults and those with disabilities is plainly the *wrong* time to do so. Service providers should not be invited to take taxpayer dollars and turn people away from health and human services just because of who they are. All older and disabled persons matter, regardless of their race, sex, sexual orientation, gender identity, national origin, religion, age, or disability. And they should be able to live their lives with dignity and respect.

CONCLUSION

For the foregoing reasons, *amici* respectfully submit that the judgment of the United States Court of Appeals for the Third Circuit should be affirmed.

⁶⁴ Houghton, *supra* note 31.

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