

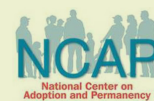
# THE HIGH STAKES IN THE *FULTON* CASE

*Undermining the Vital Role of Child Welfare Laws & Regulations in Protecting America's Children*

August 2020



Author



Partners

## This report was authored by:

### **Movement Advancement Project**

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## INTRODUCTION

More than seven million children interact with the child welfare system in a given year in the United States, including nearly half a million who are currently in foster care.<sup>1</sup> Federal, state, and local governments all have a responsibility to guarantee the safety, well-being, permanency, and best interests of these children. To that end, many laws, policies, and regulations exist to ensure that these governments fulfill their responsibility to protect the best interests of children in their care. These responsibilities include finding safe, qualified, temporary homes for children, and when children cannot safely return home, ensuring they have a safe, loving adoptive family. But more and more, some people and organizations are seeking a license to discriminate against qualified prospective parents, including when providing services using taxpayer dollars. What would it mean for the nation's children, who have been removed from their families by the state and are in state care, if private agencies receiving taxpayer dollars through government contracts could just pick and choose which laws to follow? This fall, that question will be brought before the U.S. Supreme Court, when it hears oral arguments in a case called *Fulton v. City of Philadelphia*.

*Fulton v. City of Philadelphia* centers on a Catholic child welfare agency that is suing the City of Philadelphia to receive taxpayer dollars for its child welfare services, despite the agency's refusal to comply with the City's nondiscrimination requirement. On its face, the case is about whether a child welfare agency can continue to receive City contracts to care for children in Philadelphia's child welfare system while refusing to meet the requirements set by the City for all contractors, if such requirements conflict with the agency's religious beliefs. The potential implications of the case, however, are much wider reaching. The Court is being asked to decide the extent to which cities, counties, states, and even the federal government can ensure the safety and well-being of children and families in the child welfare system through enforcement of nondiscrimination laws and other protective regulations.

If the Court rules in favor of the agency's arguments, then taxpayer-funded adoption and foster care agencies across the nation would be given a broad license to discriminate. Faith-based agencies could demand taxpayer funding, but then refuse to place children with qualified prospective parents who don't meet a given

agency's religious test—whether because they are same-sex couples or are of a different faith than the agency, someone previously divorced or currently unmarried, and more. Agencies could even claim an objection to other contract requirements designed to protect the best interests of children in the child welfare system.

This report examines the details of the *Fulton* case. It explores the role of agencies that contract with state and local child welfare systems, and why laws and regulations are so vital to protecting the well-being of some of the country's most vulnerable children. Ultimately, if private agencies that receive government funding can ignore guidelines and laws that govern whom they will serve—and how they provide for children in their care—it is children who will pay the price.

## THE ROLE OF PRIVATE CONTRACT AGENCIES IN THE PUBLIC CHILD WELFARE SYSTEM

The child welfare system in the United States is best thought of as a network of federal, state, tribal, and local public agencies that often contract with private agencies—like the one in the U.S. Supreme Court case—to support children and families. When people think of what the child welfare system provides, the first services that come to mind are often foster care and adoption for children who are removed from their families of origin. In reality, the child welfare system provides many families with services designed to keep children with their families of origin through in-home family preservation services, mental health care, substance use treatment, parenting support, services for domestic violence survivors, employment assistance, and financial or housing assistance, often in partnership with private child welfare agencies and community-based organizations that receive government contracts.<sup>2</sup>

When a child is removed from their family and put into government care, it is often because the child is a victim of abuse or neglect, so the government can provide better care for that child than the family could at that time. Through city, county, tribal, and/or state government agencies, these children become the responsibility of the government.<sup>3</sup> These government agencies are responsible for funding, policymaking,

<sup>1</sup> The majority of states in the United States have a centralized, state-wide administrative system that oversees care for children. Nine states have "county administered" systems, and two additional states (Nevada and Wisconsin) have blended systems where both state and county agencies care for children.

# THE U.S. SUPREME COURT COULD GIVE TAXPAYER-FUNDED CHILD WELFARE AGENCIES A LICENSE TO DISCRIMINATE

**\$29.9 BILLION IN TAX DOLLARS**

PAID BY ALL PEOPLE, INCLUDING



Same-sex couples



Unmarried couples



People of different faiths

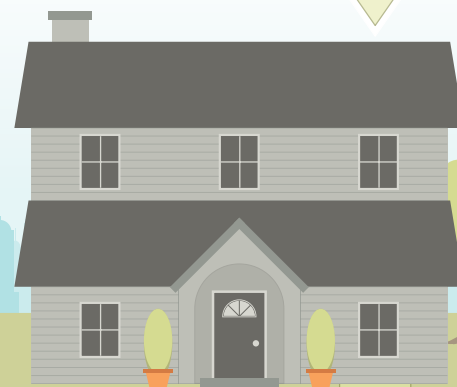


Single people



Married different-sex couples

**... FOR CHILD WELFARE AGENCIES TO CARE FOR KIDS & FAMILIES ...**



Same-sex couples



Unmarried couples



People of different faiths



Single people



Married different-sex couples

**...WHO MAY GET A LICENSE TO DISCRIMINATE**

If the U.S. Supreme Court allows publicly-funded religiously affiliated agencies to be exempt from nondiscrimination laws, these agencies could **discriminate** against all sorts of qualified parents simply because of who they are.

licensing, worker training, and more, all in service of protecting and providing for the best interests of the children in their care. The government has a legal obligation to ensure the child's safety, well-being, and permanent living situation, and to place the child in the most family-like setting possible. Any child involved with the public child welfare system will have permanent living situation goals (often referred to as "permanency"); these are articulated as long-term goals and can include returning to their families of origin, being placed in foster care with a family member or a licensed unrelated family, leaving care to live with kin, or moving toward adoption or guardianship. Currently there are too few foster or adoptive families, so many children live in group homes, and state and local governments often struggle to adequately meet the needs of and find foster or adoptive families for all the children in their care, including youth who are viewed as "hard to place," such as older teenagers, LGBTQ youth, youth of color, sibling groups, or youth with significant mental health challenges, high medical needs, or disabilities.

Government agencies often contract with private agencies to provide a vast array of services to children and families. There are more than 1,250 private child welfare agencies.<sup>3</sup> The government has increasingly used private contracting to fulfill its legal responsibility to children, thus making private agencies critical partners for ensuring that children and families can obtain services in the communities where they live.<sup>4</sup> The government contracts with private entities to provide services that can include frontline case management; recruiting, approving, training, and supervising foster parents; and handling various (or all) aspects of adoption.<sup>5</sup>

This important work of caring for children in need is paid for with a combination of federal, state, and local taxpayer dollars. In total, \$7.3 billion in dedicated federal child welfare funding flows to states and counties and then to individual child-placing agencies.<sup>6</sup> It is estimated \$29.9 billion in federal, state, and local funds was spent on child welfare in 2016.<sup>7</sup> The federal Title IV-E Foster Care Program provides funding to states and tribes to provide foster care, guardianship, and adoption for children, and for training of staff, foster parents, and contract agency personnel, while Title IV-B program dollars are used for prevention and permanency supports. In order for states and agencies to receive this federal funding, they must comply with various federal laws and regulations.

## The Importance of Regulations in Protecting Children's Safety, Permanency, and Well-being

In order to meet their obligations to children in care, who are particularly vulnerable because they have been removed from their families, governments have enacted laws, regulations, and policies that shape many aspects of how children are to be cared for, all centering on children's safety, overall well-being, and permanent living situations. It is well established that the best interests of the child should guide all child welfare decisions.

Federal laws and regulations, administered through the U.S. Department of Health and Human Services, provide vital guidance and structure for governmental entities to care for children, including to address abuse and neglect. In addition, states and local jurisdictions may create their own regulations and policies. For example, state regulations set out the criteria to which people or families must adhere to be licensed as foster parents, though families often become licensed by working with a contract agency. The state, county, or city child welfare department—or a contracted private agency—then works to identify the best foster parent or family for a child in the agency's care, to provide oversight to make sure that the care children receive meets standards, and to support agencies in achieving goals for children's long-term living situations. Notably, child welfare systems vary by state, and in some states, private agencies that contract with the state are responsible for identifying family placements for children in their care and managing their entire cases.

Nondiscrimination protections are an important type of regulation or law. Nondiscrimination provisions, as well as other government efforts to eliminate discrimination and bias, are critical to ensuring that the best interests of children are always put first, especially when in the care of the government. It can be easy for personal biases to influence decisions at every step, such as which children are removed from their homes, how children and families are treated in the system, which families are considered and deemed qualified, and more. Research finds that Black<sup>8</sup> and Native American children,<sup>9</sup> children with disabilities,<sup>10</sup> and LGBTQ youth are overrepresented in the child welfare system.<sup>11</sup> That's why robust nondiscrimination protections within the child welfare system based on race, religion, gender, disability, sexual orientation, gender identity, and other characteristics are so important even though many states lack explicit protections for sexual orientation,

gender identity, and gender expression. Without such protections, children may be mistreated or separated from their families because of factors unrelated to their safety and well-being, and otherwise qualified families may be denied the ability to foster and adopt children in need.<sup>12</sup> Nondiscrimination protections—and ensuring that all involved in the child welfare system adhere to them—are therefore a critical part of ensuring the best interests of children. Such protections are also critical to ensuring that taxpayer-funded programs remain open to all those in need. This is why the *Fulton* case has such important implications.

## ABOUT THE FULTON CASE

The City of Philadelphia, like many governments that provide child welfare services, requires that any organization that receives a taxpayer-funded City contract must abide by the City's nondiscrimination policies. This includes not discriminating based on sexual orientation or gender identity. However, in March 2018, the City of Philadelphia learned that two private agencies with which it contracts to provide foster care services were violating provisions of its contracting requirements. Specifically, two private contract agencies refused to accept same-sex couples who sought to be certified as foster parents. The agencies claimed that certifying same-sex couples would violate the agencies' religious beliefs. One of the two agencies, Bethany Christian Services, agreed to comply with the City of Philadelphia's contracting requirement. The other, Catholic Social Services (CSS), did not and instead sued the City, claiming it was entitled to a taxpayer-funded contract to provide a government service even though it was unwilling to comply with the City's nondiscrimination requirement to certify all qualified families. It argued that adhering to that provision violated its constitutionally protected free exercise of religion. After the district court and the U.S. Court of Appeals for the Third Circuit held that the City of Philadelphia could terminate the agency's contract for failing to meet the nondiscrimination requirements, the U.S. Supreme Court agreed to hear CSS's appeal and will hear oral arguments in the fall of 2020.

## POTENTIAL RULINGS IN FULTON AND THEIR IMPACTS

There are multiple ways the U.S. Supreme Court could rule in *Fulton*, ranging from upholding lower court rulings in favor of the City of Philadelphia, to a

narrow ruling in favor of CSS given the specifics of this case, to a very broad ruling in favor of CSS that could drastically alter the way in which taxpayer-funded social services are provided in the United States.

### A Ruling in Favor of the City of Philadelphia Would Affirm Nondiscrimination Contracting Requirements



The two lower courts that have considered this case ruled that the City of Philadelphia was within its legal authority to terminate the contract with CSS when the agency refused to adhere to the terms of the contract. By refusing to consider same-sex couples as potential foster or adoptive families, CSS violated the City of Philadelphia's nondiscrimination contracting provision, jeopardizing the best interests of the children in the City's and CSS's care by reducing the number of available foster or adoptive homes. A U.S. Supreme Court ruling in favor of Philadelphia would affirm that state and local governments can establish and enforce nondiscrimination requirements. States and cities with nondiscrimination laws and regulations would continue to be able to enforce those. As a result, all qualified families, regardless of religion, marital status, sexual orientation, and gender identity, could be considered as prospective foster or adoptive families for children in the system. This would expand the pool of available families for children.

### A Narrow Ruling in Favor of CSS Would Limit Options for Children and Families in Philadelphia



In what would be potentially the narrowest ruling in favor of CSS, the Court could rule that given allegations that City officials acted out of hostility toward CSS's religious beliefs about marriage, the City of Philadelphia unconstitutionally targeted CSS. *The Court could require that the City reconsider its policy for enforcing contract requirements, reinstate the contract with CSS, or send the case back to a lower court for reconsideration.* This very narrow decision would be akin to the ruling in 2019 from the U.S. Supreme Court in *Masterpiece Cakeshop*, in which the Court gave



relief to one business that had turned away a same-sex couple based on its conclusion that the state human rights commission acted out of anti-religious hostility; in this case, the Court did not set a broader precedent or rule that applied outside of that one situation. Such a ruling in *Fulton* could mean that CSS would be able to continue receiving a City contract to certify foster families but could refuse to consider same-sex couples. Ultimately, the children in Philadelphia's child welfare system would pay the price as there would be fewer certified families to care for them. Notably, the record in *Fulton* in the district court did not show any hostility toward CSS on the part of City officials.

## A Broad Ruling Could Alter the Way the Child Welfare System Operates in the U.S.



*The Court could rule that, in the context of religious or religiously affiliated child welfare agencies, requiring that agencies adhere to nondiscrimination contracting*

*terms is unconstitutional and that objecting religiously affiliated agencies must be exempt from such requirements. Such a ruling would create a license to discriminate in the child welfare system.* It would drastically alter the way in which taxpayer-funded child welfare services are administered in the United States by permitting these agencies to continue receiving taxpayer dollars while refusing to adhere to key nondiscrimination laws and provisions.

### Agencies Could Reject Loving, Qualified Parents and Force Kids to Remain in Foster Care and Group Homes

A U.S. Supreme Court ruling in favor of CSS could mean that taxpayer-funded adoption and foster care agencies would have a broad license to discriminate against families and even children. They could refuse to serve children, accept families, or place children with families because of their sexual orientation, faith, or other characteristics that do not conform to the agency's religious beliefs, regardless of the interests of the children in their care. They could also refuse services to young people, such as transgender youth, if they allege that doing so would violate their beliefs. **This has already happened.** For example, an Evangelical Christian agency in South Carolina with a state contract refused to work with both a Jewish woman and a Catholic

couple—simply because they did not share the agency's beliefs. By discriminating against qualified potential parents and volunteers, this agency punishes children in South Carolina's foster care system. It also reduces the number of qualified foster and adoptive parents who are permitted to open their homes, making it even more difficult for children in care to find a loving family.

This decision could render federal statutes and agency regulations, state laws and policies, and city ordinances—such as the one in question in Philadelphia—unenforceable for agencies citing religious objections but enforceable for other agencies. State and local governments around the country would be forced to allow discrimination in their child welfare systems, even if they previously passed nondiscrimination laws and regulations.

Children in the child welfare system have permanency goals, which may include being reunified with their family of origin, living with another family member, living with a foster family, or being adopted. Currently there are too few foster or adoptive families for children who need them; one in ten children nationally are living in group homes or institutions, with much higher percentages in some states.<sup>13</sup> If the Court were to permit agencies to establish religious litmus tests limiting who can provide a home for children in state care, the number of eligible families who could be considered would be narrowed, further limiting the ability of child welfare departments to find families who are the best fit for children. State-contracted agencies could even deny or limit visitation and reunification services to a child and family of origin if the family didn't meet the agency's religious litmus test.<sup>14</sup> Child services agencies should not have the right to impose their beliefs on others or deny loving homes to children in state care simply because the agency disapproves of an otherwise qualified prospective family. The bottom line is that allowing contracted agencies to exclude families based on religious requirements reduces the number of parents available to provide loving foster or adoptive homes.

### Millions of Otherwise Qualified Families May Be Unable to Foster or Adopt

The longer-term outcome of a decision in favor of CSS could be the creation of a model of child welfare services—and potentially all social services—in which states and cities are required to give public dollars to

# THE LICENSE TO DISCRIMINATE COULD BE BROAD OR NARROW

## NARROW



**Religiously Affiliated Agencies in Philadelphia:** The City of Philadelphia could be barred from requiring child welfare agencies to follow nondiscrimination requirements as part of receiving city contracts.



### Religiously Affiliated Child Welfare Agencies

**Across the Country:** Taxpayer-funded, religiously affiliated child welfare agencies across the country could refuse to adhere to contracting requirements, jeopardizing the health and safety of the children in their care.



### Religiously Affiliated Social Service Agencies:

In the context of any government-funded social service, religiously affiliated agencies of all sorts—including food banks, homeless shelters, and more—could receive a license to discriminate.



**Religiously Affiliated Agencies, Businesses & Individuals:** Any individual or entity could raise a religious objection to nearly any nondiscrimination law or regulation and be granted an exemption.



## BROAD



private agencies to perform public services even though they refuse to serve everyone who needs services. **The end result would be a model for public child welfare services in which agencies receive taxpayer dollars to serve the public, but they only serve some kinds of individuals and families.** While there is currently a wide array of service providers that are all expected to serve the entire public, a ruling creating a license to discriminate in the child welfare system would allow faith-based providers to pick and choose whom they

will serve. This could lead to, for example, an agency that only works with Catholic families, another agency that only works with Evangelical families, and so on. If these agencies receive the majority of a state's taxpayer dollars, then where do qualified families who are non-religious or Jewish or Muslim or any other faith go if they want to become foster or adoptive families? For example, families outside of big cities may live too far away from the one or two agencies in the state willing to serve them (especially given the requirements for home

## SPOTLIGHT



### Spotlight on Texas and the Role of Contracted Child Welfare Agencies

The State of Texas ranks second (only to California) in the number of children in its foster care system. According to federal data for Fiscal Year 2018, on October 1, 2018, there were 31,864 children in the foster care system in Texas.<sup>b</sup>

The state contracts with 148 private child-placing agencies, which are responsible for evaluating prospective foster or adoptive families and supervising existing foster and adoptive families.<sup>c</sup> Of these 148 agencies listed on the state's website, 51% can be identified as having a religious background. It is important to note that just because an agency is religiously affiliated, that does not mean that it would seek a license to discriminate against LGBTQ families, single people, unmarried couples, or families who do not share the agency's faith.<sup>d</sup> Of the 75 religiously affiliated child-placing agencies in Texas, two in five appear to be inclusive of diverse families, based on information provided by the agencies themselves.<sup>e</sup> However, three in five do not indicate that they serve all families. **Furthermore, what isn't known is the extent to which such agencies would restrict the types of families they serve if the U.S. Supreme Court grants them the explicit ability to receive an exemption from child welfare nondiscrimination requirements.**

The State of Texas is geographically diverse, with communities ranging from three of the largest cities in the country (Houston, San Antonio, and Dallas) to many rural communities. Rural lands make up 85% of the State, including large swaths of Northern, Central, and Western Texas.<sup>f</sup> Given the geographic distance separating many parts of Texas, granting religiously affiliated child-placing agencies a license to discriminate could mean that many rural parents simply would not be able to foster or adopt. For example, in three of the eleven state regions, as designated by the Department of Family and Protective Services, religiously affiliated agencies comprise 80% or more of all child-placing agencies. These agencies serve many rural communities in two of these regions (those around Central Texas and the areas of Lubbock and Abilene in North Texas). For unmarried couples, single parents, people of different faiths, and LGBTQ families, if 80% or more of the local agencies in their communities are religiously affiliated, and if those agencies are given a license to discriminate and choose to do so, such families may be dissuaded from trying to foster and adopt—especially since discriminating agencies often aren't explicit on their websites, but rather reject prospective parents after they have started the foster process. Ultimately, this would harm the children in the care of the State of Texas, particularly in rural areas where families of origin and children may struggle to remain geographically close.

<sup>b</sup> U.S. Department of Health and Human Services, Administration for Children and Families, Administration on Children, Youth and Families, Children's Bureau. "In Foster Care on the First Day of the FY!"

<sup>c</sup> Texas Department of Family and Protective Services. "Active/Open Residential Child Care Contracts: Child Placing Agencies."

<sup>d</sup> The authors respect and value the role that faith-based agencies play in providing both placement and services for children in foster care across the country. Our concern is with taxpayer-funded discrimination of any kind, including that which may be permitted by a ruling in favor of CSS by the U.S. Supreme Court in *Fulton*.

<sup>e</sup> Fostering Brighter Futures. "Agency Directory"; Our Community Our Kids. "Agencies."

<sup>f</sup> Texas Rural Funders Collaborative. November 2018. A Report for the Future of Rural Texas: A Texas Tribune Symposium.

visits, parenting classes, and more). If they are interested in fostering or adopting, they shouldn't be disqualified for reasons unrelated to their ability to care for a child.

One-third (32%) of children adopted in 2018 from foster care in the United States were adopted by single people or unmarried couples.<sup>15</sup> If the Court rules in *Fulton* that state-contracted agencies have the right to turn away otherwise qualified families because of a religious objection, it could seriously and radically reduce the chances for good and permanent outcomes for thousands of children in the child welfare system. The impact would be great on single parents and cohabiting couples living in rural areas or in parts of a state where there is only one state-contracted agency, if that one agency opts to categorically refuse to consider an entire group of people. Whether because they are single, unmarried, divorced, gay, or transgender, or because they aren't the "right" religion, this would mean both that those families may be unable to pursue adoption and that the children in those agencies' care—children for whom the state has assumed responsibility—may lose the chance to be placed with a loving foster or adoptive family. If agencies are permitted to discriminate, qualified adults who may have considered becoming foster or adoptive families may be so discouraged and fearful of being discriminated against that they decide not to find a different agency that may serve them.

If the U.S. Supreme Court rules in favor of CSS in *Fulton*, the ultimate result could be that religiously affiliated agencies are emboldened to shut out of the child welfare system entire groups of otherwise qualified parents. That means fewer children could be placed with a loving foster or adoptive family.

### Agencies Could Skirt Health and Safety Regulations Designed to Keep Children Safe, Jeopardizing the Well-being of Children in the Foster Care System

All children have the right to live in an environment free from abuse and neglect. That's why federal, state, and local laws and regulations have been developed to ensure that children in the child welfare system are safe. This includes access to physical and mental health care, schooling, and peers. If the Court ruled that agencies have a legal right to exempt themselves from contract requirements they maintain conflict with their faith, agencies could claim a right to be exempt from requirements besides nondiscrimination requirements

that they view as a burden on their religious beliefs, including standards and regulations designed to protect the well-being of children in their care. Potential harms to children could include:

- Agencies may argue that corporal punishment is a core part of their religious teaching and could permit staff and foster families to physically harm children in their care.
- Agencies may claim an exemption from cooperating with abuse investigations. For example, in a number of cases related to the Catholic Church, dioceses have cited religious exemptions from laws requiring them to address child abuse.<sup>16</sup> In 2014, a judge ruled that a member of the Fundamentalist Church of Jesus Christ of Latter-day Saints could not be compelled to testify in a federal child labor investigation because testifying violated his religious beliefs.<sup>17</sup>
- Agencies could refuse to provide children in their care with medical care they deem against their religious beliefs. For example, an agency could refuse to vaccinate children in their care, claiming a religious objection to doing so. This could result in outbreaks of dangerous childhood diseases such as measles. In another example, the U.S. Conference of Catholic Bishops, which received federal funding to provide services to trafficking victims, including some who have experienced violence and sexual assault, cited religious beliefs refusing to provide medically needed contraceptive and abortion care—even refusing to provide outside referrals so that others could provide such care—to the adults and children in their care.<sup>18</sup>
- Agencies caring for LGBTQ youth may refuse to provide competent and inclusive physical and mental health care; worse, they may argue that their religious beliefs justify subjecting such youth to harmful and discredited conversion "therapy." Agencies may even be able to refuse to accept LGBTQ youth or children of a different faith, requiring these children to be moved to a different part of the state to receive services. This may mean being further separated from their families of origin.
- Agencies could be emboldened to insist that children in their care participate in religious activities, even if those activities are not in line with a child's own religious beliefs. A state-contracted agency in Kentucky pressured children in its care to attend

Baptist church services, forced them to say prayers before meals, and enrolled them in bible study.<sup>19</sup> Many of the children in the child welfare system come from families of faith, yet they do not have a choice as to which agency they are assigned. If an agency that is contracted to provide care and identify potential foster or adoptive families limits the religious views of prospective foster or adoptive families they consider, children with a faith tradition may not have their own faith respected, or worse, they may be pressured into converting to another religion.<sup>20</sup>

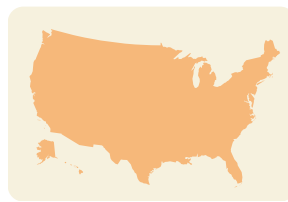
## A Broad Ruling Could Alter the Way That Social Services Are Provided in the U.S.



*The Court could rule that in the context of any government-funded social services, religiously affiliated agencies should be exempt from nondiscrimination con-*

*tracting requirements that they find burdensome. Such a ruling would create a license to discriminate across a range of social services.* If the Court rules that governments cannot enforce any contract or grant requirements when private contractors cite a religious objection—whether in child welfare services or elsewhere—it would drastically upend the way in which social services are provided in the United States. Taxpayer dollars designed to provide vital services like job training programs, food assistance, emergency shelter, healthcare services, early childhood education, and more to the general public could instead be limited only to people who meet a particular agency’s religious litmus test. For example, a field hospital run by Samaritan’s Purse set up during the COVID-19 pandemic in New York City required that workers sign a statement of faith that contained anti-LGBTQ language, raising serious questions as to whether the hospital would provide medical care to LGBTQ patients or accept LGBTQ doctors or volunteers in a time of urgent crisis. Such a ruling could eventually jeopardize vital protections for workers at government-funded agencies such as those focused on equal pay, worker safety, and nondiscrimination against LGBTQ workers, workers of different faiths, women, and more.

## A Broad Ruling Could Jeopardize Nondiscrimination Laws and Regulations and Other Laws



*The Court could rule that if an individual or entity raises a religious objection to nearly any federal, state, or local nondiscrimination law or regulation, the government*

*must prove the highest possible interest in such a regulation or else it must grant an exemption to the regulation.* This could lead to what U.S. Supreme Court Justice Antonin Scalia referred to as a situation in which any person could claim to be exempt from any law because of religious belief resulting in “every citizen to become a law unto himself.”<sup>21</sup> Whether any individual or entity is subject to a law or regulation would be in question if they claim a religious objection, undermining the consistency and general applicability of not only nondiscrimination laws, but also potentially any law or regulation. The courts could then be asked to adjudicate endless lawsuits, as the burden would be on the government to defend each and every law and regulation when someone claimed a religious objection.

### **A Series of Executive Orders, Proposed Rules, and Agency Actions by the Trump Administration Jeopardizes the Best Interests of Children**

The Trump administration, in addition to filing a brief in support of CSS in *Fulton*, has actively worked to expand the ability of government-funded agencies to discriminate against both youth in the system and prospective parents seeking to foster or adopt. Among actions taken by the administration are:

- In January 2019, the U.S. Department of Health and Human Services granted a waiver from federal nondiscrimination regulations to South Carolina, allowing the State to continue contracting with an agency that would only accept certain families based on their religious beliefs.
- In November 2019, the administration released a proposed rule that would strip critical protections against discrimination from U.S. Department of Health and Human Services grant programs. Notably, this would mean that federally funded child welfare agencies would no longer be barred from discriminating against prospective foster or adoptive parents based on religion, sex, sexual orientation, or gender identity. Simultaneously, HHS published a Nonenforcement Decision declaring it would not enforce existing nondiscrimination law protecting beneficiaries and participants in HHS grant-funded programs, including child welfare.
- In early 2020, the administration finalized a rule removing data collection requirements that would allow the agency and researchers to identify disparities for LGBTQ youth and parents, as well as Native American and Alaska Native children.
- In June 2020, the administration released an executive order designed to expand the ability of faith-based child welfare agencies to turn away otherwise qualified families who fail to meet a religious litmus test, whether because of their religion, sex, sexual orientation, or gender identity.<sup>22</sup>

## **CONCLUSION**

This fall, the U.S. Supreme Court will hear arguments in the *Fulton* case. The stakes for the children and families who are involved in the child welfare system could not be higher. The Court could create a license to discriminate in the child welfare system that would jeopardize the safety, permanency, and well-being of hundreds of thousands of children and the millions of families who receive supportive services through the system. Furthermore, the Court could send the message that any nondiscrimination requirement that accompanies the receipt of taxpayer dollars is simply optional for agencies that cite a religious objection. This would allow agencies to decide whom they do and do not want to serve, even while continuing to receive taxpayer dollars.

A broad ruling from the Court in support of CSS could also result in nearly every entity that receives government funding, ranging from child welfare agencies to soup kitchens and those offering job training programs, being able to claim a religious exemption to a wide array of regulations and laws. A ruling for CSS could also result in government-funded service providers choosing to serve only those who share their own beliefs or refusing to provide critical services to those who don't. Ultimately, this could leave millions of people without access to needed publicly funded services—and discrimination against LGBTQ people and same-sex couples, women, people of faith, unmarried couples, and more would become a regular occurrence when seeking needed social services or assistance. This undermines the very premise of taxpayer-funded social services: that they are designed to serve *all* of the public.

## ENDNOTES

- <sup>1</sup> Kristina Rosinsky and Sarah Catherine Williams. December 2018. Child Welfare Financing SFY 2016: A survey of federal, state, and local expenditures. Child Trends; U.S. Department of Health and Human Services, Administration for Children and Families, Administration on Children, Youth and Families, Children's Bureau. August The AFCARS Report: Preliminary FY 2018 Estimates as of August 22 2019 – No. 26.
- <sup>2</sup> Child Welfare Information Gateway. (2013). How the child welfare system works. Washington, DC: U.S. Department of Health and Human Services, Children's Bureau.
- <sup>3</sup> Child Welfare Information Gateway. National Foster Care & Adoption Directory Research.
- <sup>4</sup> State Policy Advocacy and Reform Center and First Focus. October 2012. Privatization of Child Welfare Services: A Guide for State Advocates.
- <sup>5</sup> Jo Jones and Paul Placek. February 15, 2017. Adoption by the Numbers. National Council for Adoption.
- <sup>6</sup> Casey Family Programs. May 2019. State-by-state data.
- <sup>7</sup> Kristina Rosinsky and Sarah Catherine Williams. December 2018. Child Welfare Financing SFY 2016: A survey of federal, state, and local expenditures. Child Trends.
- <sup>8</sup> 2017 data show that 14% of the nation's children are Black compared to 23% of those in foster care. Children's Defense Fund. February 2020. The State of America's Children: 2020.
- <sup>9</sup> American Indian and Alaskan Native children overrepresented in foster care at a rate 2.7 times greater than in the general population. National Indiana Child Welfare Association. September 2017. "What is Disproportionately in Child Welfare?"
- <sup>10</sup> Child Welfare Information Gateway. Permanency for Children with Disabilities.
- <sup>11</sup> See, for example, Laura Baams, Bianca D.M. Wilson, and Stephen T. Russell. March 2019. "LGBTQ Youth in Unstable Housing and Foster Care." *Pediatrics* 143(3).
- <sup>12</sup> Brief of Amici Curiae National Center for Lesbian Rights et al. October 4, 2018.
- <sup>13</sup> U.S. Department of Health and Human Services, Administration for Children and Families, Administration on Children, Youth and Families, Children's Bureau. August The AFCARS Report: Preliminary FY 2018 Estimates as of August 22 2019 – No. 26.
- <sup>14</sup> Brief of Amici Curiae National Center for Lesbian Rights et al. October 4, 2018.
- <sup>15</sup> U.S. Department of Health and Human Services, Administration for Children and Families, Administration on Children, Youth and Families, Children's Bureau. August The AFCARS Report: Preliminary FY 2018 Estimates as of August 22 2019 – No. 26.
- <sup>16</sup> *Doe No. 2 v. Norwich Roman Catholic Diocesan Corp.*, No. HHD07CV1250364255, 2013 WL 3871430 (Conn. Super. Ct. July 8, 2013) (arguing that state RFRA precludes claims against Church for negligent supervision and retention of alleged abuser); *Givens v. St. Adalbert Church*, No. HHDCV126032459S, 2013 WL 4420776 (Conn. Super. Ct. July 25, 2013) (same); *Noll v. Hartford Roman Catholic Diocesan Corp.*, No. HHD04CV024034702S, 2008 WL 4853361 (Conn. Super. Ct. Oct. 20, 2008) (same).
- <sup>17</sup> *Perez v. Paragon Contractors*, D. Utah Sep. 11, 2014.
- <sup>18</sup> *ACLU of Massachusetts v. Kathleen Sebelius et al.*
- <sup>19</sup> *Pedreira v. Sunrise Children's Services, F/K/A/ Kentucky Baptist Homes for Children*.
- <sup>20</sup> Lydia Currie. February 5, 2019. "I was barred from becoming a foster parent because I am Jewish." *Jewish Telegraphic Agency*.
- <sup>21</sup> Employment Division, Department of Human Resources of Oregon v. Smith (1990).
- <sup>22</sup> The White House. June 24, 2020. Executive Order on Strengthening the Child Welfare System for America's Children.



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