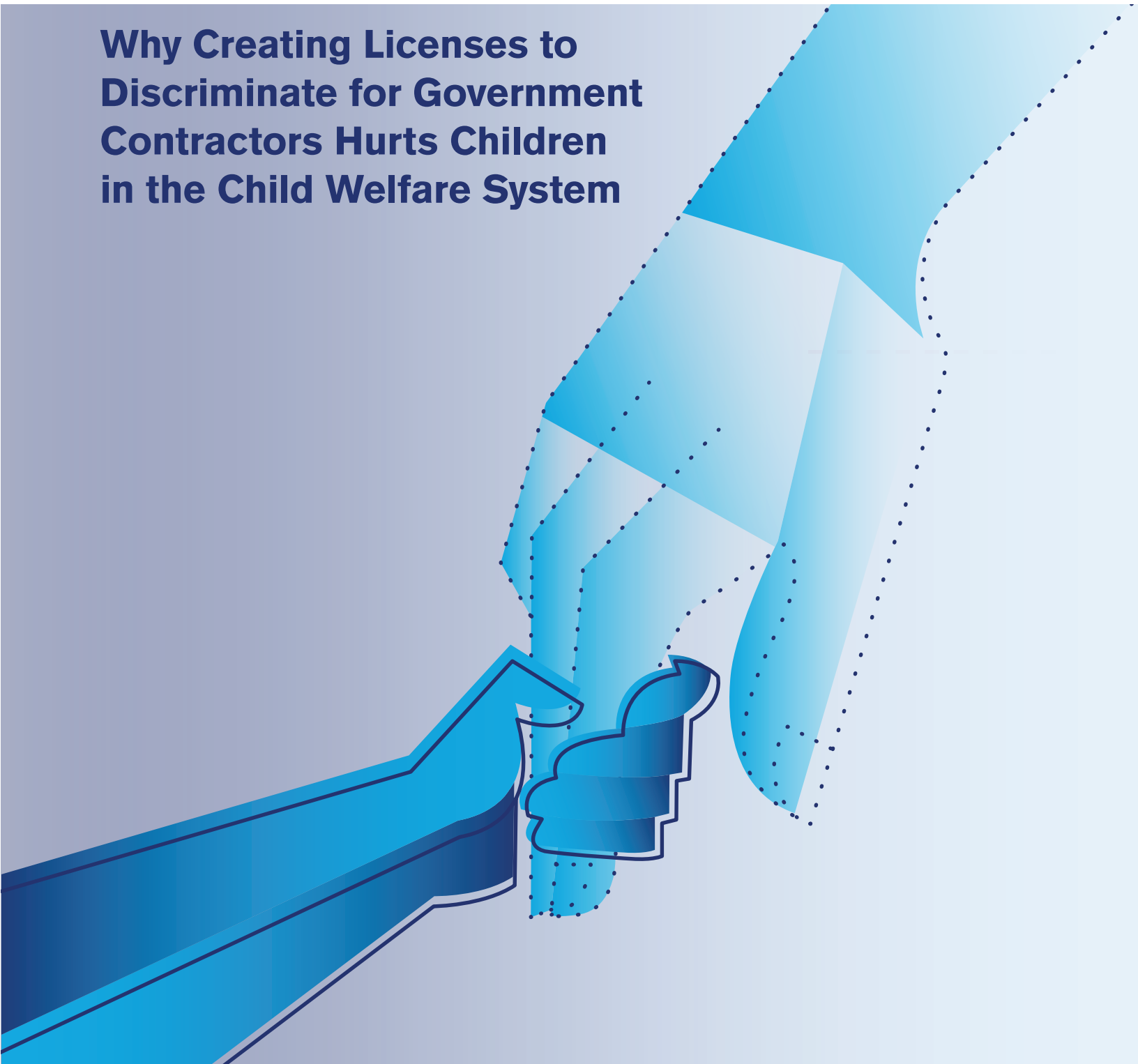


Disregarding the Best Interest of the Child:

Why Creating Licenses to Discriminate for Government Contractors Hurts Children in the Child Welfare System



Why Creating Licenses to Discriminate for Government Contractors Hurts Children in the Child Welfare System

Executive Summary

In making decisions about a child’s foster care or adoptive placement, every question should be resolved with the answer that is in the best interest of the child. Experts agree that the best interest of a child is served by placing them in a loving home with qualified parents.

Children in the foster care system are the responsibility of the state.

The state — or in some cases, county or city — is responsible for the wellbeing of the child during the time they are away from their family of origin. Usually states contract with third-parties who provide foster care services.

These third parties are government contractors who are paid for their services by taxpayers, and who are providing a government function.

The biggest bottleneck in placing children with foster or adoptive families is a lack of qualified prospective parents. Yet some agencies have refused to work with qualified prospective families based on the agency's religious views and have even asked for policy changes to explicitly allow them to discriminate.

Ten states, including eight states in the last five years, have passed laws allowing taxpayer-funded child welfare programs to refuse to work with prospective parents who do not share their religious belief or practice religion in

the agency's preferred manner. The Trump Administration has also allowed federal contractors who apply for a waiver to continue to receive federal taxpayer funds while discriminating on the basis of religious belief.

Government contractors are being allowed to pick and choose to whom they provide taxpayer funded services.

Freedom of religion is a fundamental value enshrined in the First Amendment, and a private agency may be motivated to engage in certain work as a result of its religious mission. When an agency accepts a contract with the government to provide a government service, they must be willing to abide by the terms of the contract, including

nondiscrimination requirements. The state should not attempt to free itself of its obligations to treat all citizens equally by delegating certain services to contractors who are not willing to satisfy those obligations. Neither should an agency demand entitlement to a government contract for services it is not willing to provide.

Allowing a government contractor to discriminate on the basis of the contractor's religious belief is a dangerous and disastrous precedent as a matter of public policy.

Discrimination on the basis of a contractor's religious belief has impacts that include, but go far beyond, the LGBTQ community. In fact, one of the most prominent examples of discrimination authorized by these license to discriminate policies occurred when an evangelical Protestant-affiliated child welfare agency turned away a qualified prospective foster parent due to her Catholic faith. These laws allow discrimination against same-sex couples, LGBTQ

individuals, interfaith couples, couples in which one member has previously been divorced, or even people who come from the same faith tradition but have different ways of practicing their faith. Ultimately, they allow government contractors the ability to pick and choose to whom they are willing to provide the services the government is paying for them to provide.

Introduction

The principle guiding nearly every decision in the child welfare and family law realm is quite simple: what is in the best interest of the child? From the time a child is displaced from their family of origin every decision about their situation, whether it be related to family reunification or adoption, should be in service of the best interest of the child.¹

While the child welfare system unfortunately has all too many fault lines in which the best interests of children are not well served, a troubling new trend allows taxpayer-funded providers of child welfare services to artificially limit the pool of qualified prospective parents by refusing to work with qualified parents who do not share the providers' religious beliefs. Even worse, in some places providers are able to refuse services to children in their care if the provider has a religious-based objection to those services.

Providers who are motivated by a religious mission to engage in child welfare services, including foster care and adoption services, have long been part of the fabric of the child welfare system. For religious entities who provide these services privately — for example, helping to connect and support a church member unable to raise their child find another family in the church who wishes to adopt - there is no question that their religious beliefs can and should be a guiding star in that work.

Private services are rare however. The vast majority of child welfare services, like foster care, are programs funded by the government. While states generally work with third-party providers rather than provide this care directly, the state retains responsibility for the children and the services are paid for with taxpayer funds. As government contractors, these third-party providers are subject to a variety of licensing and regulatory requirements with which they must comply in order to be eligible to provide services on behalf of the state.

Some individuals and entities have argued that sincerely, deeply held religious belief should exempt them from having to comply with all manner of generally-applicable laws. This includes a large corporate employer objecting to a requirement that it offer employees a health care plan that includes birth control, a bakery refusing to provide a cake to a same-sex couple in violation of state nondiscrimination laws regarding sexual orientation, a police officer unwilling to perform community policing duties at a Mosque, and a funeral home firing a transgender woman based on the owner's beliefs about gender in violation of federal law. These arguments have inevitably been imported into the child welfare considerations by providers with a faith-based mission who want to be excused from laws and regulations to which they object.

A child welfare agency in South Carolina invoked its religious beliefs to refuse to work with both a Catholic parent and a Jewish parent.² An agency in Philadelphia, that is suing the City, refuses to certify the homes of same-sex couples as appropriate placements for foster children even when the prospective parents are otherwise qualified.³ In Texas, an agency turned away a same-sex couple hoping to foster unaccompanied refugee children because the couple didn't "mirror the holy family."⁴ On November 4, 2020 the Supreme Court will hear oral arguments in *Fulton v. the City of Philadelphia* to determine if the First Amendment requires the City to exempt religiously-affiliated child welfare agencies from neutral, generally applicable nondiscrimination requirements.

INTRODUCTION

Freedom of religion is a core American value, which is why it is protected in the First Amendment to the United States Constitution. However, free exercise of religion does not permit individuals or institutions to flout laws with impunity simply because a religious justification is offered. Limits have always existed in order to ensure that that freedom of religion does not result in harm to others.

Government contracts are voluntary. Applicants for a government contract voluntarily subject themselves to the laws and policies that govern contractors doing the work of the state. If the applicant finds the terms unacceptable, they are free to withdraw their application and permit another applicant to take the contract instead. Applicants may also choose to apply for some contracts and decline others when the services required conflict with the views of the applicant. Contracts with governments necessarily come with statutory and regulatory requirements because the contractor is acting in lieu of the government.

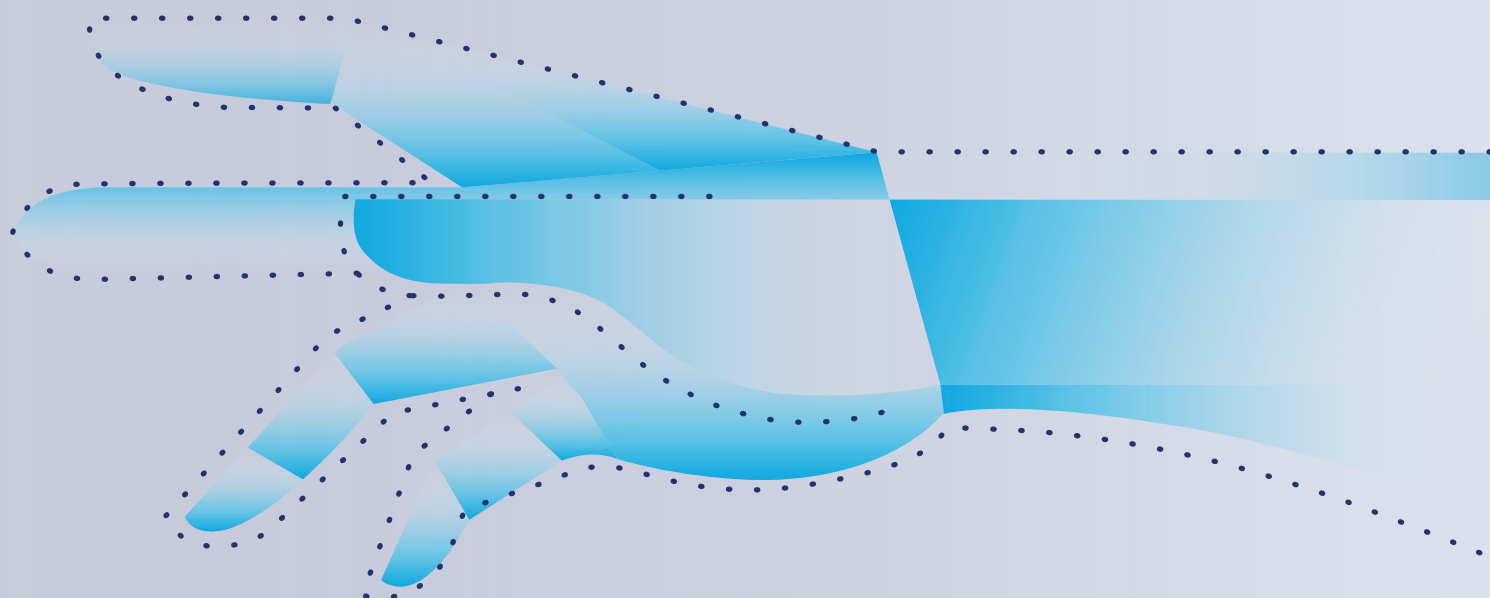
Yet agencies such as those above have argued that they should be allowed to discriminate on the basis of the contractor's religious viewpoints while accepting taxpayer funds despite longstanding laws and policies to the contrary. They believe that a nondiscrimination law that forbids discrimination on bases to which they object to be an affront to the First Amendment. Several states in recent years have agreed, passing legislation that expressly allows discrimination consistent with an agency's religious beliefs by state contractors providing child welfare

services. The most recent state to pass such legislation is Tennessee, which did so early in 2020. Eight states have passed these types of laws in the last five years, and ten total states have such laws on the books.

These laws have a broad and deleterious effect: they allow taxpayer-funded child welfare agencies to turn away qualified prospective parents seeking to care for a child in need, including LGBTQ couples, interfaith couples, single parents, married couples in which one prospective parent has previously been divorced, or other parents to whom the agency has a religious objection. Texas, which has a particularly sweeping version of this type of law, goes further by also permitting discrimination against children in custody. These bills all prevent the state from terminating a contract with an agency that is known to be discriminating, refusing to contract with an agency that intends to discriminate, or refusing to renew such a contract. These laws create a license to discriminate with taxpayer-funds.

Ultimately, the child welfare system must be anchored by one guiding principle: every decision should be made in the best interest of the child. While thousands of children age out of care because of a lack of qualified prospective parents, government contractors paid to place those children are refusing to work with qualified, interested prospective parents — and they are blatantly disregarding the best interests of the child in doing so. Child welfare agencies carry out an important government function and as such they must be held to basic standards of quality, professionalism, and duty. Allowing government contractors to disregard the best interests of the children in their care is a dereliction of the state's responsibility to care for these children.

**Excusing government
contractors from complying
with non-discrimination
requirements is a violation
of professional standards,
taxpayer trust, and the state's
obligation to provide equal
protection under the law.**



NOT IN THE BEST INTEREST OF CHILDREN.

Children in the foster care system or waiting to be adopted need to be placed in qualified, loving homes. Artificially limiting the pool of prospective parents because a government contractor refuses to abide by nondiscrimination requirements makes it harder for children to find their forever families. Over 122,000 children in the U.S. foster care system are in need of a permanent, adoptive family.⁵ An estimated 2 million LGBTQ adults are interested in adoption.⁶ Further, it certainly isn't in the best interest of an LGBTQ child to be denied medical treatment, or subjected to abusive discredited practices like "conversion therapy", because the host family or child welfare agency wants to change a child's LGBTQ identity.

RELIGIOUS ORGANIZATIONS' RELIGIOUS RIGHTS ARE NOT INFRINGED BY NON-DISCRIMINATION PROTECTIONS.

Many providers of child welfare services are motivated to do their work by their religious mission, and of course religious organizations who engage in child welfare work are entitled to their religious viewpoints without interference from the government. However, when bidding for government contracts the religious organization is of course subjecting itself to various regulatory and professional requirements as well as promising to abide

by the terms of the contract. The state has an obligation to provide services equally, without discrimination, and it cannot delegate that obligation away when engaging a third party to provide government services. Every state contractor should be required to do the job without picking and choosing to whom they provide services they have been paid by the government to deliver. These children are the state's responsibility, and they should not be subjected to discrimination or denial of necessary services simply because the state has delegated the responsibility to care for them to a third-party provider.

VIOLATION OF PROFESSIONAL BEST PRACTICES & DISREGARD OF BEST INTEREST OF THE CHILD.

Bills permitting discrimination by child welfare agencies are simply one more effort to write anti-LGBTQ discrimination into law. These bills are not supported by the larger child welfare community or by mental health professionals. They're not about serving a child's best interest. Further, in cases where agencies motivated by a religious mission have withdrawn from government contracts rather than comply with nondiscrimination requirements, other government contractors have stepped in to provide the services without detriment to the children in care.

The State Legislative Landscape

LICENSES TO DISCRIMINATE IN CHILD WELFARE SERVICES ARE PART OF A TREND OF ANTI-LGBTQ LEGISLATION IN THE STATES.

The last six legislative sessions have seen a surge of bills introduced in state legislatures that aim to diminish the rights of lesbian, gay, bisexual, transgender and queer (LGBTQ) people. In 2015, state versions of the Religious Freedom Restoration Acts proliferated in states, like Indiana, angered by the imminent arrival of marriage equality; in 2016, state legislatures took aim at the transgender community with bills like North Carolina's infamous HB2; and in 2017, 2018, and 2019 state legislatures pursued more targeted bills that carved out religiously- or morally- based refusals from regulation of certain sectors.⁷ Among these targeted refusal bills were licenses to discriminate in child welfare services. The number of these nearly doubled in 2017, from 4 to 7, with new laws passed in Alabama, South Dakota, and Texas. 2018 saw the addition of new laws in Oklahoma and Kansas, and Tennessee joined in early 2020.

REINFORCED BY FEDERAL ACTION.

The Trump/Pence administration furthered the ability of religiously-affiliated contractors and grantees to discriminate against prospective parents based on the provider's religious beliefs without loss of federal funds. Following an executive order that instructed the Department of Justice to work agency by agency to expand religious exemptions,⁸ the Department of Health and Human Services (HHS) granted a waiver to a child welfare provider in South Carolina that wanted an exemption from regulations prohibiting federal contractors from discriminating on the basis of religion.⁹ Subsequently, HHS proposed a federal regulation that would strip away nondiscrimination requirements and permit all HHS grant recipients, notably adoption and foster care agencies,

to discriminate against LGBTQ people, and in many circumstances religious minorities and women, and still receive federal funding.¹⁰

MOTIVATED BY RESISTANCE TO MARRIAGE, BUT IMPLICATIONS FAR BEYOND.

To be clear, these laws are about discrimination — they permit government contractors to pick and choose to whom they provide services they have been paid by the taxpayer to deliver. Further, proponents of these bills have been very forthright that the bills are a lingering reaction to marriage equality. However, the implications of these bills go far beyond discrimination on the basis of sexual orientation and gender identity. These licenses to discriminate also allow agencies to object to placement with single parents, parents of another faith or an interfaith couple, and other parents to whom an agency asserts a religious-based objection. Some of these bills are also drawn in such a way that there are implications around the agencies being able to responsibly care for LGBTQ youth, and some would implicate youth's reproductive rights as well.

These laws enshrine discrimination into law by granting state contractors who provide taxpayer-funded child welfare services the ability to discriminate with impunity in the provision of those services against qualified same-sex couples or LGBTQ individuals who want to adopt. Some of the laws also allow the child welfare organizations to refuse to provide necessary services to children in their care.

THE STATE LEGISLATIVE LANDSCAPE

DISCRIMINATION AGAINST PROSPECTIVE PARENTS.

This contrived controversy dates back about a decade as marriage equality spread from just a few states to the entire country. Some providers of child welfare services, citing religious objections, threatened to cease providing services if they were forced to serve same-sex couples or LGBTQ prospective parents. One of the cruelest consequences of these types of bills is that they would allow agencies to refuse to place foster children with members of their extended family — a practice often considered to be in the best interest of the child — based solely on the agency’s religious beliefs. A loving, LGBTQ-identified grandparent, for example, or a stable, eager LGBTQ sibling could be deemed objectionable as a matter of religious belief and therefore an unsuitable placement for a child. This is contrary to the professional best practice of prioritizing the placement of children within their family of origin whenever a relative is able and willing to step in.

DISCRIMINATION AGAINST CHILDREN IN CARE.

Further, some of these laws - primarily the sweeping law in Texas — would allow agencies responsible for caring for LGBTQ youth to refer that child to a provider of the abusive and discredited practice of so-called “conversion therapy”, if that was consistent with the agency’s religious beliefs, without the state being able to intervene, cancel the contract, or withdraw support in other ways. They would also allow an agency to refuse to give a child access to affirming mental health care, or to prevent them from continuing to receive hormone therapy. Similarly, some of the bills explicitly state that the agency can refuse to provide reproductive health care including contraception or abortion. It isn’t in the best interest of a child to deny them a qualified, loving family simply because that family doesn’t share all of the tenets of the placing agency’s faith,

and it certainly isn’t in the best interest of an LGBTQ child to be denied medical treatment, or subjected to abusive discredited practices, because the host family or child welfare agency wants to change a child’s LGBTQ identity.

THE FIRST LAWS TO PASS WERE FOCUSED ON REFUSING TO PLACE A CHILD WITH PARENTS TO WHOM THE AGENCY HAD A RELIGIOUS OR MORAL OBJECTION.

North Dakota was an early adopter of license to discriminate in child welfare laws, with a 2003 law that protected an agency participating in child placement activities from losing a contract or participation in a government program as a result of the agency’s written religious or moral convictions or policies.¹¹ Virginia emulated this provision about nine years later, adopting a “conscience clause” into existing state code that read: “no private child-placing agency shall be required to perform, assist, counsel, recommend, consent to, refer, or participate in any placement of a child for foster care or adoption when the proposed placement would violate the agency’s written religious or moral convictions or policies”, and that an agency shall not be denied a license or a grant, contract, or participation in a government program as a result of the agency’s objections.¹²

This framing is sweeping: by including “moral convictions” as well as religious beliefs it sets the stage for agencies to be able to object to a placement on all kinds of grounds that may go beyond what is traditionally considered religious belief. However, it is important to note that while these laws allow the agencies to discriminate against prospective parents, they do not extend to allowing the agency to refuse to provide services that a child in care needs, unlike some of the bills that would follow.

THE STATE LEGISLATIVE LANDSCAPE

WITH A SURGE IN INTEREST CAME BROADER BILLS ALLOWING DISCRIMINATION IN MORE SERVICES AND SOMETIMES AGAINST CHILDREN IN CARE.

License to discriminate in child welfare bills began to surge in popularity over the next few years, with 20 child welfare bills introduced in state legislatures across the country over the course of the 2015, 2016, and 2017 legislative sessions. Beginning with Michigan in 2015, 5 new states had license to discriminate in child welfare laws on the books by 2017. Oklahoma and Kansas passed such laws in 2018 and Tennessee did as well in 2020.

Of these, the most limited is Alabama's 2017 law; it allows some state-licensed agencies to reject qualified prospective LGBTQ adoptive or foster parents (or other parents to whom the agency may have an objection) based on the agency's religious beliefs, but that exemption is limited to agencies that receive no state or federal funding.¹³

Most of the license to discriminate laws bear a strong resemblance to each other, primarily focusing on allowing agencies to refuse to work with prospective parents to whom the agency has a religious objection.

- Michigan's law, which was passed as a three-bill package, went further by expressly allowing agencies to refuse to serve certain children: it allowed agencies providing adoption services to "decline to provide any services that conflict with...the agency's sincerely held religious beliefs",¹⁴ including refusing to accept a referral for a child for placement services if the agency objects to the child or the likely placement of the child.¹⁵ Michigan's law is currently not being enforced following a 2019 settlement that requires all taxpayer funded, state-contracted child welfare agencies to accept all qualified families.¹⁶

- Oklahoma's law exempts all private child placement agencies from being required to "perform, assist, counsel, recommend, consent to, refer, or participate in any placement of a child for foster care or adoption when the proposed placement would violate the agency's written religious or moral convictions or policies".¹⁷
- Kansas passed its very similar law only days later, but subsequent developments including the Governor issuing an Executive Order in January 2019 forbidding state contractors from discriminating on the basis of sexual orientation and gender identity, among other characteristics, have cast doubt on the scope and enforceability of the law at this juncture.
- Tennessee's law is substantially similar to the laws passed in Oklahoma and Kansas.¹⁸ The state has a two-year legislative session, and the majority of the legislative action on HB 836 happened in 2019. The Senate passed the bill the first day of the 2020 session and the Governor signed it into law shortly thereafter.¹⁹ It was the only such bill to be passed in 2020.

Parents can be rejected because the agency has an objection to them for any reason, including interfaith couples, single parents, married couples in which one prospective parent has previously been divorced, or other parents to whom the agency has a religious objection.

THE STATE LEGISLATIVE LANDSCAPE

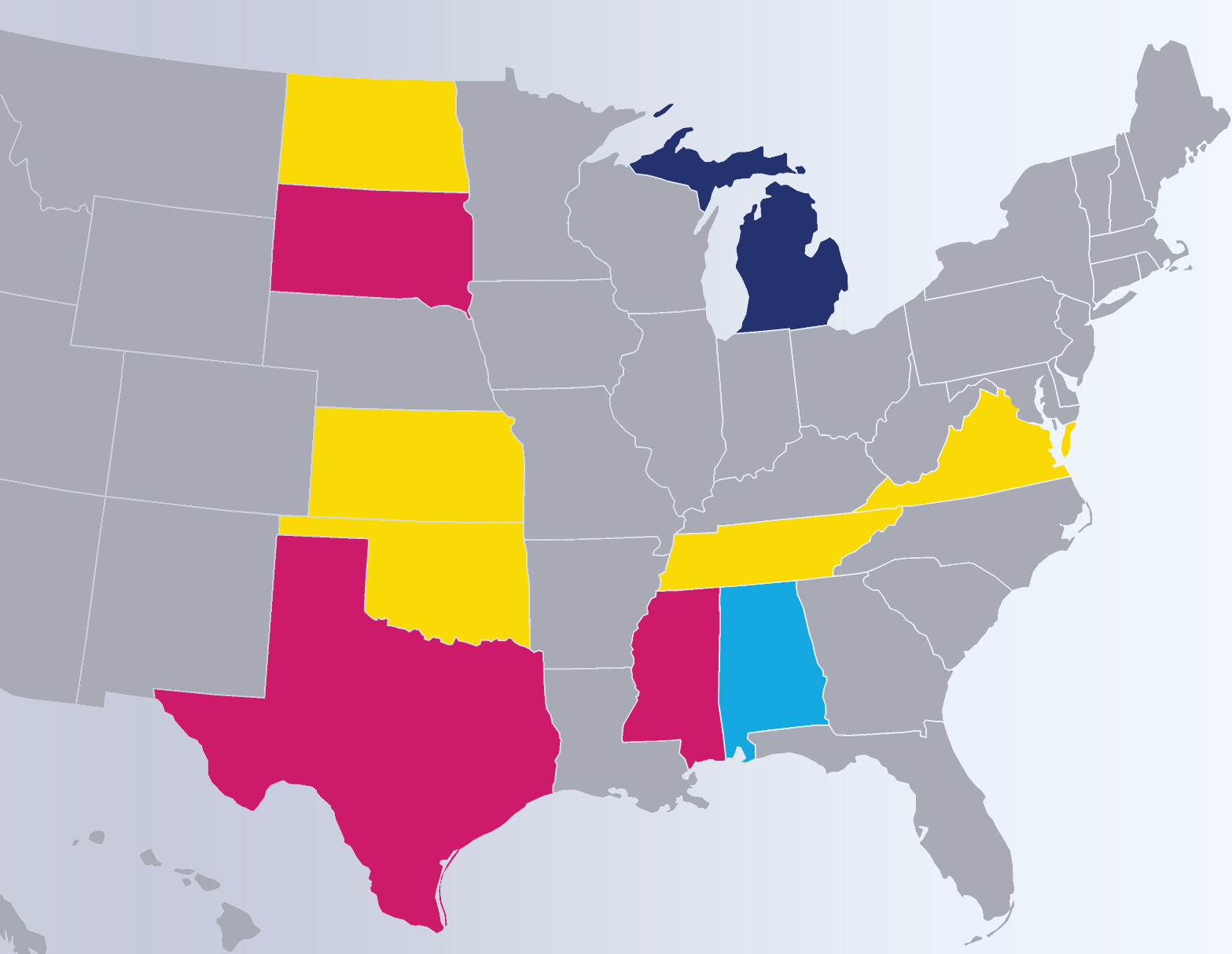
DISCRIMINATION AGAINST CHILDREN IN CARE.

South Dakota and Texas took a more expansive view of what “services” included; these laws encompass discrimination against children in care as well as discrimination against prospective parents.²⁰ Even the discrimination is bigger in Texas, where “child welfare services” is defined to include counseling for children and families, residential care and group homes, and family reunification services, among others.²¹ These sweeping laws allow government contractors to refuse to provide services to children in care if the agency has a religious objection to that service. Among other things, that means a state has its hands tied — it cannot cancel the contract or refuse to give the agency a contract in the future — if the agency refuses to provide children in their care with necessary medical services (like hormone therapy, contraceptives, or affirming mental health care) or even if the agency forces children in their care, justified by the agency’s religious belief, to dangerous and abusive practices such as so-called “conversion therapy”.

It is also important to note that while the rhetoric and political climate make it clear that it is the unwillingness of these agencies to serve same-sex parents that has been the impetus for these bills, the language of these bills is so sweeping that other prospective parents are also caught up in it.

Parents can be rejected because the agency has an objection to them for any reason, including interfaith couples, single parents, married couples in which one prospective parent has previously been divorced, or other parents to whom the agency has a religious objection.

An additional law which has the effect of a license to discriminate in child welfare services, among many other deeply problematic ramifications, is Mississippi’s H.B. 1523, passed in 2016. This law allows — among its many discriminatory and particularly anti-transgender provisions — precisely the kinds of discrimination sanctioned by the license to discriminate in child welfare: taxpayer-funded child welfare agencies are affirmatively allowed to refuse to place children with parents with whom the agency has a religious objection; to subject an LGBTQ child to conversion therapy while in care; and to deny medical treatment such as hormone therapy to children who are relying on the state to meet their needs. Furthermore, service providers could refuse transgender people access to appropriate sex-segregated facilities consistent with their gender identity.²² While immediately challenged in court, H.B. 1523 did ultimately take effect.



State License To Discriminate In Child Welfare Laws

- Allows agencies to discriminate against potential parents**
- Allows agencies to refuse to work with potential parents and children**
- Discrimination is allowed by private agencies which do not receive taxpayer funds**
- Allows sweeping anti-LGBTQ discrimination that includes allowing agencies to refuse to work with potential parents and children and allows agencies to deny children services to which the agency objects, including refusing to allow transgender people access to sex-segregated facilities consistent with their gender identity.**

Pending Litigation Before the Supreme Court: *Fulton v. City of Philadelphia*

On November 4, 2020, the Supreme Court of the United States will hear oral arguments in *Fulton v. City of Philadelphia*. In *Fulton*, Catholic Social Services (CSS) claims a constitutional right to exclude prospective foster families headed by LGBTQ couples when providing public child welfare services for purposes of placing children in foster homes. It claims it has a right to do so because it has religious objections to approving the homes of same-sex couples as suitable placements for foster children.²³ The City of Philadelphia (City) maintains that the Constitution is not violated by the City's decision to refuse to permit discrimination with city funds.²⁴

The City had contracted with CSS for many years to provide a variety of child welfare services including certifying homes as safe for foster placements. In 2018, the City learned from a news article that CSS and another contractor would not work with same-sex couples as related to placements and responded by stopping the referral of children to these two agencies. The City continued contacts with CSS for other child welfare services for which CSS was fulfilling all of the terms of the contract. CSS sued the City.

The City won at both the district court and before the 3rd Circuit Court of Appeals.²⁵ The 3rd Circuit determined that the City had adopted a neutral, generally applicable law when it passed and enforced nondiscrimination laws inclusive of sexual orientation, and that CSS was not entitled to an exemption based upon the agency's religious beliefs and that the City had not targeted CSS for its religious beliefs.

In addition to contemplating whether CSS must be provided with a religious exemption, the Supreme Court will be considering revisiting the existing standard for First Amendment claims.²⁶ The outcome of the case could have implications for religious refusal in areas far beyond child welfare, including public health care, education, poverty programs, homelessness services, and veterans services, among other social safety net programs. Even if the Court issues a narrow decision impacting only CSS in this instance, other cases are in the pipeline that could cause the Court to soon revisit the issue.²⁷

FEDERAL EXECUTIVE ACTIONS

Executive Action Attempting to Roll Back Discrimination Protections In Child Welfare Services

EXECUTIVE ACTION.

While adoption and foster care services are primarily the responsibility of the states, many state-contracted child welfare programs receive federal funding through Title IV-E of the Social Security Act. As a result, state recipients, as well as their sub-grantees and contractors, are subject to various program requirements, laws, and regulations. Discrimination in federally-funded child welfare programs is explicitly statutorily forbidden on the basis of race, color, and national origin, but not on the basis of religion, sexual orientation, gender identity, or marital status.²⁸ However, federal regulations relating to government contractors are more comprehensive, and agencies like the Department of Health and Human Services (HHS) have regulations that prohibit discrimination in the administration of programs that receive HHS funds.²⁹

Unfortunately, the Trump administration dedicated itself to creating exemptions so that religiously-affiliated organizations are not subject to nondiscrimination requirements, including in the child welfare context. A draft Executive Order leaked in February 2017 would have explicitly permitted discrimination on the basis of sexual orientation and gender identity by child welfare agencies.³⁰ While that version did not come to fruition, President Trump signed the revised, final executive order in May 2017, including a key provision ordering the Attorney General to issue guidance to agencies regarding the Department of Justice's interpretation of religious liberty under federal law.³¹ That guidance was issued in the form of a memo from the Attorney General's office released in October 2017, and it includes implicit authorization for federal employees or federally-funded programs to refuse to provide services to LGBTQ children in crisis, or to refuse to make an adoptive or foster placement with an LGBTQ parent simply because of who they are.³²

In January 2019 the implicit was made explicit: the Department of Health and Human Services (HHS) granted a waiver requested by South Carolina Governor Henry McMaster for an exemption from federal nondiscrimination requirements that forbid an agency receiving HHS funds from discriminating on several bases, including religion.³³ This waiver allowed an agency that had a contract with South Carolina to perform child welfare services to refuse to work with parents to whom the agency had a religious objection.³⁴ The agency in question is motivated to engage in child welfare work as a result of its evangelical protestant beliefs, and on separate occasions refused to work with Jewish and Catholic prospective parents or mentors.³⁵ Then in November 2019, HHS proposed a federal regulation that would strip away nondiscrimination requirements and permit all HHS grant recipients, including but not limited to adoption and foster care agencies, to discriminate against LGBTQ people, and in many circumstances religious minorities and women, while still receiving federal funds.³⁶

It is important to note that the Trump administration's interpretation of existing federal law is not consistent with the way that federal courts have interpreted these issues to date, and that these instructions are subject to legal challenges; however, there's certainly an effort to carve unprecedented religious exemptions out at the federal level in the same way that the states have done with targeted license to discriminate in child welfare services laws.

FEDERAL EXECUTIVE ACTIONS

Federal Legislation Regarding Discrimination In Child Welfare Services

Federal legislation on both sides of the issue — affirmatively allowing discrimination and expressly forbidding it — has also been introduced in Congress. The Equality Act passed the House of Representatives in May of 2019 but was not taken up by the Senate.³⁷ Otherwise, these bills have seen very little movement.

LEGISLATION CREATING A LICENSE TO DISCRIMINATE.

Legislation allowing discrimination includes two misleadingly named bills, the “Child Welfare Provider Inclusion Act” and the “First Amendment Defense Act”. Both would create a license to discriminate in child welfare services.

- The “Child Welfare Provider Inclusion Act” (H.R. 897; S. 274), reintroduced in Congress in January 2019, would penalize states that require agencies that have contracted with the state to provide child welfare services to abide by nondiscrimination requirements.³⁸ The legislation broadly defines child welfare services to include adoption, foster care, family reunification, counseling programs, and family support services.
- The “First Amendment Defense Act” was introduced and heard in Congress in 2016, and refiled in 2018. It would require the federal government to allow discrimination by individuals (including government employees), many businesses, and non-profit organizations against same-sex couples, single parents and unmarried couples. The bill would prohibit the government from requiring agencies to provide adoption or foster care services to same-sex couples, unmarried couples, and single parents as a condition of funding.

LEGISLATION PROHIBITING DISCRIMINATION.

Legislation that would prevent discrimination in child welfare services includes the “Every Child Deserves a Family” Act and the “Equality Act”.

- The “Every Child Deserves a Family” Act (H.R. 3114 S. 1791) was reintroduced in 2019 and would prohibit any child welfare agency receiving federal financial assistance from discriminating against any potential foster or adoptive family on the basis of religion, sex, sexual orientation, gender identity, or marital status. In addition, ECDFA would prevent discrimination against any foster youth because of their sexual orientation or gender identity. The bill has broad support within the child welfare provider community as well as medical and mental health organizations.³⁹
- The “Equality Act” (H.R.5; S.788) would provide consistent and explicit non-discrimination protections for LGBTQ people across key areas of life, including employment, housing, credit, education, public spaces and services, federally funded programs, and jury service. It also includes non-discrimination provisions applying to recipients of federal funds, which would impact many state child welfare programs.⁴⁰

FACT OR FICTION

Debunking the Justifications for Discrimination

Proponents of license to discriminate in child welfare laws, bills, and policies argue that these laws are in the best interest of the children: if agencies with religious objections to same-sex parenting are penalized for discriminating, then these children — who are the state’s responsibility — will be worse off.

Namely, they claim that the state will struggle to meet its obligations to the children in its care because it has such a tradition of relying on religiously affiliated contractors to provide child welfare services. Children will have longer wait times before they are placed with a family, the argument goes, and the pipeline of parents will be diminished.

These arguments are taken seriously for good reason: everyone agrees children are better off placed with qualified, loving families than remaining in the child welfare system. That’s why it is important to consider which of these arguments are based in fact, and which are based in fiction.



FICTION: Allowing Agencies to Discriminate is in the Best Interests of the Children in Care.

The number of children served by these agencies is often quite significant, and the agencies have claimed that without these agencies participating in the child welfare system children will have a harder time being matched with families and as a result they will spend a longer period of time in care. However, that claim is not supported by the data.

FACT OR FICTION



FACT: Placement Rates and Time in Care Do Not Change Significantly in Absence of Providers that Discriminate against Prospective Parents.

There were three high-profile instances in which Catholic Charities, one of the providers often invoked in conversations around these bills, closed rather than serve same-sex couples. The amount of time that children waited for placement did not change significantly as a result.

- Massachusetts, 2006. In 2006, Catholic Charities of Boston discontinued the adoption work it had been doing, saying in a statement that “the issue is adoption to same-sex couples...we simply must recognize that we cannot continue in this ministry”. This decision was highly publicized and many feared that without the work of Catholic Charities, children would remain in the system longer. However, data show that the placement rate for children did not significantly change, with the length of time that children waited for placement in 2007 remaining consistent with pre-2006 figures as well.⁴¹
- Washington, D.C., 2010. Catholic Charities withdrew from offering foster care services in February 2010, the entire foster care program — which reportedly served only 43 children — was simply transferred to another provider who was able to absorb those children.⁴²
- Illinois, 2011. Catholic Charities refused to continue to provide adoption services if it had to place children with parents in a legal same-sex relationship. Similarly, there was no gaping hole left in the services provided; in 2012, the first year after Catholic Charities had ceased to provide services, Illinois had similar mean and median times for children waiting for placement as it had the previous year while managing a significant increase in the number of children with placement needs.⁴³



FACT: Children in Care Need a Larger Pool of Qualified, Loving, Prospective Parents.

What we do know about providing these services is that children in care need parents who are willing to foster and adopt them. Over 120,000 children in the U.S. foster care are in need of a permanent, adoptive family.⁴⁴ Having more qualified, loving parents in that pool can only serve to help the children who are waiting for families. An estimated 2 million LGBTQ adults are interested in adoption.⁴⁵ In fact, same-sex couples raising children are four times more likely than different-sex couples to be raising an

adopted child: a 2013 Williams Institute study estimated that more than 16,000 same-sex couples are raising more than 22,000 adopted children across the United States.⁴⁶ That study was conducted before marriage equality was available nationwide, which means LGBTQ parents have more access to adoption now than before. And, because same-sex couples who are married or consider themselves married are more than twice as likely to be raising children than are same-sex couples who don't, that may mean

FACT OR FICTION

more prospective adoptive parents are out there now. Children in care need parents and LGBTQ individuals and couples are eager to become those parents; allowing them to be excluded from the pool of prospective parents

for discriminatory reasons is simply not what is in the best interest of the children in care — and neither is it in the best interest of the taxpayer who is footing the bill for the consequences of the discrimination.



FACT: We Need to Do Better, Not Worse, for LGBTQ Youth In Care.

Further, research consistently shows that LGBTQ youth are overrepresented in the foster care system, as many have been rejected by their families of origin because of their LGBTQ status, and they are especially vulnerable to discrimination and mistreatment while in foster care.⁴⁷ License to discriminate in child welfare laws in some states allow for agencies to refuse medical treatment to LGBTQ youth, such as hormone therapy or contraceptives, and also allow agencies to subject children

in care to discredited and dangerous practices — such as “conversion therapy” — so long as those practices are justified by religious belief.

If agencies are not able to provide the kind of professional, nurturing care that these children deserve, the state should not be contracting with them to provide these services — and laws protecting the agencies’ ability to discriminate and harm are opposed by the wider child welfare provider profession.



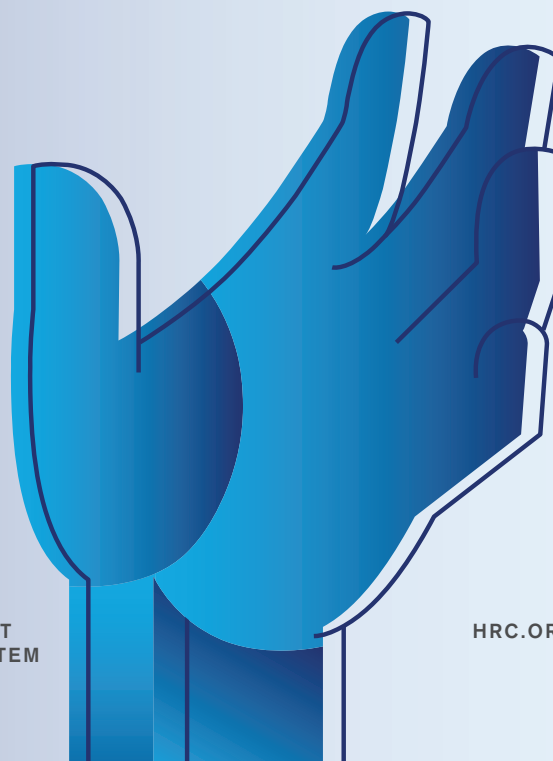
FACT: Qualified, Loving LGBTQ Parents Have Lives and Experiences That Can Support Children In Care.

Having LGBTQ adults in the pool of prospective parents is valuable for children for whom it is in their favor, same-sex couple parents and their children are more likely to be racial and ethnic minorities than are different-sex couples.⁴⁸ It is also important to dispel the myth that same-sex couples are only raising children on the coasts or in big cities: the Williams Institute Study also shows that the

states with the highest proportions of same-sex couples raising children are in Mississippi, Wyoming, Alaska, Idaho, and Montana.⁴⁹

Allowing qualified LGBTQ parents to enter the pool of prospective foster and adoptive parents would be good for children in care across the country.

Further, research consistently shows that LGBTQ youth are overrepresented in the foster care system, as many have been rejected by their families of origin because of their LGBTQ status, and they are especially vulnerable to discrimination and mistreatment while in foster care.



CASE PROFILE

FosterAdopt Connect, Missouri and Kansas

In our region, FosterAdopt Connect is one of the only agencies the LGBTQ community can trust. Other private agencies that contract with the state are either unable to do this work or unwilling to serve LGBTQ families. As a non-faith based NGO, we have a strong belief that there are great potential foster and adoptive resources for kids in our area that are not being tapped because of this 'faith based' barrier. Additionally, as an agency formed by foster and adoptive families, and informed by the voices of foster and adoptive youth, we recognize the deep need in our community for welcoming and affirming families for youth in care who identify as LGBTQ or who may be questioning their identity or sexual orientation.

As the CEO of the organization, I was motivated to pursue this work after I had a very personally painful experience, when I was asked to support our local child welfare agency and a foster family following the suicide of an 11 year old boy in care. I had known this little boy, who had played with my children, and was aware that he had been placed in multiple foster homes with deep religious convictions which might cause them to inappropriately respond to a young person who was figuring out that he was part of the LGBTQ community. The night I spent hours sitting with this young boy's body (as he had no one else after several years in foster care) while the foster family was questioned and the agency people made phone calls was life changing for me.

The critical importance of all children being able to be cared for by parents who understand, welcome and affirm the core of who they are, even as they struggle to figure that piece out, is a human right that cannot be ignored by the child welfare system. To create laws and policies which codify the ability of agencies to not only not respond to the needs of LGBTQ children, but also cause them harm, is criminal.

An agency like ours can provide the tools necessary to understand what is unfamiliar, to create an environment which is welcoming and affirming to many LGBTQ headed families for our children, and to assure that we can make placements for kids who are LGBTQ in homes with families who will truly support them for who they are.

LORI ROSS

President/CEO, FosterAdopt Connect,
Missouri and Kansas

CASE PROFILE

Lutheran Child and Family Services of Illinois

“With this change, we have gained so much ... new prospective foster and adoptive families for children, and most importantly, a supportive and affirming environment for children and youth”

Several years ago, Lutheran Child and Family Services went through a process full of lively and sometimes, contentious, debate to answer the question, “How do we, as a faith-based agency that is deeply rooted in the Lutheran tradition and the Lutheran Missouri Synod embrace the provision of service to the LGBTQ community?” This was a painful journey replete with highly charged beliefs and positions. This issue filled the air of our agency for months and involved all of us — our Board of Trustees, the Agency’s leadership staff members, direct service personnel, our donors, and our contract partners. It felt that we would never come together. Yet, like most processes, perseverance was key and all remained steadfast and committed to resolution.

Finally, our Board of Trustees decided that because of our faith, we must embrace inclusion and diversity.

In fact, the Board of Trustees enacted the following: 1. The Board believes diversity in its many dimensions enriches our world. 2. The Board encourages the development of a diverse staff and leadership whose characteristics reflect the rich diversity of those we serve. To value diversity and inclusion means that we don’t simply tolerate and put up with others who are different.

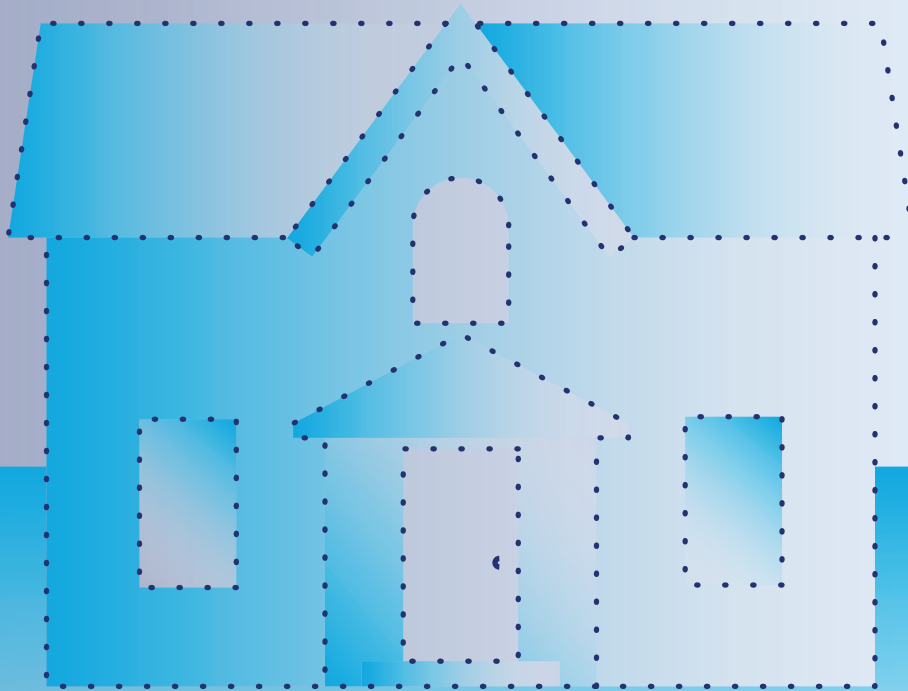
Furthermore, it does not mean that we lovingly accept them in hopes that they might change their ways. Valuing inclusion means that we embrace one another and affirm the inherent value of each and every person. Unfortunately, the agency lost a board member, a few staff members, and a few longstanding stakeholders. However, with this change, we have gained so much — new learning, new partnerships, new donors, new prospective foster and adoptive families for children, and most importantly, a supportive and affirming environment for children and youth whose gender identity/sexual orientation/gender expression have been rejected previously by so many.

BEVERLY JONES

Vice President — Chief Operating Officer
Lutheran Child and Family Services of Illinois

Conclusion

The proliferation of laws in states across the country combined with federal actions to permit discriminatory actions in making determination about youth in care should alarm anyone who believes that the children in our child welfare system deserve to have their best interests be at the heart of every decision made on their behalf. The justifications for these licenses to discriminate simply don't hold up — and the harms they impose are very real. Our nation's children deserve better.



About the Author

Cathryn Oakley is the state legislative director and senior counsel at the Human Rights Campaign, where she is responsible for advising legislators and advocates working to enact laws that further LGBTQ equality.

She focuses in particular on passing non-discrimination laws at the state and local levels and combating anti-LGBTQ legislation in state legislatures, including bills preventing municipalities from passing non-discrimination ordinances, bills that would give state agents the ability to deny service from LGBTQ people, and anti-transgender legislation.

Cathryn earned her law degree from the George Mason University School of Law and is a member of the Virginia Bar. She holds a bachelor's degree in Economics from

Smith College, where she was a Research Fellow at the Louise W. and Edmund J. Kahn Liberal Arts Institute. Prior to working at the Human Rights Campaign, Cathryn practiced family law at Myerson Law Group in Northern Virginia.

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Appendix

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- ¹² Va. Code Ann. § 63.2-1709.3 (2020).
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- ¹⁹ *Id.*
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- ²⁶ *Fulton v. City of Philadelphia, Pennsylvania*, SCOTUSBlog (last visited Oct. 26, 2020), <https://www.scotusblog.com/case-files/cases/fulton-v-city-of-philadelphia-pennsylvania/>.
- ²⁷ *Maddonna v. Dep't of Health and Human Servs.*, No. 19-cv-3551 (D.S.C. filed Aug. 8, 2020).
- ²⁸ 42 U.S.C. 671(a)(18) (2018), "[N]ot later than January 1, 1997, provides that neither the State nor any other entity in the State that receives funds from the Federal Government and is involved in adoption or foster care placements may— (A) deny to any person the opportunity to become an adoptive or a foster parent, on the basis of the race, color, or national origin of the person, or of the child, involved; or (B) delay or deny the placement of a child for adoption or into foster care, on the basis of the race, color, or national origin of the adoptive or foster parent, or the child, involved..."
- ²⁹ 45 C.F.R. § 75.300(c) (2016), "It is a public policy requirement of HHS that no person otherwise eligible will be excluded from participation in, denied the benefits of, or subjected to discrimination in the administration of HHS programs and services based on non-merit factors such as age, disability, sex, race, color, national origin, religion, gender identity, or sexual orientation. Recipients must comply with this public policy requirement in the administration of programs supported by HHS awards."
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- ³⁷ Equality Act of 2019, H.R. 5, 116th Cong. (2019), <https://www.congress.gov/bill/116th-congress/house-bill/5/text>.
- ³⁸ Child Welfare Provider Inclusion Act of 2019, H.R. 897, 116th Cong. (2019), <https://www.congress.gov/bill/116th-congress/house-bill/897?r=4&s=1>.
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- ⁴¹ Commonwealth of Mass., Department of Social Services, *Annual Data Profile* (2004), <https://archives.lib.state.ma.us/handle/2452/207008>; Commonwealth of Mass., Department of Social Services, *Annual Data Profile* (2005),

<https://archives.lib.state.ma.us/handle/2452/207009>; Commonwealth of Mass., Department of Social Services, Annual Data Profile (2006), <https://archives.lib.state.ma.us/handle/2452/207010>; Commonwealth of Mass., Department of Social Services, Annual Data Profile (2007), <https://archives.lib.state.ma.us/handle/2452/207011>; Commonwealth of Mass., Department of Children and Families, Annual Data Profile (2008), <https://archives.lib.state.ma.us/handle/2452/207012>; Commonwealth of Mass., Department of Children and Families, Annual Data Profile (2009), <https://archives.lib.state.ma.us/handle/2452/207013>; Commonwealth of Mass., Department of Children and Families, Annual Data Profile (2010), <https://archives.lib.state.ma.us/handle/2452/207014>; Commonwealth of Mass., Department of Children and Families, Annual Data Profile (2011), <https://archives.lib.state.ma.us/handle/2452/207015>; Commonwealth of Mass., Department of Children and Families, Annual Data Profile (2012), <https://archives.lib.state.ma.us/handle/2452/207016>; Commonwealth of Mass., Department of Children and Families, Annual Data Profile (2013), <https://archives.lib.state.ma.us/handle/2452/238621>; Commonwealth of Mass., Department of Children and Families, Annual Data Profile (2014), <https://archives.lib.state.ma.us/handle/2452/424041>. These data show the placement rate for children in care at 23% in 2006 and 21% in 2007. Compare to the 21% average placement rate over the period 2004-2014. The data also show that the waiting time for placements did not rise after 2006 from 2004-2006, the average percent of children placed in less than one year was 42% and in less than two years was 64%; from 2007- 2009, 47% of children were placed in less than one year and 70% were placed in less than two. The average for the 2004-2014 period was 46% placed in less than one year and 68% placed in less than two.

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months from termination of parental rights to adoption and a median of 15.4 months. Compare that data with the 2008-2014 average (two years before Catholic Charities began diminishing services and two years after services had been declared withdrawn) of 1,429 children served with a mean of 18.1 months from termination of parental rights to adoption and a median of 14.0 months. Particularly given the increased overall demand for services, these numbers are remarkably stable.

⁴⁴ U.S. Dep't of Health and Human Servs. *supra* note 5.

⁴⁵ Gates *supra* note 6.

⁴⁶ Gary Gates, LGBT Parenting in the United States (2013), <https://williamsinstitute.law.ucla.edu/publications/lgbt-parenting-us/>.

⁴⁷ Human Rights Campaign & Foster Club, LGBTQ Youth in the Foster Care System (2015), <https://assets2.hrc.org/files/assets/resources/HRC-YouthFosterCare-IssueBrief-FINAL.pdf>.

⁴⁸ Gates *supra* note 46.

⁴⁹ *Id.*



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