KIDS ARE NOT CAKES: A CHILDREN'S RIGHTS PERSPECTIVE ON *FULTON V. CITY OF PHILADELPHIA*

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INTRODUCTION

Fulton v. City of Philadelphia[1] illustrates the low priority of children and children's rights in American jurisprudence. Ostensibly a case about the foster care system, all of the Supreme Court Justices treated children as proxies for other issues—particularly religious liberty, LGBTQ+ rights, and clashes between these rights—focused through the question of whether the 1990 precedent on religious liberty, *Employment Division v. Smith,*[2] should be overruled.[3] Like children in a war zone, the children impacted by this litigation, both in Philadelphia and nationally, were potential casualties caught in the crossfire. In the aftermath of the case, advocacy groups and commentators have continued to focus primarily on what the case might mean for the larger issues of religious liberty and LGBTQ+ rights and equality rather than on what the case means for the future of the foster care system.[4]

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> As an expert in the areas of adoption, foster care, and children's rights, he believes that meeting the complex needs of vulnerable children in the child welfare system requires a broad inclusion of persons and organizations, working together with governments. Hence, Professor Smolin supports both the inclusion of LGBTQ persons as foster and adoptive parents, and also supports the inclusion of religious agencies and religious adoptive and foster parents, including those whose religious beliefs do not accept same-gender marriage.

Brief of the Coalition for Jewish Values et al. as Amici Curiae Supporting Petitioners at 3, Fulton v. City of Philadelphia, 141 S. Ct. 1868 (2021) (No. 19-123).

[1] *See* Fulton v. City of Philadelphia, 141 S. Ct. 1868 (2021).

[2] Emp. Div., Dep't of Hum. Res. of Or. v. Smith, 494 U.S. 872 (1990).

[3] *See* Petition for Writ of Certiorari, *infra* note 16, at i.

[4] *See* Ira C. Lupu & Robert W. Tuttle, *Two Surprises in* Fulton v. City of Philadelphia*—A Unanimous Outcome and the Enduring Quality of Free Exercise Principles*, GEO. WASH. L. REV. ON THE DOCKET (June 21, 2021), https://www.gwlr.org/two-surprises-in-fulton-v-city-of-philadelphia/ [https://perma.cc/QTF9-DNQC]; *Whither the Intersection of Religious Free Exercise and Anti-Discrimination Laws? A Rapid Response to* Fulton v. City of Philadelphia, AM. BAR ASS'N (July 15, 2021), https://www.americanbar.org/groups/crsj/events_cle/recent/fulton-v-city-of-philadelphia/; *see also* Andrew R. Lewis, *The Supreme Court Handed Conservatives a Narrow Religious Freedom Victory in* Fulton v. City of Philadelphia, WASH. POST (June 18, 2021, 6:00 A.M.), https://www.washingtonpost.com/politics/2021/06/18/supreme-court-handed-conservatives-narrow-religious-freedom-victory-fulton-v-city-philadelphia/ [https://perma.cc/GNF6-GRTM]; Kathryn Jean Lopez, *Ten Quick Reactions to Today's* Fulton *Victory for Children in Philadelphia,* NAT'L REV. (June 17, 2021, 2:13 PM), https://www.nationalreview.com/corner/ten-quick-reactions-to-todays-fulton-victory-for-children-in-philadelphia/ [https://perma.cc/5D44-R9RQ].

The child rights norms informing the analysis will be drawn in part from international norms relevant to child protection and foster care systems, including the Convention on the Rights of the Child ("CRC"),[5] the foundational modern child rights document, and the UN Guidelines for the Alternative Care of Children.[6] The United States is virtually the only nation in the world that has not ratified the CRC, so this approach may seem inappropriate in a United States context.[7] However, given the global significance of the CRC, it seems fair to ask what the United States could learn from the Convention, as the United States Supreme Court indicated when it abolished the juvenile death penalty in *Roper v. Simmons* while using the CRC as a kind of persuasive authority in its interpretation of the Eighth Amendment of the United States Constitution.[8] In addition, some of the relevant norms of the CRC and Guidelines for the Alternative Care of Children are similar to those found in federal or state laws or guidelines governing foster care in the United States.[9]

The title of this article, "Kids are not Cakes," is meant as a reminder that *Fulton* and other disputes regarding children cannot be properly analogized to conflicts among adults about equal access to goods and services. "Cakes" of course refers to the *Masterpiece Cakeshop LTD* decision concerning a baker who refused to create a wedding cake for a same-sex couple based on his religious beliefs concerning marriage.[10] Bakeries, along with restaurants, theaters, and many other businesses open to the public, are public accommodations.[11] The City of Philadelphia maintained that the foster care system was also covered by public accommodations law, as though this was

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[5] *See generally* G.A. Res. 44/25, Convention on the Rights of the Child (Nov. 20, 1989).

[6] *See generally* G.A. Res. 64/142, annex, Guidelines for the Alternative Care of Children (Dec. 18, 2009).

[7] Amy Rothschild, *Is America Holding Out on Protecting Children's Rights?*, THE ATLANTIC (May 2, 2017), https://www.theatlantic.com/education/archive/2017/05/holding-out-on-childrens-rights/524652/ [https://perma.cc/58K5-PHEW]; *Status of Ratification Interactive Dashboard*, U.N. OFF. OF THE HIGH COMM'R FOR HUM. RTS., https://indicators.ohchr.org [https://perma.cc/RRM6-C3F3] (last visited Oct. 12, 2021) (under "Select a Treaty" select "Convention on the Rights of the Child").

[8] Roper v. Simmons, 543 U.S. 551, 576 (2005).

[9] *See infra* notes 117–118 and accompanying text (illustrating that both international child welfare acts and general domestic law share similar interests in protecting children from discrimination and providing state assistance to foster children); *see also* G.A. Res. 64/142, *supra* note 6, at ¶¶ 5–6 (requiring that the State should provide assistance to foster children and prevent discrimination in the foster care process).

[10] Masterpiece Cakeshop, Ltd. v. Colorado C.R. Comm'n, 138 S. Ct. 1719 (2018).

[11] *Id.* at 1725, 1728.

somehow a pro-civil rights position.[12] However, to view a foster care system as a public accommodation, it would be necessary to view children as a good or service to which the state guarantees access to strangers—an extreme form of commodification. To view the foster care system as a public accommodation also implies that the purpose of the foster care system is to give adults the opportunity to foster unrelated children, with foster children used as a means of fulfilling adult desires to nurture children and foster parents viewed as customers who are supplied by the state with unrelated children. This view, of course, turns on its head the proper purposes of the foster care system. A child rights perspective demands a very different approach.

This article is an attempt to analyze the *Fulton* case as though it was a case actually about children, families, and the foster care system rather than a case about conflicts among adults over conflicting adult-rights claims. This article thus attempts to extract the meanings of *Fulton* for the foster care system, since none of the Justices in the four opinions issued were interested enough in foster children to do so explicitly.[13] So let us play pretend: let's pretend that children actually matter in a world of adults focused on their adult conflicts.

To be clear: once one focuses on the best interests and rights of foster children, there are different views as to whether including or excluding religious agencies like Catholic Social Services (CSS) is better or worse.[14] This article defends the proposition that the needs of foster children require a broad inclusion of persons and organizations working with government, including both the inclusion of LGBTQ+ persons and couples as foster and adoptive parents, and also the inclusion of religion agencies and religious foster and adoptive parents, including those whose religious beliefs restrict marriage to different-sex couples. In addition, this article is intended to advance the conversation by analytically disentangling the best interests of children and children's rights from adult conflicts about religious liberty and LGBTQ+ rights and equality.

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[12] Fulton v. City of Philadelphia, 141 S. Ct. 1868, 1879–81 (2021).

[13] *See* discussion *infra* Part I (discussing that the opinions issued in *Fulton* were primarily concerned with overturning *Employment Divison v. Smith*, while discussing the foster care system as an afterthought.)

[14] *See* Tanya Washington & Catherine Smith, *In* Fulton*, Children's Interests Fall in High Court's Blindspot*, BERKLEY CTR. FOR RELIGION, PEACE & WORLD AFFS. (Aug. 3, 2021), https://berkleycenter.georgetown.edu/responses/in-fulton-children-s-interests-fall-in-high-court-s-blindspot [https://perma.cc/5VU4-46G5]; James Dwyer, *In Deciding* Fulton v. Philadelphia*, the Supreme Court Should Remember That Foster Care Is for the Children,* NAT'L REV. (May 6, 2021, 6:30 AM), https://www.nationalreview.com/bench-memos/in-deciding-fulton-v-philadelphia-the-supreme-court-should-remember-that-foster-care-is-for-the-children/.

I. ALL OF THE OPINIONS IN *FULTON* WERE ABOUT WHETHER THE COURT SHOULD OVERRULE *EMPLOYMENT DIVISION V. SMITH* WITH FOSTER CARE ITSELF AN AFTERTHOUGHT

In granting certiorari,[15] the Supreme Court in *Fulton* for the first time explicitly accepted the question of "[w]hether *Employment Division v. Smith* should be revisited."[16] However, the Court also accepted a narrower question, which concerned a purported circuit split in how to interpret and apply *Smith*.[17]

In *Smith*, the Court famously rejected constitutionally mandatory exemptions to "neutral laws of general applicability[.]"[18] *Smith* thus limited religious liberty to a non-discrimination principle and rejected religious liberty as a substantive right.[19] The key to *Smith* was the two-track approach: exemption claims to "neutral laws of general application" would be evaluated and rejected under the rational basis test, but religious liberty objections to governmental laws or rules outside of this characterization of "neutral laws of general application" would be evaluated under strict scrutiny.[20]

From the City's perspective, *Fulton* was simple: CSS had a policy of not certifying same-sex married couples as foster parents; such policy violated the City's non-discrimination norms forbidding discrimination against same sex married couples; hence, the City properly ended its contracts with CSS insofar as necessary to prevent such discrimination in the City's foster care programs.[21] Further, the City, with the agreement of the federal district court and Third Circuit, believed its anti-discrimination norms constituted a neutral law of general

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[15] Fulton v. City of Philadelphia, 922 F.3d 140 (3d Cir. 2019), *cert. granted*, 140 S. Ct. 1104 (2020) (No. 19-123); *see also* Amy Howe, *Justices to Take Up Case Involving Faith-Based Adoption Agencies and Same-Sex Couples*, SCOTUSBLOG (Feb. 24, 2020, 3:33 PM), https://www.scotusblog.com/2020/02/justices-to-take-up-case-involving-faith-based-adoption-agencies-and-same-sex-couples/ [https://perma.cc/6JQT-94RY].

[16] Petition for Writ of Certiorari at i, *Fulton*, 141 S. Ct. 1868 (No. 19-123); *see also* Howe, *supra* note 15.

[17] Petition for Writ of Certiorari at i, *Fulton*, 141 S. Ct. 1868 (No. 19-123).

[18] Emp. Div., Dep't of Hum. Res. of Or. v. Smith, 494 U.S. 872, 878–82 (1990).

[19] *See id*; Fulton v. City of Philadelphia, 141 S. Ct. 1868, 1883 (Barrett, J., concurring) ("As a matter of text and structure, it is difficult to see why the Free Exercise Clause—lone among the First Amendment freedoms—offers nothing more than protection from discrimination.").

[20] *See Smith,* 494 U.S. at 885–90.

[21] *See* Brief for City Respondents at 7–9, *Fulton*, 141 S. Ct. 1868 (No. 19-123); Fulton, v. City of Philadelphia, 320 F. Supp. 3d 661, 670–73 (E.D. Pa. 2018); Adam Liptak, *Supreme Court Backs Catholic Agency in Case on Gay Rights and Foster Care*, N.Y. TIMES (June 17, 2021), https://www.nytimes.com/2021/06/17/us/supreme-court-gay-rights-foster-care.html [https://perma.cc/3AZR-YACT].

application under *Smith* because the City prohibited such discrimination against same-sex couples by all agencies working with the City's foster care system, whether religious or secular.[22] From the City's perspective, this was precisely the kind of situation included in *Smith*'s rejection of exemptions from neutral laws of general application; thus, CSS had no right to an exemption from a non-discrimination norm applied to all.[23] CSS was not being picked on due to their faith, but was simply being required to follow the same rules as all of the other agencies contracting with the City.[24]

CSS countered the City's claim that a neutral anti-discrimination rule applied generally in numerous ways.[25] CSS pointed out the shifting legal justifications from the City for excluding CSS; the context in which CSS was excluded, which involved religiously and politically-charged statements by City officials; the fact that CSS had never actually excluded any same-sex married couples; CSS's willingness if such occurred to refer any same-sex married couple to other agencies; the existence of many agencies willing to work with same-sex married couples; the provision in the contractual anti-discrimination statement allowing the City unfettered discretion to make exceptions to the anti-discrimination norm; and the use of sensitive categories like race and disability when matching foster children to foster parents.[26] CSS thus portrayed the City's anti-discrimination norm in the context of foster care as riddled in practice with exceptions, and the City's decision to exclude CSS as motivated by religious animus against the Catholic Church due to its longstanding religious doctrine on marriage.[27]

CSS made a technical argument that by implication goes to the heart of whether there could ever be a neutral anti-discrimination norm of general application in the context of foster care. The technical argument was that Philadelphia's Fair Practices Ordinance (FPO) prohibiting discrimination based on sexual orientation in "public accommodations" was not applicable because foster care is not a public accommodation.[28] The reason this argument is fundamental, as will be

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[22] Brief for City Respondents, *supra* note 21, at 28–29; *Fulton,* 320 F. Supp. 3d at 682–83; Fulton v. City of Philadelphia, 922 F.3d 140, 153–56 (3d Cir. 2019).

[23] Brief for City Respondents, *supra* note 21, at 28–29.

[24] *Id.* at 29.

[25] *See* Petition for Writ of Certiorari, *supra* note 16, at 25, 27–28; Reply Brief for Petitioners 2019 at 2–4, *Fulton*, 141 S. Ct. 1868 (No. 19–123); Brief for Petitioners at 24–28, *Fulton*, 141 S. Ct. 1868 (No. 19-123); Brief for City Respondents, *supra* note 21, at 24–28; Reply Brief for Petitioners 2020 at 2–6, *Fulton*, 141 S. Ct. 1868 (No. 19–123).

[26] *See* Brief for Petitioners, *supra* note 25, at 6–9.

[27] *See id.* at 27–28.

[28] Petition for Writ of Certiorari, *supra* note 16, at 2, 11.

argued below, is the implicit claim that non-discrimination norms in the context of foster care can never be neutral laws of general application.[29] The very processes of evaluating families as prospective foster parents and matching foster children with foster homes intrinsically involves consideration of protected categories like family structure, gender, disability, religion, and race.[30]

CSS's position was strengthened when the Court used its emergency docket during the COVID-19 pandemic to narrow *Smith* and expand the circumstances under which religious liberty claims would be evaluated under strict scrutiny. Oral argument in *Fulton* occurred on November 4, 2020.[31] On April 9, 2021, the Court decided *Tandon v. Newsom*.[32] *Tandon* granted injunctive relief against California's pandemic rule limiting religious gatherings in homes to three households.[33] In this context, the Court summarized free exercise law under multiple principles:

> First, government regulations are not neutral and generally applicable, and therefore trigger strict scrutiny under the Free Exercise Clause, whenever they treat any comparable secular activity more favorably than religious exercise. It is no answer that the State treats some comparable secular businesses or other activities as poorly as or even less favorably than the religious exercise at issue.[34]
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> Second, whether two activities are comparable for purpose of the Free Exercise Clause must be judged against the asserted government interest that justifies the regulation at issue. Comparability is concerned with the risks various activities pose, not the reasons why people gather.[35]
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> Third, the government has the burden to establish that the challenged law satisfies strict scrutiny. . . . [N]arrow tailoring requires the government to show that measures less restrictive of the First Amendment activity could not address its interest in reducing the spread of COVID. Where the government permits other activities to proceed with precautions, it must show that the religious exercise at issue is more dangerous than those activities even when the same precautions are applied.[36]

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[29] *See* discussion *infra* notes 199–219 and accompanying text.

[30] *See* Petition for Writ of Certiorari, *supra* note 16, at 11–12.

[31] Fulton v. City of Philadelphia, 141 S. Ct. 1868, 1886 (2021).

[32] Tandon v. Newsom, 141 S. Ct. 1294 (2021) (per curiam).

[33] *Id.* at 1297; John R. Vile, Tandon v. Newsom *(2021)*, THE FIRST AMENDMENT ENCYCLOPEDIA (April 18, 2021), https://www.mtsu.edu/first-amendment/article/1901/tandon-v-newsom [https://perma.cc/RU5L-2LA4].

[34] *Tandon*, 141 S. Ct. at 1296 (citations omitted).

[35] *Id.* (citations omitted).

[36] *Id.* at 1296–97. The Court added a fourth principle concerning mootness that is not relevant here.

The Court found that "California treat[ed] some comparable secular activities more favorably than at-home religious exercise, permitting hair salons, retail stores, personal care services, movie theaters, private suites at sporting events and concerts, and indoor restaurants to bring together more than three households at a time."[37] This differential treatment was not justified because California never demonstrated that precautions used in those secular settings would be ineffective in home religious services: "The State cannot assume the worst when people go to worship but assume the best when people go to work."[38]

The Court's *Tandon* decision could be seen as adopting a version of Professor Douglas Laycock's proposal, in the aftermath of *Employment Division v. Smith*, of the "most-favored nation" approach.[39] Professor Laycock was opposed to the *Smith* decision, but at the same time created an interpretation of *Smith* that potentially could mitigate some of the damage to religious liberty.[40] Professor Laycock originally described this approach as follows:

> In such individualized decision-making processes, the Court's explanation of its unemployment compensation cases would seem to require that religion get something analogous to most-favored nation status. Religious speech should be treated as well as political speech, religious land uses should be treated as well as any other land use of comparable intensity, and so forth.[41]

Justice Kavanaugh has advocated for Professor Laycock's approach, but it appears to be *Tandon* where the approach is adopted by a Court majority.[42] Further, the version of most-favored nation status adopted in *Tandon* apparently goes beyond what Professor Laycock himself envisioned given its acceptance of retail stores as a relevant comparator to at-home religious services.[43]

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[37] *Id.* at 1297.

[38] *Id.* (internal quotation marks omitted) (quoting Roberts v. Neace, 958 F.3d 409, 414 (6th Cir. 2020) (per curiam)).

[39] *See* Douglas Laycock, *The Remnants of Free Exercise*, 1990 SUP. CT. REV. 1, 49–50.

[40] *See id.*; Douglas Laycock, *The Supreme Court's Assault on Free Exercise, and the Amicus Brief That Was Never Filed*, 8 J. L. & RELIGION 99, 99 (1990).

[41] Laycock, *supra* note 39, at 49.

[42] Michael C. Dorf, *Justice Kavanaugh's Calvary Chapel Dissent Misstates Free Exercise Law*, DORF ON LAW (July 29, 2020, 8:00 AM), http://www.dorfonlaw.org/2020/07/justice-kavanaughs-calvary-chapel.html [https://perma.cc/PY4T-CEBY]; Jim Oleske, Tandon *Steals* Fulton*'s Thunder: The Most Important Free Exercise Decision Since 1990*, SCOTUSBLOG (Apr. 15, 2021, 10:13 AM), https://www.scotusblog.com/2021/04/tandon-steals-fultons-thunder-the-most-important-free-exercise-decision-since-1990/ [https://perma.cc/4AXB-P6GK].

[43] Jim Oleske, Fulton *Quiets* Tandon*'s Thunder: A Free Exercise Puzzle*, SCOTUSBLOG (June 18, 2021, 4:20 PM), https://www.scotusblog.com/2021/06/fulton-quiets-tandons-thunder-a-free-exercise-puzzle/ [https://perma.cc/3VNH-D95E].

Justice Kagan's *Tandon* dissent, joined by Justices Breyer and Sotomayor, saw the question of "comparable" religious and secular conduct very differently:

> The First Amendment requires that a State treat religious conduct as well as the State treats comparable secular conduct. Sometimes finding the right secular analogue may raise hard questions. But not today. California limits religious gatherings in homes to three households. If the State also limits all secular gatherings in homes to three households, it has complied with the First Amendment. And the State does exactly that: It has adopted a blanket restriction on at-home gatherings of all kinds, religious and secular alike. California need not, as the *per curiam* insists, treat at-home religious gatherings the same as hardware stores and hair salons—and thus unlike at-home secular gatherings, the obvious comparator here. . . . [T]he law does not require that the State equally treat apples and watermelons.[44]

Justice Kagan's dissent in *Tandon* mirrors the City's arguments in *Fulton*: since the City was prohibiting discrimination by both religious and secular agencies, the First Amendment was satisfied.[45] However, since Kagan's dissent represented only the three liberal Justices, the prospects for the City in *Fulton* looked grim in the light of the Court's pandemic precedents. *Tandon*'s methodology, applied to *Fulton*, suggested that strict scrutiny would be applied. It would not be enough that the anti-discrimination norm, as to sexual orientation, applied to both secular and religious agencies. For foster care, "comparable conduct" would include any consideration of any sensitive categories (LGBTQ+ identities, race, gender, family structure, disability), at any stage of the foster care process, including both certifying foster parents and matching children with foster parents.[46] Since it is impossible to run a foster care system without taking account of these sensitive categories which can impact the best interests of the child, and since there was evidence that the City made allowance for some use of such categories at some stages of the foster care process, strict scrutiny would be inevitable.[47] Further, once strict scrutiny was applied, the City's compelling interest in non-discrimination would not be enough; the City would need a compelling interest for excluding CSS while allowing secular "exceptions" to the non-discrimination norm in a context

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[44] Tandon v. Newsom, 141 S. Ct. 1294, 1298 (2021) (Kagan, J., dissenting).

[45] *Compare id.*, *with* Brief for City Respondents, *supra* note 21, at 29.

[46] *See generally* Petition for Writ of Certiorari, *supra* note 16, at 6–8; *see also* James G. Dwyer, The Child's Rights Forgotten, Again: Reframing Fulton v. City of Philadelphia 19–21 (Nov. 12, 2020) (unpublished manuscript), https://ssrn.com/abstract=3737686 [https://perma.cc/5YLS-NFKA].

[47] *See* Petition for Writ of Certiorari, *supra* note 16, at 6–7.

where same-sex couples had ample alternative means of becoming certified as foster parents.[48]

Hence, once the Court in April issued *Tandon*, with *Fulton* still pending, the focus turned even more from whether CSS would win to *how* CSS would win. In particular, would the Court overturn *Smith*?

A. Does It Matter Whether the Court Overturns Employment Division v. Smith?

One irony of this focus on overruling *Employment Division v. Smith* is the diminishing significance of *Smith*. *Smith* seemed to be based on the presumption that most governmental actions impacting religion in contemporary society would be clearly based on "neutral laws of general application"—laws that applied to everyone and were not intended to disadvantage or target religious practice.[49] *Smith* seemed to assume that determining whether a governmental action was based on a neutral law of general application would be easily ascertained and objective.[50] Hence, *Smith* purported to make free exercise adjudication less subjective, more certain in outcome, and subject to clear rules. None of this has proven true.

The problems began with Justice Scalia's attempt, in authoring *Smith*, to pretend that his newly-minted rejection of religious exemptions and rejection of the compelling interest test for exemption cases were compatible with prior precedent.[51] This led Justice Scalia to suggest two immediate exceptions based on prior precedents: the "hybrid rights" exception, involving a combination of two rights, and the exception for systems, like that in the unemployment compensation field, which allow individualized exemptions.[52] *Smith* thus implied that strict scrutiny could still be applied to exemption cases in both hybrid rights cases and legal contexts providing for individualized exemptions.

Hybrid rights cases included cases involving a combination of a religious freedom claim with another right, particularly freedom of speech and the press or parental rights.[53] Justice Scalia appeared to distinguish, and hence preserve pro-exemption precedents, by claiming these cases were different because they involved hybrid or combined rights.[54] Since many religious liberty cases involve speech in some

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[48] *Id.* at 29–31.

[49] *See* Emp. Div., Dep't of Hum. Res. of Or. v. Smith, 494 U.S. 872, 878–79 (1990).

[50] *See id.*

[51] *Id.* at 887–88; Laycock, *supra* note 40, at 104–06. *See generally* Laycock, *supra* note 39.

[52] *Smith,* 494 U.S. at 881–85.

[53] *Id.* at 881–82.

[54] *See id.*

way or another, and some involve parental rights, this "exception" suggested that many religious liberty exemption cases could still demand strict scrutiny review by being brought as hybrid rights cases.[55] At a minimum, Justice Scalia's attempts to distinguish prior precedent created substantial uncertainty about the reach of the no-exemption rule—uncertainty that has remained decades after Smith.[56]

Smith and the uncertainties of the hybrid rights exception has led advocates to litigate religious liberty cases primarily or secondarily as freedom of speech cases.[57] To the degree litigants invoke freedom of speech, they may be hoping for stronger protection than is available under religious liberty caselaw since freedom of speech remains a substantive right rather than just an anti-discrimination principle.[58] At the same time, bringing both speech and religious liberty cases together also brings the possibility of escaping *Smith* under the "hybrid rights" theory.

As to the exception for cases involving systems of individualized exemptions, the Court in *Smith* stated:

> The *Sherbert* test, it must be recalled, was developed in a context that lent itself to individualized governmental assessment of the reasons for the relevant conduct. . . . [A] distinctive feature of unemployment compensation programs is that their eligibility criteria invite consideration of the particular circumstances behind an applicant's unemployment: " . . . a person was not eligible for unemployment compensation benefits if, 'without good cause,' he had quit work or refused available work. The 'good cause' standard created a mechanism for individualized exemptions." . . . [O]ur decisions in the unemployment cases stand for the proposition that where the State has in place a system of individual exemptions, it may not refuse to extend that system to cases of "religious hardship" without compelling reason.[59]

Justice Scalia's majority opinion in *Smith* purported to find a clear line between criminal laws, which he viewed as neutral laws of general application, and systems involving individual exemptions, such as unemployment compensation cases.[60] Yet, Justice Scalia's conceptual

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[55] *Id.*

[56] *See* Ryan S. Rummage, *In Combination: Using Hybrid Rights to Expand Religious Liberty*, 64 EMORY L. J. 1175, 1184–87 (2015); Ian Huyett, *How to Overturn* Employment Division v. Smith*: A Historical Approach*, 32 REGENT U. L. REV. 295, 319–21 (2020).

[57] *See, e.g.*, Brief for The Becket Fund for Religious Liberty as Amicus Curiae Supporting Petitioners at 4–6, State v. Arlene's Flowers, Inc., 389 P.3d 543 (Wash. 2017) (No. 91615-2); Rummage, *supra* note 56, at 1184–93 (explaining generally the hybrid rights approach, among others); Huyett, *supra* note 56, at 336–39.

[58] *See* Fulton v. City of Philadelphia*,* 141 S. Ct. 1868, 1882 (Barrett, J., concurring).

[59] *See Smith*, 494 U.S. at 884.

[60] *Id.* at 875.

distinction was flawed from the beginning. *Smith* itself was procedurally an unemployment compensation case, rather than a criminal case, as the respondents in *Smith* were contesting the denial of unemployment compensation.[61] The state law denied unemployment compensation for dismissal due to work-related "misconduct;" the issue of criminal law only came into relevance because it impacted this "misconduct" standard in the law of unemployment compensation.[62] The respondents were not criminally prosecuted, and there was uncertainty in state law as to whether or not sacramental use of peyote even violated the law at the time of the respondents' actions.[63] Hence, Justice Scalia's distinction between unemployment compensation cases and criminal prohibitions for purposes of free exercise seems inappropriate and ironic in the context of a case that was actually an unemployment compensation case.[64]

The purported distinction between generally applicable criminal laws and systems of individualized exemptions is incoherent. This is illustrated in *Smith* in an additional way: the lack of a criminal prosecution of the respondents for their admitted peyote use.[65] This illustrates the well-known fact that criminal prosecution is inherently discretionary and thus riddled with individualized exceptions. Indeed, "[u]nder American law, government prosecuting attorneys have nearly absolute and unreviewable power to choose whether or not to bring criminal charges and what charges to bring"—a power that can clearly be used in destructive and discriminatory ways.[66] Further, police discretion operates at "every level" of policing and enforcement of the law—a discretion that can lead to controversies such as occurred through the "broken windows" model of policing.[67] The application of the criminal law at the levels of law enforcement and prosecutorial decisions is inherently individualized and involves the government providing individualized exemptions. Is this really fundamentally different from the individualized adjudication of unemployment

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[61] *Id.* at 874.

[62] *Id.* at 874–76.

[63] *Id.* at 874–75.

[64] *See* Laycock, *supra* note 39, at 41–53 (discussing exceptions to Smith's no-exemption rule).

[65] *See Smith*, 494 U.S. at 874–75.

[66] Rhonda Brownstein, *Are There Limits to Prosecutorial Discretion*?, INTELLIGENCE REP., Summer 2007, https://www.splcenter.org/fighting-hate/intelligence-report/2003/are-there-limits-prosecutorial-discretion [https://perma.cc/BM87-H9BC].

[67] GEORGE L. KELLING, NAT'L INST. OF JUST., U.S. DEP'T OF JUST., "BROKEN WINDOWS" AND POLICE DISCRETION 5 (1999), https://www.ojp.gov/pdffiles1/nij/178259.pdf [https://perma.cc/HGS3-VTWB] (recommending policing methods that focus on disorder and less serious crimes in order to prevent more serious crimes).

compensation claims? To the degree it is somewhat different, is that a difference with any non-arbitrary relevance to religious liberty claims? Indeed, prosecutorial and police discretion are even more discretionary, and less limited by law, than are the "good cause" or "misconduct" standards in unemployment compensation cases. If the metric that allows strict scrutiny is that of executive branch discretion in the application of the law, which creates risks of discriminatory application,[68] that discretion is even less bridled in criminal prosecutions since there is no legal standard limiting that discretion and no real possibility of judicial review as to the use of prosecutorial and police discretion.

Once the Court adopted the kind of strong version of the "most-favored nation" theory in *Tandon*, there may in fact be very few neutral laws of general application.[69] At the time of *Smith*, however, despite Professor Laycock's initial proposal of the most favored nation theory, most presumed that *Smith* would allow few circumstances for strict scrutiny in religious exemption claims.[70]

Smith, of course, was initially quite unpopular. Congress acted with overwhelming bipartisan majorities—unanimous in the House and 97–3 in the Senate—to re-impose the compelling interest strict scrutiny test for exemption cases in the Religious Freedom Restoration Act ("RFRA").[71] When the Supreme Court invalidated the RFRA as applied to state laws,[72] Congress responded with the Religious Land Use and Institutionalized Persons Act ("RLUIPA").[73] Thus, despite *Smith*, exemption claims to federal law and in zoning and prisoner cases are evaluated by strict scrutiny without regard to the "neutral laws of general application" standard.[74] Further, more than twenty states have created state religious freedom acts, and other states anyway require strict scrutiny in religious freedom claims, further narrowing the

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[68] *See* Laycock, *supra* note 39, at 47–51.

[69] *See* Oleske, *supra* note 43.

[70] *See, e.g.,* Laycock, *supra* note 39, at 49–51.

[71] Religious Freedom Restoration Act (RFRA) of 1993, Pub. L. No. 103–141, 1993 U.S.C.C.A.N. (107 Stat.) 1488, *invalidated by* City of Boerne v. Flores, 521 U.S. 507 (1997); *Roll Call Vote 103rd Congress - 1st Session*, U.S. SENATE, https://www.senate.gov/legislative/LIS/roll_call_lists/roll_call_vote_cfm.cfm?congress=103&session=1&vote=00331 [https://perma.cc/YUW9-G4MX] (last visited Sept. 24, 2021).

[72] *City of Boerne*, 521 U.S. at 536.

[73] Religious Land Use and Institutionalized Persons Act (RLUIPA) of 2000, Pub. L. No. 106–274, 114 Stat. 803 (codified at 42 U.S.C. §§ 2000cc, *et seq*.) (providing strict scrutiny where the government substantially burdens the religious exercise of institutionalized persons or substantially burdens religious exercise through land use regulation).

[74] *See* 42 U.S.C. § 2000cc-1; *City of Boerne*, 521 U.S. at 536 (invalidating RFRA only as to state laws).

reach of *Smith*.[75] Hence, free exercise law became a patchwork with different standards applicable to exemption claims depending on the source and subject matter of the law.

The intellectual incoherence of the "neutral law of general application" standard has become increasingly clear over the years. One aspect of the problem was illustrated in the *Masterpiece Cakeshop* case where a baker had refused to create a wedding cake for a same-sex couple, invoking his religious view of marriage and freedom of speech.[76] Hence, the case again posed the problem of the hybrid rights doctrine and the related issue of relying on freedom of speech in religious liberty cases.[77] Instead of trying to unravel the confusion still flowing from *Smith*'s hybrid rights doctrine, the Court focused on statements by the members of the Colorado Civil Rights Commission that evidenced a negative view of the baker's faith.[78] Based in part on these negative statements, the Court overturned the Colorado Civil Rights Commission and ruled for the baker.[79] The Court even skipped the step of applying strict scrutiny, ruling immediately for the baker, but with language indicating an expectation of future conflicts in this and other cases.[80] That led to questions as to the shelf life of the opinion. Could the Commission just do a redo and this time keep their mouths shut on their views of the baker? Could the same people with the same attitudes toward the baker's religion render the same judgment and have it upheld this time, so long as they were more disciplined in their speech?[81]

Fulton itself reflected this uncertainty as CSS, relying on *Masterpiece Cakeshop*, pointed to various statements about the Catholic view of marriage and CSS's religion by City officials.[82] The Supreme Court

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[75] *State Religious Freedom Restoration Acts,* NAT'L CONF. OF STATE LEGISLATURES (May 4, 2017), https://www.ncsl.org/research/civil-and-criminal-justice/state-rfra-statutes.aspx [https://perma.cc/manage/create?folder=68954]; *Religious Freedom Restoration Act Information Central*, BECKET, https://www.becketlaw.org/research-central/rfra-info-central/ [https://perma.cc/MB3P-PDYE] (last visited Oct. 14, 2021; *Numbers*, BECKET, https://www.becketlaw.org/research-central/rfra-info-central/numbers/ [https://perma.cc/YTX8-9BXR] (last visited Oct. 14, 2021).

[76] Masterpiece Cakeshop, Ltd. v. Colorado C.R. Comm'n, 138 S. Ct. 1719, 1723 (2018).

[77] *Id.*

[78] *Id.* at 1731.

[79] *Id.* at 1732.

[80] *See id.* at 1737 (Gorsuch, J., concurring).

[81] *But see* Douglas Laycock, *The Broader Implications of* Masterpiece Cakeshop, 2019 BYU L. REV. 167, 183–87 (2019) (arguing that the Court's focus on the differential treatment of free speech claims by the Colorado Civil Rights Commission could be replicated in future litigations in Colorado and elsewhere).

[82] *See* Brief for Petitioners, *supra* note 25, at 22.

declined to adjudicate this part of *Masterpiece Cakeshop*,[83] leaving open the following question: what degree of speech by government officials showing a negative view of a claimant's religion is enough to trigger strict scrutiny, or even automatically substantiate a religious liberty claim? If Justice Scalia had sought to create clear rules and certainty through his *Smith* opinion, he failed, as *Smith* instead has created a line of precedent filled with subjective and uncertain line-drawing.[84]

Hence, it is not clear that Justice Scalia's ideal of "neutral laws of general application" actually exists, or if it does, whether this standard is capable of providing a clear rule for courts.[85] After more than thirty years under *Smith*, there is less certainty than ever as to what the "neutral laws of general application" standard requires and how to apply it. The Supreme Court has created a roadmap of uncertainty as to how to evade *Smith*'s no exemption rule and obtain strict scrutiny review. The roadmap includes identifying a second right at stake, pointing to any discretion or exceptions in the law, or identifying any indications of negative views of the claimant's religion by relevant government officials. After the pandemic cases, culminating in *Tandon v. Newsom*, the roadmap also includes identifying any more favorable treatment of "comparable" secular activities or motivations, even if the comparable secular conduct is regulated under a different rule or norm than the religious conduct and is literally a different activity.[86]

Smith's ambitions to provide clear, objective rules that would largely eliminate the uncertainty of exemption claims have failed. Ironically, a major reason to overrule *Smith*, a decision designed to create certainty and consistency, would be to restore a greater degree of certainty and consistency in the law.[87]

The practical significance of overruling *Smith* has decreased, particularly for those whose objections are *Smith*'s reduction of the scope of religious liberty. Given the RFRA, RLUIPA, state RFRAs, and the myriad ways to show that a law fails the "neutral law of general application" standard under *Tandon*, the categories of exemption cases

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[83] Fulton v. City of Philadelphia, 141 S. Ct. 1868, 1877 (2021) ("CSS points to evidence in the record that it believes demonstrates that the City has transgressed this neutrality standard, but we find it more straightforward to resolve this case under the rubric of general applicability.").

[84] *See generally* Laycock, *supra* note 81 (discussing the background and implications of the Court's decisions in *Smith* and *Masterpiece Cakeshop*).

[85] *See generally* Laycock, *supra* note 39, at 1–2 (noting in 1990 that the Court in *Smith* announced "a dramatic new rule and a large number of ill-defined exceptions").

[86] *See* Fulton v. City of Philadelphia, 141 S. Ct. 1868, 1921–22 (Alito, J., concurring).

[87] *See* Brief of Christian Legal Society et al. as Amici Curiae Supporting Petitioners, *Fulton*, 141 S. Ct. 1868 (No. 19-123) [hereinafter Brief of CLS]; *see also* Laycock, *supra* note 39, at 2–3.

evaluated under *Smith*'s rational basis test has continued to shrink.[88] The "ministerial exception" protecting matters of internal church governance from state interference applies also to religious institutions and hence establishes another group of religious liberty cases beyond the reach of *Smith*'s rational basis test.[89] Coupled with the current composition of the Court, which has a clear pro-religious freedom majority, it may be that exemption religious liberty claims are more likely to win at the Supreme Court today than prior to *Smith*. Religious liberty in the Supreme Court is an increasingly winning argument, even without formally over-ruling *Smith*.[90]

A major rationale for overruling *Smith* lies in the lower federal courts and state courts, where the complex ways in which *Smith* has been undercut may be too subtle to be fully implemented. *Fulton* itself is a good example of this rationale in that the federal district court and a unanimous panel of the Third Circuit ruled for the City while the Supreme Court ruled 9–0 for CSS.[91] Another motivation for formally overruling *Smith* would be to provide a clear, binding precedent for government officials, who may, perhaps for their own ideological reasons, choose to give *Smith* more reach and religious liberty less reach than appropriate given post-*Smith* precedents and legislative enactments.[92]

At the Supreme Court, the issue of overruling *Smith* appears to be primarily political and symbolic. When *Smith*'s "neutral law of general application" rule was imposed by the Supreme Court in a 5-4 vote on the rule (as opposed to the outcome), *Smith*'s no-exemption rule was quite unpopular, as evidenced by the large and bipartisan majorities enacting the RFRA and RLUIPA.[93]

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[88] *See generally* Christopher C. Lund, *Religious Liberty After Gonzales: A Look at State RFRAs*, 55 S.D. L. REV. 466 (2010); Christopher C. Lund, *A Matter of Constitutional Luck: The General Applicability Requirement in Free Exercise Jurisprudence*, 26 HARV. J. L. & PUB. POL'Y 627 (2003).

[89] *See* Hosanna-Tabor Evangelical Lutheran Church and Sch. v. EEOC, 565 U.S. 171, 188–89 (2012); Our Lady of Guadalupe Sch. v. Morrissey-Berru, 140 S. Ct. 2049, 2060 (2020).

[90] *See* Joe Carter, *The Supreme Court's 15-Case Winning Streak on Religious Liberty*, THE GOSPEL COAL. (July 15, 2020), https://www.thegospelcoalition.org/article/the-supreme-courts-15-case-winning-streak-on-religious-liberty/ [https://perma.cc/6MKC-JG94].

[91] *See* Fulton v. City of Philadelphia, 320 F. Supp. 3d 661, 704 (E.D. Pa. 2018); Fulton v. City of Philadelphia, 922 F.3d 140, 165 (3d Cir. 2019); *Fulton*, 141 S. Ct. at 1882.

[92] *See* Brief of CLS, *supra* note 87, at 1–3 (discussing death of Mary Stinemetz due to the stance of government officials; the ultimate court vindication in Stinemetz v. Kansas Health Pol'y Auth., 252 P.3d 141, 155 (Kan. Ct. App. 2011) was too late to save her life).

[93] *See* sources cited *supra* notes 71, 73.

However, religious liberty in recent years has become an increasingly divisive issue, with some progressives perceiving religious liberty primarily as a threat to LGBTQ+ equality and reproductive rights.[94] Religious liberty has come to be viewed negatively by some through the lens of a purported right to discriminate or to do harm.[95] Religious exemptions similarly came to be viewed as synonymous with an anti-LGBTQ+ agenda, and state religious liberty enactments became highly controversial.[96] In this context, many today would interpret overruling *Smith* negatively as designed to limit LGTBQ+ equality and reproductive rights rather than positively as protecting religious liberty.

As the composition of the Court has changed, liberal Justices and progressive commentators have taken to espousing the importance of adherence to precedent in the hopes of dissuading the conservative majority from overruling cherished liberal precedents.[97] This newfound love of precedent by progressives is more than a little ironic given that the very concepts of evolving constitutionalism and progressive politics are about *not* being bound by the past.[98]

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[94] *See, e.g.*, Erwin Chemerinsky & Michele Goodwin, *Religion Is Not a Basis for Harming Others*, 105 GEO. L. J. 1111, 1135 (2016); BRIAN J. GRIM, RELIGIOUS FREEDOM AND BUS. FOUND., RELIGIOUS FREEDOM AND LGBT RIGHTS 10 (2019), https://religiousfreedomandbusiness.org/wp-content/uploads/2021/06/COMMON-GROUND-LGBT-Rights-and-Religious-Freedom.pdf [https://perma.cc/4UAW-7SBV]; Emily London & Maggie Siddiqi, *Religious Liberty Should Do No Harm*, CTR. FOR AM. PROGRESS (Apr. 11, 2019, 9:03 AM), https://www.americanprogress.org/issues/religion/reports/2019/04/11/468041/religious-liberty-no-harm/ [https://perma.cc/9KFW-86DD]; Ryan Thoreson, *"All We Want Is Equality": Religious Exemptions and Discrimination against LGBT People in the United States*, HUM. RTS. WATCH (Feb. 19, 2018), https://www.hrw.org/report/2018/02/19/all-we-want-equality/religious-exemptions-and-discrimination-against-lgbt-people [https://perma.cc/X3UE-LA56].

[95] *See* sources cited *supra* note 94.

[96] *See* sources cited *supra* note 94; *see also* Lacy Crawford, Jr., *Supreme Court Sides with Religious Bigotry in* Fulton v. City of Philadelphia, LAWS.' COMM. FOR C.R. UNDER L. (June 17, 2021), https://www.lawyerscommittee.org/supreme-court-decision-a-setback-for-lgbtq-and-intersectional-rights/ [https://perma.cc/9XC5-7GRG].

[97] Sam Berten, *The Long Game: Justice Kagan's Approach in* Ramos v. Louisiana, U. CIN. L. REV. (May 26, 2020), https://uclawreview.org/2020/05/26/the-long-game-justice-kagans-approach-in-ramos-v-louisiana/ [https://perma.cc/8SUQ-ECFD]; *Reuters: U.S. Justice Breyer Touts Compromise, Democracy, Adherence to Precedent*, NAT'L CONST. CTR. (May 28, 2021) https://constitutioncenter.org/press-room/in-the-news/reuters-u.s-justice-breyer-touts-compromise-democracy-adherence-to-precedent [https://perma.cc/S9QZ-LSW7].

[98] *See generally* Michael H. v. Gerald D., 491 U.S. 110, 136–57 (1989) (Brennan, J., dissenting).

> The document that the plurality construes today is unfamiliar to me. It is not the living charter that I have taken to be our Constitution; it is instead a stagnant, archaic, hidebound document steeped in the prejudices and superstitions of a

In this context, Chief Justice Roberts' efforts to separate the Court from politics and project a non-partisan, non-ideological image of the Court necessitates being very selective in overturning precedents valued by liberals.[99] Chief Justice Roberts' efforts have acquired additional urgency with the recent proposals from progressives to "reform" or alter the structure of the Supreme Court, such as adding four seats to the Supreme Court and implementing term limits for the Justices.[100] These proposals are seen as essential and justified by some, while others perceive such proposals negatively as nakedly partisan and ideological attempts to pack the courts that would undermine the reputation of the judiciary.[101] Given the statements against these proposals—even by liberal Justices such as the late Justice Ruth Bader Ginsburg, and Justice Breyer[102]—it is likely that a conservative and pragmatic institutionalist like Chief Justice Roberts would be quite opposed. Hence, Chief Justice Roberts, to the degree he can influence it, may be particularly determined to avoid opinions likely to add fuel to the political push to change the structure of the Court. Overruling *Smith* in a sharply divided Court would thus have fueled the court reform movement. The unanimous ruling in *Fulton*, however, provided political cover for ruling in favor of CSS, a result that otherwise could have been seen as the mark of an overly conservative, activist court by some. This 9–0 ruling

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> time long past. *This* Constitution does not recognize that times change, does not see that sometimes a practice or rule outlives its foundations. I cannot accept an interpretive method that does such violence to the charter that I am bound by oath to uphold.

Id. at 141.

[99] *See* June Med. Servs. L.L.C. v. Russo, 140 S. Ct. 2103, 2133–142 (2020) (Roberts, J., concurring); Adam Liptak, *Chief Justice Defends Judicial Independence After Trump Attacks 'Obama Judge'*, N.Y. TIMES (Nov. 21, 2018), https://www.nytimes.com/2018/11/21/us/politics/trump-chief-justice-roberts-rebuke.html [https://perma.cc/7DPC-MMYW]; Michael McGough, *In Striking Down Abortion Law, Perhaps John Roberts Was Keeping His Word*, MIAMI HERALD (July, 1, 2020, 6:58 PM), https://www.miamiherald.com/opinion/op-ed/article243933232.html [https://perma.cc/J9ZB-LLD8].

[100] *Supreme Court Reform*, DEMAND JUST., https://demandjustice.org/priorities/supreme-court-reform/ [https://perma.cc/5495-B3GA] (last visited Oct. 12, 2021).

[101] Daniel Epps & Ganesh Sitaraman, *The Future of Supreme Court Reform*, 134 HARV. L. REV. F. 398, 398–99 (2021); William G. Ross, *Court Packing: As Perverse Today as It Was in 1937*, JURIST (July 24, 2021, 9:00 AM), https://www.jurist.org/commentary/2021/07/william-ross-court-packing-still-perverse/ [https://perma.cc/R43H-Z2CB].

[102] Jess Bravin, *Justice Breyer Lays Out Opposition to Expanding Supreme Court*, WALL ST. J. (Apr. 7, 2021, 6:10 PM), https://www.wsj.com/articles/justice-breyer-lays-out-opposition-to-expanding-supreme-court-11617816434; Quint Forgey, *Ginsburg Opposes 2020 Democrats' Proposals to Expand Supreme Court*, POLITICO (July 24, 2019, 7:07 AM), https://www.politico.com/story/2019/07/24/ginsburg-expand-supreme-court-1428426 [https://perma.cc/ZM8N-KWTU].

is very difficult to use as a justification for adding seats to the Court or creating term limits for Supreme Court Justices. Superficially, that outcome projects an image of a non-ideological Court able to come to unanimous agreement on cases linked to some of society's most contentious issues.

It is easy to speculate that behind the 9–0 ruling in *Fulton* was some kind of deal. Perhaps Justice Alito's long concurring opinion arguing for overruling *Smith* was originally designed as a majority opinion.[103] Perhaps Chief Justice Roberts made a deal with the three progressives: rule for CSS without even a word of complaint and the Court will not overrule *Smith*.[104] Of course, such a deal required getting at least one other conservative Justice to go along and in the end produced two: Justices Barrett and Kavanaugh. The possible motivations of Justices Barrett and Kavanaugh will be explored below.[105] Regardless of such speculations, the issue of whether or not to overrule *Smith*, and how to rule for CSS with the greatest possible Court majority, appear to have taken up the entire focus of the Justices. In that context, they forgot to write a precedent actually about children and the foster care system. This will be more fully demonstrated in the section below analyzing the four opinions.

B. The Court's Four Opinions in Fulton Were Primarily Focused on the Issue of Over-Ruling Smith and Virtually Ignored the Rights and Welfare of Foster Children

Under these circumstances, all four of the opinions in *Fulton*, representing all nine Justices, were about the issue of overruling *Smith* and not really about the case before them—and even less about foster care.

1. The Majority Opinion

The majority opinion in *Fulton* was authored by Chief Justice Roberts and joined by Justices Barrett and Kavanaugh, as well as the

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[103] *See* Fulton v. City of Philadelphia, 141 S. Ct. 1868, 1884–1926 (2021) (Alito, J., concurring).

[104] *See* Linda C. McClain, *Is There a "Center" to Hold in Supreme Court Jurisprudence on Religious Liberty and LGBTQ Rights?,* BERKLEY CTR. FOR RELIGION, PEACE & WORLD AFFS. (July 26, 2021), https://berkleycenter.georgetown.edu/responses/is-there-a-center-to-hold-in-supreme-court-jurisprudence-on-religious-liberty-and-lgbtq-rights [https://perma.cc/UY4E-YD56] ("Perhaps Roberts wrote such a narrow opinion to appear nonpartisan or consensus-building. Perhaps he did so to gain the votes of the three liberals—Justices Breyer, Kagan, and Sotomayor. They, in turn, may have taken a pragmatic approach in joining Roberts' narrow opinion, rather than dissenting from a broader opinion less protective of LGBTQ rights and of anti-discrimination law more generally.").

[105] *See infra* notes 131–143 and accompanying text.

three liberal Justices: Breyer, Kagan, and Sotomayor.[106] The opinion found that the City's non-discrimination policies were not generally applicable primarily because the non-discrimination provision placed in the City's standard contract with agencies included the following language: "[U]nless an exception is granted by the Commissioner or the Commissioner's designee, in his/her sole discretion."[107] The existence of other non-discrimination provisions without such an exception was irrelevant because the exception provision is not annulled by other contractual provisions not stating the exception.[108] Further, the Court rejected the City's reliance on the City's Fair Practices Ordinance forbidding various forms of discrimination as to "public accommodations opportunities" because it accepted CSS's argument that under local law foster care is not a public accommodation.[109] The opinion also noted, without comment, CSS's additional argument that "the ordinance cannot qualify as generally applicable because the City allows exceptions to it for secular reasons despite denying one for CSS's religious exercise."[110]

The Court's opinion dispensed with the issue of revisiting *Smith* in a short paragraph that concluded the case "falls outside of *Smith* because the City has burdened the religious exercise of CSS through policies that do not meet the requirement of being neutral and generally applicable."[111] This explained why the Court "need not revisit" *Smith*;[112] it does not explain why the Court chose not to do so. The Court would have been acting properly to revisit *Smith* in a case requiring it to apply *Smith*'s tests. The decision to take a narrower pathway was an unexplained act of discretion.

Most of the Court's substantive reasoning appeared designed to justify the conclusion that the City's policies failed *Smith*'s requirements of being neutral and generally applicable.[113] The Court repeatedly pointed out that CSS had made additional arguments toward that end, with the implication being that there were likely multiple grounds on which the Court could have found the City's policies deficient in that regard, and it was simply choosing the "more straightforward" ground.[114] Thus, as a matter of rhetoric, much of the opinion was a

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[106] *See* Fulton v. City of Philadelphia, 141 S. Ct. 1868, 1873 (2021).
[107] *Id.* at 1878 (internal quotation marks omitted).
[108] *Id.* at 1879.
[109] *Id.* at 1879–80.
[110] *Id.* at 1880.
[111] *Id.* at 1876–77.
[112] *Fulton,* 141 S. Ct. at 1877.
[113] *See id.*
[114] *See id.*

justification of the unexplained decision to avoid revisiting *Smith*, even as the Court applied *Smith*.

From a child rights perspective, the majority opinion is notable for barely addressing the rights or interests of children at all. The technical discussion of whether the City's policies were neutral and generally applicable pertained to the disagreement between the City and CSS and the free exercise rights of CSS.[115] Children were simply irrelevant to this legal discourse, even though in theory serving children is the very purpose of the foster care system at issue.

One might have expected children to come more directly into view, at least at the stage of applying strict scrutiny. Two of the three compelling interests asserted by the City concerned children, at least by implication: "maximizing the number of foster parents . . . and ensuring equal treatment of prospective foster parents and foster children."[116] From a child rights perspective, "maximizing the number of foster parents" would pertain to the rights of foster children to "special protection and assistance provided by the State" in the form of appropriate foster care placements.[117] Similarly, "ensuring equal treatment of . . . foster children" would pertain to the right of the child to protect their rights to special protection and appropriate foster care "without discrimination of any kind."[118] Although this language comes from international standards not directly applicable in courts in the United States, presumably state and federal lawmakers in the United States would agree with these fundamental points. When the state removes a child from the child's family, the state is obligated to provide appropriate forms of care and to treat the child in a non-discriminatory manner in the provision of such appropriate care.[119] The Court accepted that in general, these were state compelling interests.[120]

The Court, however, pointed out that under strict scrutiny, the City could not rely on highly abstract generalities as to these compelling interests.[121] "The question, then, is not whether the City has a compelling interest in enforcing its non-discrimination policies generally, but whether it has such an interest in denying an exception to CSS."[122]

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[115] *See id.* at 1878–1882.

[116] *Fulton,* 141 S. Ct. at 1881.

[117] G.A. Res. 44/25, *supra* note 5, at art. 20.

[118] *Id.* at art. 2.

[119] *See Foster Care Bill of Rights*, NAT'L CONF. OF STATE LEGISLATURES (Oct. 29, 2019), https://www.ncsl.org/research/human-services/foster-care-bill-of-rights.aspx [https://perma.cc/XF38-ER6A].

[120] *Fulton*, 141 S. Ct. at 1881.

[121] *Id.*

[122] *Id.*

As to the State's compelling interest in "maximizing the number of foster parents," the Court concluded in one sentence (without explanation) that, "including CSS in the program seems likely to increase, not reduce, the number of available foster parents."[123]

The Court also quickly dispatched the City's interest in non-discrimination as to foster parents and foster children. The Court acknowledged that the non-discrimination interest as to "gay persons and gay couples" is weighty, and, quoting language from *Masterpiece Cakeshop*, that such persons and couples "cannot be treated as social outcasts or as inferior in dignity and worth."[124] However, the Court concluded, without any real analysis, that "[t]he City offers no compelling reason why it has a particular interest in denying an exception to CSS while making them available to others."[125]

The Court's concluding remarks warmly praised CSS:

> As Philadelphia acknowledges, CSS has "long been a point of light in the City's foster-care system." CSS seeks only an accommodation that will allow it to continue serving the children of Philadelphia in a manner consistent with its religious beliefs; it does not seek to impose those beliefs on anyone else.[126]

The Court's warm praise of CSS's role in the foster care system is a striking contrast to comments by others viewing CSS negatively as a discriminatory organization engaged in "religious bigotry."[127] The Court's positive words about CSS, in combination with the Court's language affirming the dignity and worth of LGBTQ+ persons and couples, suggests a rhetorical strategy to affirm the dignity and social worth of both sides in this conflict between religious liberty and LGBTQ+ rights.[128] Given that the Court's language represented the views of three conservative Justices and all three liberal Justices as authored by the Chief Justice, one could read into it a typical Roberts theme of the Court as impartial umpire.[129] The role of an umpire is to settle disputes between parties under the law, not to disparage parties. Put another way, umpires and the rule of law allow people of differing

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[123] *Id.* at 1881–82.

[124] *Id.* at 1882 (quoting Masterpiece Cakeshop, Ltd. v. Colorado C.R. Comm'n, 138 S. Ct. 1719, 1727 (2018)).

[125] *Id.*

[126] *Id.* (citation omitted).

[127] Crawford, *supra* note 96.

[128] *See Fulton,* 141 S. Ct. at 1882.

[129] *See Confirmation Hearing on the Nomination of John G. Roberts, Jr. to be Chief Justice of the United States: Hearing Before the S. Comm. on the Judiciary*, 109th Cong. 55 (2005) (statement of John G. Roberts, Jr.).

politics, religion, and ideals to live together in society. This living together requires each side, perhaps, to accommodate the other.

Whether one embraces Roberts' rhetoric or finds it offensive, the rhetoric pays scant attention to the children served by the foster care system. The impact of removing CSS from the foster care system on services for foster children (in particular, the number of available foster parents) is evaluated in a highly conclusory way without explanation in a single sentence. The impact on LGBTQ+ children of "accommodating" an agency that will not certify same-sex married couples as foster parents is mentioned in only the most indirect way and receives just as little analysis or explanation.[130] Whether the Court got those issues right or wrong, which will be discussed below, the short shrift given to them makes them appear as afterthoughts. Children and children's rights remain largely invisible, neither seen nor heard, particularly as compared to the pages of attention to the technical aspects of *Smith*'s "neutral law of general application" standard. The Court's opinion is about conflicting rights claims by adults and is strategically designed to buttress the public reputation of the Court.

2. Concurring Opinion of Justice Barrett

Justice Barrett joined in full Chief Justice Roberts' majority opinion, but also wrote a separate concurrence.[131] Justice Kavanaugh joined both the majority opinion and Justice Barrett's concurrence.[132] Justice Breyer joined both the majority opinion and all but the first paragraph of Justice Barrett's concurrence.[133]

Justice Barrett's three paragraph concurrence was completely occupied with the question of whether *Employment Division v. Smith* should be overruled, and if so, what should replace *Smith*.[134] A self-described originalist,[135] Justice Barrett first briefly discussed whether *Smith* was correct as a matter of original understanding, text, and structure.[136] She found the "historical record more silent than supportive on the question whether the founding generation understood the First Amendment to require religious exemptions from generally applicable

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[130] *See Fulton*, 141 S. Ct. at 1882.

[131] *See Fulton,* 141 S. Ct. at 1882–83 (Barrett, J., concurring).

[132] *Id.*

[133] *Id.*

[134] *Id.*

[135] Ian Millhiser, *Originalism, Amy Coney Barrett's Approach to the Constitution, Explained*, VOX (Oct. 12, 2020, 8:30 AM), https://www.vox.com/21497317/originalism-amy-coney-barrett-constitution-supreme-court [https://perma.cc/JEU6-KFCU].

[136] *Fulton,* 141 S.Ct. at 1882 (Barrett, J., concurring).

laws in at least some circumstances."[137] But she found the "textual and structural arguments against *Smith* . . . more compelling" because "it is difficult to see why the Free Exercise Clause—lone among the First Amendment freedoms—offers nothing more than protection from discrimination."[138]

Justice Barrett then catalogued several "issues to work through if *Smith* were overruled."[139] Justice Barrett suggested a "nuanced" approach would be more appropriate than a "categorical strict scrutiny regime" as a replacement for *Smith*.[140]

Finally, Justice Barrett followed Chief Justice Roberts in stating that the Court "need not wrestle . . . in this case" with the question of overruling *Smith*, and what might replace it, because the result would be the same.[141] She noted that "all nine Justices agree that the City cannot satisfy strict scrutiny."[142]

Thus, Justice Barrett's concurrence was entirely focused on speculating on whether *Smith* should be overruled and on what might replace *Smith*, while also justifying not ruling on those questions.[143] There was not a word on foster care or children's issues, nor on the impact of the decision on other foster care cases.

3. Concurring Opinion of Justice Alito

Justice Alito's forty-three page concurrence, far longer than any of the other opinions, was focused on the necessity of reconsidering *Employment Division v. Smith*, the substantive arguments for overruling *Smith*, and the question of what rules should replace *Smith*.[144] As noted above, it is possible much of it was originally written as a majority opinion, or at least in the hopes of attracting a majority of the Court.[145] Justices Thomas and Gorsuch joined Justice Alito's concurrence.[146]

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[137] *Id.*
[138] *Id.*
[139] *Id.* at 1883.
[140] *Id.*
[141] *Id.*
[142] *Fulton,* 141 S. Ct. at 1883 (Barrett, J., concurring).
[143] *See id.* at 1882–83.
[144] *Id.* at 1883–1926 (Alito, J., concurring).
[145] *See supra* note 104 and accompanying text.
[146] *Fulton*, 141 S. Ct. at 1883 (Alito, J., concurring).

a. Justice Alito on the Care of "Orphaned and Abandoned Children"

Unlike the other opinions, Justice Alito did take a number of pages to focus on issues related to vulnerable children.[147] However, Justice Alito's discussions of vulnerable children were instrumental to his arguments about overruling *Smith* and religious liberty.[148] Because children served as a means of proving his points about the religious liberty rights of adults, Justice Alito made largely invisible the actual contexts of children in contemporary foster care systems.[149]

Justice Alito's first discussion of children was designed to demonstrate that "providing for the care of orphaned and abandoned children" is a Christian mission that "dates back to the earliest days of the Church."[150] Justice Alito provided a short history of orphanages, from the founding of an orphanage by St. Basil the Great in the fourth century to the founding of the "first known orphanage in what is now the United States . . . by an order of Catholic nuns in New Orleans around 1729[,]" and noted the establishment of orphanages by Protestants and Jews in early American history.[151] Justice Alito then noted the shift from orphanages to foster families in the late nineteenth and twentieth centuries.[152] Yet, as Justice Alito noted, quoting amici supporting the City, "[i]nto the early twentieth century, the care of orphaned and abandoned children in the United States remained largely in the hands of private charitable and religious organizations."[153]

Justice Alito explained the changes that occurred, which included the government playing a "more active role" such that "today many governments administer what is essentially a licensing system. As is typical in other jurisdictions, no private charitable group may recruit, vet, or support foster parents . . . without the City's approval."[154] Justice Alito then praised the role of CSS in Philadelphia and elsewhere for their "long record of finding homes for children whose parents are unable or unwilling to care for them . . . including children who are hard to place . . . ."[155]

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[147] *See id.* at 1884–85.
[148] *See id.*
[149] *See id.*
[150] *Id.* at 1884.
[151] *Id.* at 1884–85.
[152] *Id.* at 1885.
[153] *Id.* (internal quotation marks omitted) (footnote omitted).
[154] *Id.*
[155] *Fulton*, 141 S. Ct. at 1885 (Alito, J., concurring).

Justice Alito's historical review is meant to demonstrate the strength and longevity of the religious obligation and role in assisting vulnerable children. Yet, this part of Justice Alito's opinion distorts and makes invisible the actual circumstances of the children involved with the modern foster care system. Thus, his repeated emphasis on "the care of orphaned and abandoned children,"[156] while perhaps accurate in some historical contexts, is inaccurate terminology as applied to the vast majority of children served by the modern foster care system.[157] Few of those children are literal orphans—their parents are generally alive.[158] Typically, the state has moved coercively (even if formally by "voluntary placements") to remove the children from their families in order to protect the children from abuse and/or neglect.[159] About half of the children in the foster care system will return to their families of origin.[160] The United States foster care system is an adjunct of our child protection system. This is quite different from much earlier historical periods, with much higher death rates and much lower longevity where orphanages and fostering-type arrangements more commonly served literal orphans where one or both parents were dead.[161] Justice Alito's later description of "children whose parents are unable or unwilling to care for them" is a better designation, though also somewhat misleading.[162] Again, a relatively small proportion of children served by the state foster care system have parents "unwilling" to care for them.[163] The term "unable" brings again to mind dead parents—to make it accurate, it must encompass situations where the state deems parent(s) unable to *adequately or safely* care for children.

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[156] *Id.* at 1884–85.

[157] *See* CHILDREN'S BUREAU, ADMIN. FOR CHILD. & FAMILIES, U.S. DEP'T OF HEALTH AND HUM. SERVS., THE AFCARS REPORT #27 (2020) [hereinafter AFCARS REPORT]; Smith v. Org. of Foster Families for Equal. and Reform, 431 U.S. 816 (1977); DOROTHY ROBERTS, SHATTERED BONDS: THE COLOR OF CHILD WELFARE (2002).

[158] *See* sources cited *supra* note 157.

[159] *See* sources cited *supra* note 157.

[160] *See* AFCARS REPORT, *supra* note 157, *Foster Care Numbers Up for Fifth Straight Year*, N. AM. COUNCIL ON ADOPTABLE CHILD., https://www.nacac.org/2019/01/18/foster-care-numbers-up-for-fifth-straight-year/ [https://perma.cc/P7UU-3TLX] (last visited Oct. 14, 2021).

[161] *See* J.T. Fitzgerald, *Orphans in Mediterranean Antiquity and Early Christianity*, 23 ACTA THEOLOGICA 29, 30–32 (Supp. 2016); TIMOTHY S. MILLER, THE ORPHANS OF BYZANTIUM: CHILD WELFARE IN THE CHRISTIAN EMPIRE (2003); *History of Foster Care*, VOICES FOR CHILD. (May 25, 2020), https://www.speakupnow.org/history-of-foster-care/ [https://perma.cc/Z86P-EZ82].

[162] *See Fulton*, 141 S. Ct. at 1885 (Alito, J., concurring).

[163] *See* sources cited *supra* note 157.

These distinctions may seem nitpicking and beside the point. But for those in the child rights field, these distinctions make a huge difference. The term "orphan" reflects the sentimental tendency to make invisible children's ties to their family of origin, whereas those ties are fundamental to the actual workings of contemporary foster care systems. Because of those ties, the state has an obligation under most circumstances to make reasonable efforts to avoid removal of children from their families, and once removed, to reunify foster children with their original families.[164] Because of those ties, kinship foster care—care provided by relatives or the extended favor—is favored.[165] Because of those ties, there are complicated issues when reunification is not the result as to how to help children navigate their complex identities and relationships based on psychological ties to multiple families.[166] Hence, for those in the child rights field, the term "orphan" is a problematic term freighted with layers of meaning and has often been misused in ways harmful to children and families.[167]

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[164] *See* 42 U.S.C. § 671(a)(15)(A–B) (2018); CHILD WELFARE INFO. GATEWAY, U.S. DEP'T OF HEALTH AND HUM. SERVS., REASONABLE EFFORTS TO PRESERVE OR REUNIFY FAMILIES AND ACHIEVE PERMANENCY FOR CHILDREN 1 (2020), https://www.childwelfare.gov/pubpdfs/reunify.pdf [https://perma.cc/ZU5J-689H]; *Reunifying Families*, CHILD WELFARE INFO. GATEWAY, U.S. DEP'T OF HEALTH AND HUM. SERVS., https://www.childwelfare.gov/topics/permanency/reunification/ [https://perma.cc/Y4JA-7VX6]; CHILD WELFARE INFO. GATEWAY, U.S. DEP'T OF HEALTH AND HUM. SERVS., REUNIFICATION: BRINGING YOUR CHILDREN HOME FROM FOSTER CARE 2 (2016), https://www.childwelfare.gov/pubPDFs/reunification.pdf [https://perma.cc/2M6E-Y3HW]. For similar international standards, see NIGEL CANTWELL ET AL., THE CTR. FOR EXCELLENCE FOR LOOKED AFTER CHILD. IN SCOT., MOVING FORWARD: IMPLEMENTING THE 'GUIDELINES FOR THE ALTERNATIVE CARE OF CHILDREN' 14 (2012), https://bettercarenetwork.org/sites/default/files/Moving-Forward-implementing-the-guidelines-for-web.pdf [https://perma.cc/8QBW-3QD8].

[165] Heidi Redlich Epstein, *Kindship Care is Better for Children and Families*, AM. BAR ASS'N (July 1, 2017), https://www.americanbar.org/groups/public_interest/child_law/resources/child_law_practiceonline/child_law_practice/vol-36/july-aug-2017/kinship-care-is-better-for-children-and-families/ [https://perma.cc/KWA4-G987].

[166] *See Identity Issues*, PACT, https://www.pactadopt.org/resources/identity-issues.html [https://perma.cc/B8F6-5DXD] (last visited October 14, 2021) (collecting resources on identity and adoption); CHILD WELFARE INFO. GATEWAY, U.S. DEP'T OF HEALTH AND HUM. SERVS., THE IMPACT OF ADOPTION 5 (2019), https://www.childwelfare.gov/pubPDFs/factsheets_families_adoptionimpact.pdf [https://perma.cc/4PL9-PNNM] (discussing core issues of adoption including identity).

[167] *See, e.g.*, Nigel Cantwell & Emmanuelle Werner Gillioz, *The Orphanage Industry: Flourishing When It Should Be Dying*, 17 SCOTTISH J. RESIDENTIAL CHILD CARE 1, 3 (2018), https://bettercarenetwork.org/sites/default/files/2018_Vol_17_1_Cantwell_N_The_orphanage_industry.pdf [https://perma.cc/JFD6-CFEN]; E. J. Graff, *The Problem with Saving the World's 'Orphans'*, THE BOSTON GLOBE (Dec. 11, 2008),

b. Dissolving Paper: Justice Alito on the Precedential Value of Fulton for Future Foster Care Cases

Justice Alito noted that conflicts between non-discrimination policies and religious liberties have impacted religious agencies, foster care, and adoption systems in multiple places in the United States.[168] Justice Alito thus raised the issue of what the *Fulton* precedent would mean for religious liberty cases in the context of foster care systems.[169] Here, Justice Alito chose to make yet another argument for why the Court should have reconsidered *Smith*, at the cost of minimizing the significance of *Fulton* as a precedent for foster care cases.[170] Justice Alito suggested that *Fulton* would not even be a lasting precedent as to the conflict in Philadelphia:

> This decision might as well be written on the dissolving paper sold in magic shops . . . . [I]f the City wants to get around today's decision, it can simply eliminate the never-used exemption power. If it does that, then, voilà, today's decision will vanish—and the parties will be back where they started.[171]

In an accompanying footnote, Justice Alito made a similar argument about the Court's interpretation that local public accommodations law did not apply to foster care systems, noting that state courts are not bound by federal court interpretations of state law.[172] Hence, this part of the Court's decision could be overcome by a differing state court interpretation of local law.[173] Justice Gorsuch's concurrence completes the thought by noting that the City could revise its public accommodations laws to explicitly include foster care.[174] This "dissolving paper" rhetoric is likely to be used liberally by those who side against CSS or other religious agencies in further litigation. Justice Alito has provided a roadmap for undercutting the victory of CSS in the Supreme Court.[175] This suggests that making an argument about the need to overrule *Smith* is more important to Justice Alito than furthering religious liberty in the context of foster care and adoption.

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http://archive.boston.com/bostonglobe/editorial_opinion/oped/articles/2008/12/11/the_problem_with_saving_the_worlds_orphans/ [https://perma.cc/2E2Z-3HWQ].

168 *See Fulton*, 141 S. Ct. at 1888 (Alito, J., concurring).

169 *Id.*

170 *Id.*

171 *Id.* at 1887–88 (footnote omitted).

172 *Id.* at 1887 n.21.

173 *See id.*

174 *Id.* at 1930 (Gorsuch, J., concurring).

175 *Fulton*, 141 S. Ct. at 1929–30 (Gorsuch, J., concurring).

As I will argue below, *Fulton* as a precedent provides material from which religious agencies and persons could build a winning argument in most similar cases.[176] This could have been made clearer by Justice Alito, given his clear propensity to favor religious agencies in these kinds of disputes. Yet, Justice Alito does the opposite and seems determined to claim a loss out of a partial victory. Justice Alito would rather complain than win. Unfortunately, he is joined in this propensity in this case by Justices Thomas and Gorsuch. The most conservative Justices on the Court, it appears, do not know how to win partial victories.[177]

4. Concurring Opinion of Justice Gorsuch

Justice Gorsuch's concurrence represents the same three Justices as Justice Alito's concurrence—Justices Alito, Thomas, and Gorsuch.[178] Justice Gorsuch also focused on arguing that the Court should have reconsidered and overruled *Employment Division v. Smith.*[179] Given Justice Alito's forty-three-page concurrence to the same aim and representing the same Justices, Justice Gorsuch's five-page concurrence was designed to target a different aspect of the same argument by seeking to rebut the majority's holding that strict scrutiny is properly triggered under *Smith*'s "neutral law of general application" standard.[180]

Justices Gorsuch, Alito, and Thomas are so focused on rebutting the majority opinion's refusal to reconsider *Smith* that they are willing to contradict their own views. Thus, Justice Gorsuch spends pages rebutting the Court's application of *Smith* despite suggesting at the start that the Court could properly have come to the same conclusion under *Smith* by a different route.[181]

Justice Gorsuch suggested at the outset that public accommodations laws cannot meet the *Smith* standard of a generally applicable law.[182] He stated that the City's public accommodations law "applies only to certain defined entities that qualify as public accommodations

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[176] *See infra* Part II.

[177] This is in contrast with some Justices of a past era, such as Justice Brennan, who knew how to find common ground and win incremental victories. *See* Adam Liptak, *No Vote-Trading Here*, N.Y. TIMES (May 15, 2010), https://www.nytimes.com/2010/05/16/weekinreview/16liptak.html [https://perma.cc/V5RZ-GWQQ].

[178] *See Fulton*, 141 S. Ct. at 1926 (Gorsuch, J., concurring).

[179] *Id.* at 1926, 1931.

[180] *Id.* at 1926–27, 1929.

[181] *Id.* at 1926–31.

[182] *Id.* at 1926.

while the 'generally applicable law' in *Smith* was 'an across-the-board criminal prohibition' enforceable against anyone."[183]

If public accommodations laws are not generally applicable, then other non-discrimination norms targeted at foster care also are not generally applicable. If nondiscrimination laws applicable to foster care are not generally applicable, then Justice Alito's conclusion—that Justice Gorsuch joined—that *Fulton* is written on "dissolving paper" would be incorrect.[184] If public accommodations laws are not generally applicable, Justice Gorsuch's own complaint a few pages later that the City could simply revise its public accommodations law "to make even plainer still that its law does encompass foster services" is irrelevant.[185] Hence, under Justice Gorsuch's own reasoning, strict scrutiny is properly triggered in *Fulton* and similar foster care cases, even without overruling *Smith*.[186]

Ironically, Justice Gorsuch does not choose to follow up on the implications of his own suggestion that public accommodations laws are not generally applicable. If he had done so, he would have found that *Fulton* is a powerful religious liberty precedent in the foster care area. Instead, Justice Gorsuch spends pages disagreeing with the Court's interpretations of local law as a means of undermining the strength of *Fulton* as a precedent and support Justice Alito's "dissolving paper" conclusion.[187] Yet, the Court's errors on the interpretation of local law, if errors they were, are irrelevant to the result if Justice Gorsuch is correct in his suggestion that public accommodations laws are not generally applicable. Justice Gorsuch, like Justice Alito, would rather minimize and undermine a victory to make a point than consolidate a partial victory.

Justice Gorsuch fell into the debater's error of being so determined to rebut his opponent that he ends up rebutting himself instead. His opinion reads like the bitter product of a grudge match. This grudge match over whether the Court should have reconsidered and overruled *Smith* overcomes any other focus to the point that he weakens a precedent whose outcome he supports in order to make a point.

Like most of the other opinions, Justice Gorsuch's concurrence contained no focus or concern on the rights or best interests of children.[188] Justice Gorsuch did complain that the majority's approach will

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[183] *Id.*
[184] *See id.* at 1887 (Alito, J., concurring).
[185] *See Fulton*, 141 S. Ct. at 1930 (Gorsuch, J., concurring).
[186] *See id.*
[187] *Id.* at 1926–27.
[188] *See id.* at 1926–31.

lead to continuing litigation, which will consume "time and resources in court that could be better spent serving children."[189] However, this complaint ignored his own role, and those of Justices Alito and Thomas, in making this problem worse. If, instead of making and joining their "dissolving paper" arguments, these Justices had demonstrated the ways in which *Fulton* could be a decisive precedent in foster care cases, it would have alleviated that problem.

Indeed, Justice Gorsuch complained about the "opacity of the majority's professed endorsement of CSS's arguments"[190] —a complaint that may be partially valid. However, he refused to play the usual role of a concurring opinion in clarifying and interpreting the majority in a way supportive of his own views, choosing instead to undermine and belittle the majority.[191]

Sadly, Justices Alito, Thomas, and Gorsuch could have had their cake and eaten it, too, but they instead irrationally chose to throw out the cake. These Justices could have argued that the Court could have and should have reconsidered and overruled *Smith* while simultaneously demonstrating that the Court's 9-0 ruling for CSS was a dispositive victory and powerful precedent for religious liberty in the context of foster care. There was ample room for demonstrating the harm of continued uncertainty and inconsistency in religious liberty cases beyond the sphere of foster care while consolidating a victory in the foster care area. The failure to do so reflected a lack of imagination and, frankly, a lack of caring about children and their rights. Justices Alito, Thomas, and Gorsuch chose to use children to make a rhetorical point while ignoring the needs and rights of vulnerable children.

II. *FULTON* PROVIDES A ROADMAP AND PRECEDENT FOR RELIGIOUS AGENCIES TO WIN SIMILAR CONFLICTS IN FOSTER CARE OR ADOPTION CASES

A. Dissolving Paper or Dispositive Precedent?

As noted above, Justice Alito suggested that *Fulton* would not even be a lasting precedent as to the conflict between CSS and the City, let alone other similar conflicts, stating that the Court's decision "might as well be written on the dissolving paper[.]"[192]

Despite Justice Alito's "dissolving paper" rhetoric, *Fulton*, properly understood, should be dispositive for most conflicts between

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[189] *Id.* at 1930.
[190] *Id.*
[191] *See id.* at 1927–28.
[192] *See id.* at 1887 (Alito, J., concurring) (footnote omitted).

religious liberty and anti-discrimination norms in the context of foster care or adoption. The reasons are simple: first, *Fulton's* rejection of foster care as a public accommodation, with its implicit understanding that foster care systems necessarily take into account sensitive categories like family structure, gender, sexual orientation, and even race to further the best interests of the child, makes clear that strict scrutiny is required under current religious liberty precedents in the context of foster care or adoption systems, even without overruling *Employment Division v. Smith*.[193] Second, *Fulton* makes clear that excluding religious agencies or persons from foster care or adoption systems will fail strict scrutiny so long as there are real alternative routes for all qualified persons to become foster or adoptive parents as there were in *Fulton* and are likely to be in all relevant litigation.[194]

B. Triggering Strict Scrutiny

The concurring opinions by Justices Alito and Gorsuch, joined by Thomas, argued that the specific reasons given by the majority for triggering strict scrutiny in *Fulton* could be countered by the City making cosmetic, technical changes to their non-discrimination laws.[195] Further, these Justices argued that the majority opinion relied on potentially erroneous federal court interpretations of state laws, which could be overruled by state courts.[196] Specifically, these Justices argued that the City could counter the Court's holdings by eliminating the discretionary exception language from its non-discrimination language in contracts with agencies and could amend its public accommodations laws to clearly apply to foster care.[197] In addition, state courts could interpret city and state public accommodations laws to apply to foster care.[198]

None of this makes any difference. Even if the City eliminated its specific exceptions language in its contractual provisions prohibiting discrimination and explicitly included foster care in its public accommodations law, and even if state courts affirmed that public accommodations laws included foster care, the majority opinion in *Fulton* offers a roadmap and mandate for triggering strict scrutiny and ruling in favor of religious agencies like CSS. The reasons can be found in the majority's explanation for why public accommodations laws are a poor fit

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[193] *See id.* at 1880 (majority opinion); *see supra* notes 34, 47 and accompanying text.
[194] *Fulton*, 141 S. Ct. at 1881–82.
[195] *See id.* at 1930 (Gorsuch, J., concurring).
[196] *See id.* at 1887 n.21 (Alito, J., concurring); *id.* at 1930 (Gorsuch, J., concurring).
[197] *See id.* at 1930 (Gorsuch, J., concurring).
[198] *See id.*

for foster care.[199] The same reasons that make public accommodations laws a poor fit for foster care also demonstrate that foster care systems can never implement non-discrimination policies that are "neutral laws of general application."[200] Foster care systems must intrinsically take account of sensitive and protected categories of persons in a way incompatible with a simple non-discrimination principle.[201] Put another way, in practice, foster care systems intrinsically must discriminate as to the very categories non-discrimination laws forbid. As the Court stated:

> Certification as a foster parent, by contrast, is not readily accessible to the public. It involves a customized and selective assessment that bears little resemblance to staying in a hotel, eating at a restaurant, or riding a bus. The process takes three to six months. Applicants must pass background checks and a medical exam. Foster agencies are required to conduct an intensive home study during which they evaluate, among other things, applicants' "mental and emotional adjustment," "community ties with family, friends, and neighbors," and "[e]xisting family relationships, attitudes and expectations regarding the applicant's own children and parent/child relationships." Such inquiries would raise eyebrows at the local bus station. And agencies understandably approach this sensitive process from different angles. As the City itself explains to prospective foster parents, "[e]ach agency has slightly different requirements, specialties, and training programs." All of this confirms that the one-size-fits-all public accommodations model is a poor match for the foster care system.
>
> The City asks us to adhere to the District Court's contrary determination that CSS qualifies as a public accommodation under the ordinance. The concurrence adopts the City's argument, seeing no incongruity in deeming a private religious foster agency a public accommodation. We respectfully disagree with the view of the City and the concurrence. Although "we ordinarily defer to lower court constructions of state statutes, we do not invariably do so." Deference would be inappropriate here. The District Court did not take into account the uniquely selective nature of the certification process, which must inform the applicability of the ordinance. We agree with CSS's position, which it has maintained from the beginning of this dispute, that its "foster services do not constitute a 'public accommodation' under the City's Fair Practices Ordinance, and therefore it is not bound by that ordinance."[202]

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[199] *Id.* at 1880 (majority opinion).

[200] *See Fulton*, 141 S. Ct. at 1880 ("All of [these reasons] confirm[] that the one-size-fits-all public accommodations model is a poor match for the foster care system.").

[201] *Id.*

[202] *Id.* at 1880–81 (alterations in original) (citations omitted).

The Court's characterizations are accurate. Certifying foster families requires examination of sensitive categories like family structure and family relationships that implicate fundamental rights like the right to marry, the right to procreate, and the right to direct the education and upbringing of one's children.[203] Certifying foster families involves examination of supportive networks for the family that implicate the right to associate.[204] Certifying foster families also involves examination of sensitive categories like disability, health status, medical history, and socio-economic indicators like income.[205] While some of these categories do not receive heightened scrutiny constitutionally, they nonetheless are included in non-discriminatory policies and thus would be relevant to the question of whether such policies are neutral laws of general application.[206] These same sensitive factors are inescapable at the matching stage of foster care as well.[207]

Perhaps one simple example will make this clearer: LGBTQ+ advocates argued in *Fulton* and elsewhere that LGBTQ+ persons or couples can make particularly suitable foster or adoptive parents for LGBTQ+ children.[208] The point is well taken and underscores the need for recruiting LGBTQ+ persons and couples as foster and adoptive parents. However, the point assumes that the government can take account of sexual orientation and/or gender identity at the matching stages of foster care and adoption, as appropriate in individual cases. The non-discrimination policy as to sexual orientation and gender identity give way to the best interests of the child, as foster or adoptive parents are favored or disfavored based on sexual orientation or gender identity in order to best meet the needs of particular children.[209] From a policy viewpoint, this is appropriate; from a constitutional standpoint, this

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[203] CHILD WELFARE INFO. GATEWAY, U.S. DEP'T OF HEALTH & HUM. SERVS., HOME STUDY REQUIREMENTS FOR PROSPECTIVE PARENTS IN DOMESTIC ADOPTION 1–3 (2021) [hereinafter HOME STUDY REQUIREMENTS FOR PROSPECTIVE PARENTS], https://www.childwelfare.gov/pubPDFs/homestudyreqs_adoption.pdf [https://perma.cc/W86S-W7Q5].

[204] *Fulton*, at 1880–81.

[205] *See* HOME STUDY REQUIREMENTS FOR PROSPECTIVE PARENTS, *supra* note 203, at 3–4.

[206] ERWIN CHEMERINSKY, CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES 846–52 (6th ed. 2019).

[207] HOME STUDY REQUIREMENTS FOR PROSPECTIVE PARENTS, *supra* note 203, at 3–4.

[208] Brief of Organizations Serving LGBTQ Youth as Amici Curiae Supporting Respondents at 18, Fulton v. City of Philadelphia, 141 S. Ct. 1868 (2021) (No. 19–123) ("[A]t least some LGBTQ children will be best served by placements with members of the LGBTQ community."). *See generally* Michael Waters, *The Untold Story of Queer Foster Families*, NEW YORKER (Feb. 28, 2021), https://www.newyorker.com/news/us-journal/the-untold-story-of-queer-foster-families [https://perma.cc/F6RU-7WR9].

[209] *See* Brief of Organizations Serving LGBTQ Youth as Amici Curiae, *supra* note 208, at 17–18.

means that any non-discrimination policy must have secular exceptions in the context of foster care and adoption. Once there are secular exceptions, the strong version of the "most-favored" nation approach to *Smith* adopted by the Court in *Tandon* and reaffirmed in *Fulton* would require strict scrutiny for the refusal to provide religious exemptions.[210]

Another example: a female child has been extensively sexually abused by a male parent over a long period of time and requests foster and adoptive placement in a home without an adult or adolescent male. Alternatively, some sexually abused children have learned over-sexualized behaviors which could create issues in placements with other children or adolescents.[211] Thus, in some circumstances, it would be good practice to avoid placing a sexually abused child in homes with certain genders or with other children of certain ages. It would be good practice to honor that request, even though it would involve discriminating against prospective foster and adoptive parents by gender/sex and family structure (no different-sex couples would be considered as placements for this child). Even though there are compelling secular reasons for such discrimination, the necessary discretion to create such exceptions to a non-discrimination policy require strict scrutiny for the refusal to allow religious exemptions under the *Tandon* and *Fulton* cases.[212]

Under international children's rights law, the use of such sensitive categories in making foster care and adoption decisions is a norm rather than an exception reserved for special cases.[213] Hence, the CRC, as noted above ratified in every country except the United States, states as to foster care placements that "due regard shall be paid to the

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[210] *See supra* notes 39–43 and accompanying text.

[211] *See Tips for Parenting the Child Who Has Been Sexually Abused*, ADOPTIVE & FOSTER FAMILY COAL. OF N.Y. 1, 3, http://affcny.org/wp-content/uploads/8_Tips_for_Parenting_the_Child_Who_has_Been_Sexually_Abused.pdf [https://perma.cc/YVS5-TZER] (last visited Oct. 16, 2021) (noting that "[s]exualized behavior toward adults or peers" can be a behavioral sign of child sexual abuse); CHILD WELFARE INFO. GATEWAY, U.S. DEP'T OF HEALTH & HUM. SERVS., PARENTING A CHILD OR YOUTH WHO HAS BEEN SEXUALLY ABUSED: A GUIDE FOR FOSTER AND ADOPTIVE PARENTS 6–8 (2018), https://www.childwelfare.gov/pubPDFs/f_abused.pdf [https://perma.cc/9X7Y-S88E] (discussing difficulties for foster or adoptive families in providing safety for siblings and others where a sexually abused child engages in inappropriate or sexually aggressive behavior); Elizabeth B. Dowdell et al., *Girls in Foster Care: A Vulnerable and High-Risk Group*, 34 AM. J. MATERNAL CHILD/NURSING 172, 172 (2009), https://pubmed.ncbi.nlm.nih.gov/19550260/ [https://perma.cc/29N4-UAQA] (explaining the results of study of girls in foster care who exhibited sexually abusive behavior).

[212] *See supra* notes 34–36 and accompanying text.

[213] *See* G.A. Res. 44/25, *supra* note 5, at art. 20(3); G.A. Res. 64/142, *supra* note 6, at ¶¶ 58, 62.

desirability of continuity in a child's upbringing and to the child's ethnic, religious, cultural and linguistic background."[214] The more detailed United Nations Guidelines for the Alternative Care of Children reiterates this norm within the broader contexts of other factors.[215]

Within the United States, the issue of race and tribal affiliation have resulted in differential approaches which forbid (with certain exceptions) consideration of race while requiring consideration of tribal affiliation; these disparate treatments of race and tribal affiliation permit the consideration of cultural and linguistic background.[216] The attempt to forbid any consideration of race at placement has proven difficult in practice due to potential overlaps with other categories (such as culture) and the commonly held view that sometimes race-matching can be in the best interests of children and can ameliorate race-based harms in the operation of child welfare systems.[217] Overall, it would be impossible to create or sustain a child welfare system serving the best interests of children that did not take account of various non-discrimination categories.

Hence, in practice, there will always be secular exceptions to any non-discrimination policy governing foster care systems. Sometimes those exceptions will be clearly stated in the law; sometimes they will be hidden underneath non-discrimination language that ignores the actual operation of foster care systems.[218] It is irrelevant whether local law purports to include foster care as a public accommodation. It is irrelevant that such exceptions to a non-discrimination policy are justified by compelling reasons, such as the best interests of children, and thus may not be characterized as "discrimination" at all by some. The point is that in foster care, non-discrimination policies co-exist with the

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[214] G.A. Res. 44/25, *supra* note 5, at art. 20(3).

[215] G.A. Res. 64/142, *supra* note 6, at ¶¶ 58, 62.

[216] *Cf.* Howard M. Metzenbaum Multiethnic Placement Act of 1994, Pub. L. No. 103-382, §§ 551–554, 108 Stat. 3518, 4056–57 (codified as amended at 42 U.S.C. § 5115a) (repealed in part) (amended by Small Business Job Protection Act of 1996, Pub. L. No. 104-188, § 1808, 110 Stat. 1755, 1904 (codified at 42 U.S.C. § 1996b (2018))); Indian Child Welfare Act of 1978, Pub. L. No. 95-608, §§ 3, 105 92 Stat. 3069, 3069, 3073 (codified as amended at 25 U.S.C. §§ 1902, 1915(a)–(b) (2018)). *See generally* 45 C.F.R. §§ 1355.34, 1356.22 (2012); ALLON KALISHER ET AL., U.S. DEP'T OF HEALTH & HUM. SERVS., THE MULTIETHNIC PLACEMENT ACT 25 YEARS LATER: KEY INFORMANT INTERVIEWS 8 (2020), https://aspe.hhs.gov/sites/default/files/private/pdf/264526/MEPA-Key-informants-report.pdf [https://perma.cc/A2ZK-SESN].

[217] David J. Herring, *The Multiethnic Placement Act: Threat to Foster Child Safety and Well-Being?*, 41 U. MICH. J. L. REFORM 89, 96–99 (2007); *see* ROBERTS, *supra* note 157, at 167.

[218] Herring, *supra* note 217, at 96, 100–02 (discussing the realities and controversies in the foster care system when there are attempts to limit the use of race in foster care and adoption matching).

practice of regularly treating prospective foster parents differently based on the categories protected by constitutional and statutory non-discrimination norms. Once the government makes secular exceptions to a non-discrimination policy, no matter how justified and necessary, the refusal to provide exceptions for religious actors triggers strict scrutiny under *Smith,* as interpreted in *Tandon* and *Fulton*.[219]

This conclusion is buttressed, not contradicted, by Justice Gorsuch's concurrence in two ways. First, Justice Gorsuch supplies yet another reason that public accommodations laws are not laws of general application: they literally do not apply "generally."[220] Hence, as noted above, Justice Gorsuch states that public accommodations laws apply "only to certain defined entities that qualify as public accommodations while the 'generally applicable law' in *Smith* was 'an across-the-board criminal prohibition' enforceable against anyone."[221] The same is likely to be true in regard to any non-discrimination policy targeted at or created specifically for foster care agencies.

Second, Justice Gorsuch, in noting that public accommodations laws can and sometimes do include foster care systems, cites the statutory inclusion of "colleges and universities" as examples of public accommodations, noting that "these institutions *do* engage in a 'customized and selective assessment' of their clients (students) and employees (faculty)."[222] Justice Gorsuch's point is that the concept of public accommodations can cover institutions using customized and selective assessments and hence that public accommodations laws can apply to foster care systems.[223] However, regardless of whether or not foster care agencies are included as public accommodations, non-discrimination laws applicable to foster care agencies would inherently trigger strict scrutiny under *Smith* because such laws can never be neutral laws of general application. The parallel issue as to colleges and universities would be affirmative action policies. Inclusion of colleges and universities as public accommodations does not change the result that affirmative action policies at public institutions are subject to strict scrutiny under the Equal Protection Clause.[224] Regardless of how benign and

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[219] Fulton v. City of Philadelphia, 141 S. Ct. 1868, 1881 (2021); Tandon v. Newsom, 141 S. Ct. 1294, 1296 (2021).

[220] *See Fulton*, 141 S. Ct. at 1926 (Gorsuch, J., concurring).

[221] *Id.*

[222] *Id.* at 1927.

[223] *See id.*

[224] *See* U.S. CONST. amend. XIV, § 1; City of Richmond v. J.A. Croson Co., 488 U.S. 469, 493–94 (1989); Metro Broad., Inc. v. FCC, 497 U.S. 547, 564–65 (1990) (applying heightened scrutiny to governmental programs implementing race-conscious selection policies designed to assist racial minorities), *overruled by* Adarand Constructors. v. Pena, 515 U.S.

compelling the reason for using race as a category, once the state uses race as a category, strict scrutiny is triggered.[225] The *Smith* test of "neutral laws of general application" works the same way. Once the state makes a secular exception in a non-discrimination policy, no matter how benign or justified the reason, the denial of a religious exemption triggers strict scrutiny.

There are several other reasons why non-discrimination policies applied to foster care systems would trigger strict scrutiny in the context of religious freedom claims. First, it is even clearer that foster care systems use protected classifications such as gender, family structure, disability, and even race at the matching stage.[226] Under *Tandon v. Newsom*, the granting of exceptions at the matching stage would trigger strict scrutiny as to a blanket refusal to consider religious exemptions at the certification stage.[227] If "hair salons, retail stores, personal care services, movie theaters, private suites at sporting events and concerts, and indoor restaurants" are comparable secular activities for at-home religious exercise, under the broad rubric of pandemic restrictions, then all stages of the foster care system should be comparators for purposes of non-discrimination laws.[228] After all, the various stages of recruiting, certifying, and matching foster parents are different steps toward the same end of providing children with foster homes.

Finally, as mentioned in the introduction, as a matter of basic human rights, it is offensive to treat foster care systems as public accommodations or otherwise to treat foster parents as having a "right to foster" or a right to be matched with children. Children are neither goods nor services, but human persons under the law. Access to unrelated children is nothing like access to a bakery, restaurant, theater, or even university. The basic criteria of foster care is the best interests of the child, not the rights or equality interests of adults.[229] This is not to say

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200, 227 (1995) ("[A]ll racial classifications, imposed by whatever federal, state, or local governmental actor, must be analyzed by a reviewing court under strict scrutiny. . . . To the extent that *Metro Broadcasting* is inconsistent with that holding, it is overruled."); Grutter v. Bollinger, 539 U.S. 306, 326 (2003) (explaining that "strict scrutiny [applies] to all racial classifications"); Gratz v. Bollinger, 539 U.S. 244, 270 (2003) (same); Fisher v. Univ. of Tex. at Austin, 136 S. Ct. 2198, 2209–10 (2016) (noting that a public university had a "continuing obligation to satisfy the burden of strict scrutiny" its admissions policy giving preference to racial minorities).

[225] *See Gratz*, 539 U.S. at 270.

[226] *See Fulton*, 141 S. Ct. at 1880.

[227] Tandon v. Newsom, 141 S. Ct. 1294, 1296 (2021) (per curiam).

[228] *See id.* at 1297–98.

[229] CHILD WELFARE INFO. GATEWAY, U.S. DEP'T OF HEALTH & HUM. SERVS., DETERMINING THE BEST INTERESTS OF THE CHILD 1 (2020),

that any form of discrimination against adults in foster care systems is permissible, but it means that all non-discrimination norms will be subject to exceptions based on the best interests of the child—both in individual cases but also as needed to construct a system that generally serves the best interests of children.

III. STRICT SCRUTINY AND THE RIGHTS AND BEST INTERESTS OF CHILDREN AND YOUTH IN THE FOSTER CARE SYSTEM

As Justice Barrett's concurrence pointed out, "all nine Justices agree that the City cannot satisfy strict scrutiny."[230] The Court's application of strict scrutiny was surprisingly sparse.[231] The City invoked three compelling interests, two of which indirectly pertained to children's rights: "maximizing the number of foster parents . . . and ensuring equal treatment of . . . foster children."[232] As to the former, the Court concluded in one sentence, without explanation, that "including CSS in the program seems likely to increase, not reduce, the number of available foster parents."[233] The Court did not address the "equal treatment of . . . foster children" separately from the compelling interest in "equal treatment of prospective foster parents."[234] As to both—but apparently focused mostly on equal treatment of prospective foster parents—the Court noted: "The question, then, is not whether the City has a compelling interest in enforcing its non-discrimination policies generally, but whether it has such an interest in denying an exception to CSS."[235] Having thus framed the question, the Court concluded, without explanation, that "[t]he City offers no compelling reason why it has a particular interest in denying an exception to CSS while making them available to others."[236]

As a matter of precedent for lower courts, the Court's sparse but definitive strict scrutiny analysis should be determinative for most cases, like *Fulton*, involving religious agencies in foster care or adoption systems. Since strict scrutiny would be triggered in such cases even without over-ruling *Employment Division v. Smith*,[237] the

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https://www.childwelfare.gov/pubpdfs/best_interest.pdf [https://perma.cc/DVW4-F44G]; G.A. Res. 44/25, *supra* note 5, at art. 3(1), 21.

[230] *Fulton*, 141 S. Ct. at 1883 (Barrett, J., concurring).

[231] *Id.*

[232] *Id.* at 1881 (majority opinion).

[233] *Id.* at 1882.

[234] *See id.* ("That leaves the interest of the City in the equal treatment of prospective foster parents *and* foster children.") (emphasis added)).

[235] *Id.* at 1881.

[236] *Id*. at 1882.

[237] *See supra* notes 18–20, 49–52 and accompanying text.

conclusion that CSS wins under strict scrutiny would mean that similar religious agencies would also win under strict scrutiny. *Fulton*'s strict scrutiny analysis intrinsically must mean that the stigmatic and dignitary harms to LGBTQ+ foster parents and foster children caused by the government contracting with religious agencies that refuse to certify same-sex married couples are not a sufficient reason to justify excluding such religious agencies.[238] So long as LGBTQ+ individuals and couples have alternative pathways to becoming licensed and matched foster parents, CSS and similarly situated agencies cannot be excluded from their role of certifying foster parents.[239]

Nonetheless, as a matter of children's rights, it is important to give more extensive analysis to the issues posed in a fuller strict scrutiny analysis. Doing so reveals the conflicting benefits and burdens in trying to balance LGBTQ+ rights and equality, not only with religious liberty, but more specifically with the rights and best interests of children.

A. "Maximizing the Number of Foster Parents"

1. Why Is There a Shortage of Foster Parents?

There is broad agreement that there is a shortage of foster parents in the United States and hence in most local foster care systems.[240] In order to understand this shortage, it is helpful to understand the role of a foster parent and the disincentives to fostering.[241]

Foster parents are asked to provide "parental" care to generally traumatized and special needs children temporarily in their own homes by contract with and under the supervision of the state.[242] Foster parents have the duties and tasks of parents without the rights, privacy, and

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[238] *See Fulton*, 141 S. Ct. at 1882.

[239] *Id.*

[240] DOUGLAS E. ABRAMS ET AL., CHILDREN AND THE LAW 453 (7th ed. 2020); John N. DeGarmo, *Foster Parent Retention Revisited*, FOSTER FOCUS MAG., Feb. 2017, https://www.fosterfocusmag.com/articles/foster-parent-retention-revisited [https://perma.cc/3TFU-ZDZV]; JOHN KELLY ET AL., THE CHRON. OF SOC. CHANGE, THE FOSTER CARE HOUSING CRISIS 1 (2017), https://chronicleofsocialchange.org/wp-content/uploads/2017/10/The-Foster-Care-Housing-Crisis-10-31.pdf [https://perma.cc/VJ77-CY3W].

[241] DeGarmo, *supra* note 240; *see infra* notes 246–272 and accompanying text.

[242] *See* Andrea M. Jones & Tracy L. Morris*, Psychological Adjustment of Children in Foster Care: Review and Implications for Best Practice*, 6 J. PUB. CHILD WELFARE 129, 135–139 (2012); Smith v. Org. of Foster Families for Equal. and Reform, 431 U.S. 816, 845 (1977); Sandra Stukes Chipungu & Tricia B. Bent-Goodley, *Meeting the Challenges of Contemporary Foster Care*, 14 FUTURE OF CHILD. 74, 83 (2004).

permanency of actual parents.[243] Foster parents, in fact, are not, statutorily or constitutionally, parents.[244] They are temporary care-providers.[245] Under these circumstances, there are significant disincentives to fostering.

1. The age of the children: 63% of the children are age five or older; 25% are teens (thirteen to nineteen).[246] While there are some very young children, fostering usually is nothing like adopting a baby.[247] Children come into foster care with pre-existing attachments and traumas, and their personalities are already formed to a significant degree.[248]

2. The special needs of the children: the vast majority of children in foster care have a variety of significant special needs in areas of physical and/or mental health.[249] Many have emotional, mental health, educational, cognitive, and behavioral issues that can present severe parenting issues.[250] These issues often directly and detrimentally impact the relationship between the foster child and foster parents.[251] Parenting styles and skills that might work well with children born or adopted from infancy often are inapplicable to older foster care children.[252] Even if the special needs do not negatively impact the relationship, they present serious demands on foster parents.[253]

3. Loss of privacy and control: in order to become a foster parent, it is necessary to pass an intrusive assessment or home-study which includes examination of one's existing personal relationships, parenting, support networks, finances, and health.[254] During placement, the

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[243] *Smith*, 431 U.S. at 845.

[244] *See id.*

[245] *Id.* at 823–24.

[246] AFCARS REPORT, *supra* note 157, at 1.

[247] Carrie Craft, *The Differences Between Foster Care and Adoption*, VERYWELL FAMILY (June 5, 2020), https://www.verywellfamily.com/differences-between-foster-care-and-adoption-26612 [https://perma.cc/NK4X-S8DW].

[248] Peter M. Miller et al., *Developmental Issues for Young Children in Foster Care*, 106 PEDIATRICS 1145, 1145 (2000).

[249] *Id.*; Chipungu & Bent-Goodley, *supra* note 242, at 77.

[250] *See* Chipungu & Bent-Goodley, *supra* note 242, at 79.

[251] Miller et al., *supra* note 248, at 1146.

[252] *See id.* at 1146–47 (explaining that effects of stress and trauma mean that foster care placement organizations and foster parents need to work together to develop parenting plans that account for the foster child's particular needs).

[253] Jones & Morris, *supra* note 242, at 138.

[254] *See generally* Blais v. Hunter, 493 F. Supp. 3d 984, 989–90 (E.D. Wash. 2020); CHILD WELFARE INFO. GATEWAY, U.S. DEP'T OF HEALTH & HUM. SERVS., HOME STUDY REQUIREMENTS FOR PROSPECTIVE FOSTER PARENTS 1 (2018) [hereinafter HOME STUDY REQUIREMENTS], https://www.childwelfare.gov/pubpdfs/homestudyreqs.pdf [https://perma.cc/M3WE-FXHX]; *see also Completing a Home Study*, ADOPTUSKIDS,

family is subject to continual intrusive monitoring by state social workers.[255] Inviting the same agency that removes children from families into continuing contact with your family can be a frightening prospect for families with children already in the home.[256]

4. Lack of support: paradoxically, the lack of privacy is accompanied by a frequent lack of practical support due to the severe limitations of state child welfare agencies. State social workers are generally overwhelmed with large caseloads, poorly paid, and transient.[257] Child welfare systems are often highly dysfunctional: as of 2019, fifteen states were operating under federal court consent decrees with another ten jurisdictions in pending litigation due to systemic failings in their foster care systems.[258] Child welfare systems have been known to lose track of the location of children in care, with one study finding more than 60,000 children listed as missing in America's child welfare system since 2000.[259] Practically, this means that foster parents often do not receive what they need from the state as to support and guidance and assistance when problems arise. The limits of the state system are one reason, of course, that private agencies play a critical role in supporting foster parents.

5. Temporary nature of the relationship: about half of foster children return to their family of origin.[260] About one-quarter of children are eventually adopted with about half of those being adopted by foster parents.[261] Hence, while some foster relationships can transition into adoptions, the vast majority will not.[262] The process of providing for a child over weeks and months and then having the child leave the home

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https://www.adoptuskids.org/adoption-and-foster-care/how-to-adopt-and-foster/getting-approved/home-study [https://perma.cc/A9WE-VUAY] (last visited Oct. 12, 2021).

[255] HOME STUDY REQUIREMENTS, *supra* note 254, at 1.

[256] *See Completing a Home Study*, *supra* note 254; *How Invasive Will My Home Study Process Be,* DATZ FOUND. OF N.C., https://www.ncadopt.com/north-carolina-adoption-home-study/how-invasive-are-home-studies/ [https://perma.cc/AWP4-A2AR] (last visited Nov. 7, 2021).

[257] CHILD WELFARE INFO. GATEWAY, U.S. DEP'T OF HEALTH & HUM. SERVS., CASELOAD AND WORKLOAD MANAGEMENT 1 (2016), https://www.childwelfare.gov/pubpdfs/case_work_management.pdf [https://perma.cc/LGT9-8JXU].

[258] *Can You Share a Summary of Child Welfare Consent Decrees?*, CASEY FAM. PROGRAMS (July 10, 2019), https://www.casey.org/consent-decree-summary/ [https://perma.cc/5298-6GTV].

[259] *See* Rene Denfeld, *The Other Missing Children Scandal: Thousands of Lost American Foster Kids*, WASH. POST. (June 18, 2018), https://www.washingtonpost.com/news/posteverything/wp/2018/06/18/the-other-missing-children-scandal-thousands-of-lost-american-foster-kids/ [https://perma.cc/CM87-BXBJ].

[260] AFCARS REPORT*, supra* note 157, at 3.

[261] *See id.* at 1, 6.

[262] *See id.* at 3.

can be emotionally exhausting and is completely different from the permanent bond expected in parenting by birth or adoption.[263]

6. Complex competing relationships: foster children are still legally the children of their original parents until and unless a termination of parental rights is concluded.[264] As noted above, about half the time the children will return to their original family.[265] Foster children typically have strong attachments back to their family of origin and even to the parents accused of neglect and abuse, regardless of whether or not parental rights have been terminated.[266] The state serves as legal custodian of the child as well.[267] Hence, foster parents are, in practice, often the least significant of those with custodial or parental responsibilities for the children.[268] That is certainly the constitutional picture.[269]

7. Financial costs: the state provides non-taxable monthly subsidy payments to foster parents to reimburse for the costs of providing care (housing, food, clothing, transportation) and also provides health insurance for the children.[270] The subsidies provided are generally viewed as less than the costs incurred by foster parents so that, subject to some possible exceptions, there is more of a financial disincentive than incentive to foster.[271] In addition, many foster care children need a highly structured environment and significant supervision to function well, perhaps more than the typical child, and this time commitment may interfere with time that otherwise might be spent working, which can further impact the finances of a family. Thus, despite the state assistance, in most situations, finances are another disincentive to foster.

8. Mental health: fostering can negatively impact the mental health of foster parents and other members of the foster family, including other children in the home. Fostering brings often severely traumatized

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[263] *See Guest Post: Letting Go When Foster Children Leave*, FOSTER2FOREVER, https://foster2forever.com/2011/05/letting-go.html [https://perma.cc/62NF-7F8B] (last visited Oct. 18, 2021).

[264] *See* Smith v. Org. of Foster Families for Equal. and Reform, 431 U.S. 816, 837 (1977).

[265] *See supra* note 260 and accompanying text.

[266] Lenore M. McWey, Alan Acock & Breanne Porter, *The Impact of Continued Contact with Biological Parents upon the Mental Health of Children in Foster Care*, 32 CHILD. YOUTH SERVS. REV. 1338, 1339 (2010).

[267] *See Smith,* 431 U.S. at 845.

[268] *See id.* at 845–46.

[269] *See id.*

[270] Peeples, *Getting Paid to Be a Foster Parent: State-by-State Monthly Guide*, WE HAVE KIDS, https://wehavekids.com/adoption-fostering/What-does-being-a-foster-parent-really-pay [https://perma.cc/PC4Y-3C78] (July 23, 2020).

[271] *Id.*

children into the home, with that trauma often secondarily absorbed by the foster parents and other children in the home.[272]

2. The Roles of Agencies in Ameliorating the Disincentives to Fostering

Private agencies play key roles in foster care systems in the United States—roles which respond positively to the disincentives to foster.[273] These roles include the following.

a. Building Bridges Between Foster Families and the State

Private agencies provide an important bridge between the state and prospective and existing foster families, which ameliorates the fear of bringing the state into one's home and family life. Agencies that share identities and/or values congruent with the foster family can be effective in recruiting foster parents and can provide reassurance and build trust. This trust can overcome the understandable reluctance to invite the state into one's home and family life.[274]

b. Providing Supportive Services

Given how overwhelmed governmental foster care systems and workers are, supportive services of foster families are often insufficient, which can impact the retention of foster families.[275] The presence of private agencies with the capacity to provide supportive services can be critical. Such supportive services can be important in

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[272] *See* David Conrad, *Secondary Trauma and Foster Parents: Understanding Its Impact and Taking Steps to Protect Them,* MUSKIE SCH. OF PUB. SERV., UNIV. OF S. ME., http://muskie.usm.maine.edu/helpkids/rcpdfs/Sec.Trauma-foster.pdf [https://perma.cc/9252-3RZS] (last visited Oct. 18, 2021; *Resource Parent Self-Care and Secondary Traumatic Stress*, FOSTERING PERSPECTIVES (2015), https://fosteringperspectives.org/fpv19n2/STS.htm [https://perma.cc/37PY-DDNK].

[273] *See* Fulton v. City of Philadelphia*,* 141 S. Ct. 1868, 1925 (Alito, J. concurring) ("States and cities were latecomers to this field, and even today, they typically leave most of the work to private agencies.").

[274] *See* Mary Ellen Cox et al., *Recruitment and Foster Family Service*, 29 J. SOCIO. & SOC. WELFARE 151, 170–71 (2002); NATALIE GOODNOW, HERITAGE FOUND., THE ROLE OF FAITH-BASED AGENCIES IN CHILD WELFARE 1 (2018), https://www.heritage.org/sites/default/files/2018-05/BG3320.pdf [https://perma.cc/WBE2-CQH5]; Michael Howell-Moroney, *On the Effectiveness of Faith-Based Partnerships in Recruitment of Foster and Adoptive Parents*, 19 J. PUB. MGMT. & SOC. POL'Y 168, 169 (2013).

[275] *See* Chipungu & Bent-Goodley, *supra* note 242, at 88; Cox et al., *supra* note 274, at 151 (explaining that a chronic shortage of foster parents is "due in large part to the fact that many certified families quit fostering within first year"); FRED WULCZYN ET AL., CTR. FOR STATE CHILD WELFARE DATA, THE DYNAMICS OF FOSTER HOME RECRUITMENT AND RETENTION 2 (2018) (pointing out how studies indicate "negative interactions with the child welfare agency" as reason for low retention of foster parents).

helping recruit foster families, guiding them through the state processes, and supporting them during placements.[276]

Religious agencies often play these roles of building bridges and providing supportive services.[277] Given the central role that religious faith often plays in the family and home-life of religious persons, religious agencies can reassure co-religionists or persons of similar faith or values that it is safe and workable to bring the state into their home and family life.[278] Without such mediation, many persons of religious faith may choose not to foster, fearing that their faith is incompatible with such a role. Private religious agencies emphasize religious motivations to foster as expressions of religious duties to assist vulnerable persons, especially children, while also reassuring religious families that their faith and home-life will not be attacked or undermined by the state.[279] Recruiting and retaining religiously motivated foster and adoptive parents may be particularly important due to findings indicating that religiously-motivated persons are more likely to be altruistically motivated, foster larger numbers of children, and care for children with special needs.[280]

3. Areas of Agreement: The Need to Include LGBTQ+ Individuals and Couples as Adoptive or Foster Parents

So far as can be determined, all jurisdictions in the United States are officially open to LGBTQ+ persons and married couples adopting or becoming foster parents.[281] Further, CSS and other religious agencies have not argued in relevant litigations that the state should exclude LGBTQ+ persons or married couples as adoptive or foster parents.[282]

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[276] GOODNOW, *supra* note 274, at 1; Howell-Moroney, *supra* note 274, at 168–69.

[277] *Fulton*, 141 S. Ct. at 1882 ("As Philadelphia acknowledges, CSS 'has long been a point of light in the City's foster care system."); Howell-Moroney, *supra* note 274, at 169; GOODNOW, *supra* note 274, at 1–2.

[278] Howell-Moroney, *supra* note 274, at 169; GOODNOW, *supra* note 274, at 1–3.

[279] Howell-Moroney, *supra* note 274, at 173–77; GOODNOW, *supra* note 274, at 2–7.

[280] Michael Howell-Moroney, *The Empirical Ties Between Religious Motivation and Altruism in Foster Parents: Implications for Faith-Based Initiatives in Foster Care and Adoption*, 5 RELIGIONS 720, 733 (2014); Emily Helder & Elisha Marr, *Religiosity and Adoption*, *in* THE ROUTLEDGE HANDBOOK OF ADOPTION 291, 301 (Gretchen Miller Wrobel, et al., eds., 2020).

[281] Mollie Reilly, *Same-Sex Couples Can Now Adopt Children In All 50 States*, HUFFPOST, https://www.huffpost.com/entry/mississippi-same-sex-adoption_n_56fdb1a3e4b083f5c607567f [https://perma.cc/L2DE-JY3N] (Mar. 31, 2016) (citing Campaign for S. Equal. v. Mississippi Dep't of Hum. Servs., 175 F. Supp. 3d 691 (S.D. Miss. 2016)).

[282] *See id*.; *Fulton*, 141 S. Ct. at 1875 ("CSS does not object to certifying gay or lesbian individuals as single foster parents or to placing gay and lesbian children.").

The backdrop of this and similar litigation are official governmental policies of inclusion as to LGBTQ+ persons and couples being adoptive or foster parents.

Of course, such was not always true. The exclusion of LGBTQ+ persons and married couples from fostering or adopting was common in the past.[283] *Obergefell*, extending the right to marry to same-sex couples, was only decided in 2015.[284] Given the past controversies over the inclusion of LGBTQ+ persons and couples as foster or adoptive parents, it is relevant to review why, from child rights and child welfare perspectives, it would be important to have a governmental policy of inclusion. First, given the shortages of foster parents and disincentives to foster, the exclusion of qualified persons as foster parents could be a significant harm to children.[285] Second, given the apparent over-representation of LGBTQ+ children and youth in the foster care system, it is particularly important to have LGBTQ+ persons available as foster parents.[286] This does not mean that LGBTQ+ persons or couples are the only ones qualified to foster LGBTQ+ children and youth, but it does mean that at times they will be particularly qualified and helpful.[287]

Of course, constitutional and statutory rights and anti-discrimination norms are in themselves reasons to include LGBTQ+ persons and couples as prospective foster parents.[288] However, given the focus of this article on children's rights and the understanding that foster care is not a typical form of public accommodation (even if labeled as such),

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[283] *See* Dana Rudolph, *A Very Brief History of LGBTQ Parenting*, FAM. EQUAL. COUNCIL (Oct. 20, 2017), https://www.familyequality.org/2017/10/20/a-very-brief-history-of-lgbtq-parenting/ [https://perma.cc/TS2F-YNHK]; FLA. STAT. ANN. § 63.042(3) (West 2003), *invalidated by* Fla. Dep't of Child. & Fams. v. Adoption of X.X.G., 45 So. 3d 79 (Fla. Dist. Ct. App. 2010).

[284] *See generally* Obergefell v. Hodges, 576 U.S. 644 (2015).

[285] *See* sources cited *supra* notes 240–272 (discussing the shortages of foster parents).

[286] *See* CHILD WELFARE INFO. GATEWAY, U.S. DEP'T OF HEALTH & HUM. SERVS., SUPPORTING LGBTQ+ YOUTH: A GUIDE FOR FOSTER FAMILIES 1 (2021), https://www.childwelfare.gov/pubPDFs/LGBTQyouth.pdf [https://perma.cc/3T65-8KKT] [hereinafter SUPPORTING LGBTQ+ YOUTH]; *Child Welfare*, YOUTH.GOV, https://youth.gov/youth-topics/lgbtq-youth/child-welfare [https://perma.cc/6UQK-AAU7] (last visited Oct. 16, 2021).

[287] *See Child Welfare*, *supra* note 286; *see also* Brief for Organizations Serving LGBTQ Youth, *supra* note 208, at 18 ("[A]t least some LGBTQ children will be best served by placements with members of the LGBTQ community . . . . "); Waters, *supra* note 208.

[288] *See, e.g.*, *Obergefell*, 576 U.S. at 668–69; Pavan v. Smith, 137 S. Ct. 2075, 2076–79 (2017) (holding that married same-sex couples have same right to be named on children's birth certificates as married opposite-sex couples).

this article is focused on the impact on the vulnerable children of the foster care system.[289]

The context of *Fulton* was that the City of Philadelphia had a clear policy of inclusion as to LGBTQ+ persons and married couples as foster parents.[290] To the degree the situation was different, it would present a very different issue in which the litigants would be quite different—presumably with an excluded LGBTQ+ person(s) or couples as plaintiffs and the City and its representatives as defendants.

Hence, the dispute in *Fulton* and like cases occurs in a context of important areas of agreement: the urgent need to expand the number and diversity of foster parents, which requires the inclusion, as foster parents, of all willing and qualified persons, including LGBTQ+ persons.

4. Areas of Disagreement: The Best Means for Increasing the Number and Diversity of Foster Parents

Given the general agreement on ends—the need to increase the number and diversity of foster parents—the real disagreement occurs as to means. In *Fulton*, the City of Philadelphia claimed that denying an exemption to CSS from the City's anti-discrimination norms would increase the number of foster parents.[291] The Supreme Court concluded, to the contrary, that "including CSS in the program seems likely to increase, not reduce, the number of available foster parents."[292] The precise question in *Fulton*, and any like cases, is whether the refusal to grant an exemption to CSS or similarly situated religious agencies from anti-discrimination norms would increase or decrease the number of foster parents.[293] Importantly, the question is not the impact of the anti-discrimination policy on the number of foster parents, but rather the impact of refusing to grant an exemption to that policy.[294]

In evaluating this question, the Supreme Court made the correct inference that the City refusing the exemption would lead to the

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[289] *See* Fulton v. City of Philadelphia, 141 S. Ct. 1868, 1880 (2021) ("Certification as a foster parent, by contrast, is not readily accessible to the public. It involves a customized and selective assessment that bears little resemblance to staying in a hotel, eating at a restaurant, or riding a bus.").

[290] *See id.* at 1875 ("The City later explained that the refusal of CSS to certify same-sex couples violated a non-discrimination provision in its contract with the City as well as the non-discrimination requirements of the citywide Fair Practices Ordinance.").

[291] *Id*. at 1881.

[292] *Id.* at 1882.

[293] *See id.*

[294] *See id.* at 1881 ("The question, then, is not whether the City has a compelling interest in enforcing its non-discrimination policies generally, but whether it has such an interest in denying an exception to CSS.").

exclusion of CSS from its prior role in the foster care system.[295] This is important as some may evaluate this question as though the relevant comparison was between a system in which CSS refers same-sex married couples to other agencies or a system where CSS evaluates and approves same-sex married couples as foster parents.[296] This is not the relevant comparison. Instead, the comparison is between a system that includes CSS, even though they refer same-sex couples to other agencies, and a system that excludes CSS.

Some religious agencies do certify and work with same-sex couples.[297] Faith traditions disagree about the underlying issues regarding marriage and human sexuality, with some religiously approving same-sex marriages and others not doing so.[298] Even among those who do not religiously approve same-sex relationships as an equal form of marriage, there may be disagreement about how to apply teachings on marriage and human sexuality to the foster care and adoption context.

Bethany Children's Services, an evangelical agency, changed their policies under pressure from the City of Philadelphia in order to keep their role in the foster care system.[299] However, CSS has a history in Massachusetts and Illinois of responding to such pressures by removing themselves from foster care and adoption systems rather than complying with demands CSS views as contrary to the Catholic faith.[300] Other similarly situated agencies might indeed do the same thing. Hence, for purposes of *Fulton* and similar disputes, it is necessary to take the religious agency at its word when it says it would withdraw if denied an exemption.

The arguments about the impact of excluding agencies like CSS implicate several different factors. The relevant factors would be as follows:

1. Would current foster parents recruited, certified, or supported through the religious agency remain as foster parents for at least the

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[295] *Fulton*, 141 S. Ct. at 1882.

[296] *See id.* at 1875.

[297] Ruth Graham, *Major Evangelical Adoption Agency Will Now Serve Gay Parents Nationwide,* N.Y. TIMES (Mar. 1, 2021), https://www.nytimes.com/2021/03/01/us/bethany-adoption-agency-lgbtq.html [https://perma.cc/L3R7-YQWM].

[298] *Religious Groups' Official Positions on Same-Sex Marriage*, PEW RSCH. CTR. (Dec. 7, 2012), https://www.pewforum.org/2012/12/07/religious-groups-official-positions-on-same-sex-marriage/ [https://perma.cc/D6KN-QPQR].

[299] Graham, *supra* note 297.

[300] *See* GOODNOW, *supra* note 274.; Steven Roach, Exec. Dir. of Cath. Charities Diocese of Springfield, Ill., Testimony in Support of Protecting Faith Based Adopting Providers (Mar. 20, 2018) [hereinafter *Testimony of Steven Roach*], http://kslegislature.org/li_2018/b2017_18/committees/ctte_s_fed_st_1/documents/testimony/20180320_18.pdf [https://perma.cc/4DKJ-X8RJ].

same amount of time if their agency were excluded under such circumstances?

2. Would those who shared the religious identity and/or view of marriage of CSS be less inclined to become foster parents in the future if CSS were excluded?

3. Would current or prospective LGBTQ+ persons or couples be less likely to participate or continue participating if CSS were granted an exemption from anti-discrimination norms?

4. What impact would the loss of expertise of a long-standing agency like CSS be, as to both the quantity of foster parents and also the quality of recruitment and supportive services for foster parents?

The difficulties with such determinations are numerous. First, research on past situations where such CSS or other agencies discontinued involvement for similar reasons cannot provide a clear answer because there are always going to be multiple factors impacting the number of foster parents in the system at any given time. Therefore, there are important obstacles to attributing cause and effect relationships between the exclusion or inclusion of religious agencies as a factor and any statistical measures regarding the foster care system. Attributing cause and effect is particularly difficult because child protection and foster care systems are chronically in crisis and face shortages. Hence, there is not really a stable baseline to make comparisons. In addition, different interpretations may always be given to changes in the numbers that do occur. These problems are compounded and illustrated by the problems of result-oriented research bias, as illustrated in the next section.

Second, research bias is a notable factor. Research bias presumably exists on both sides of the debate and is another way in which the foster care and adoption spaces are held hostage to the broader, high-profile conflicts between religious liberty and LGBTQ+ rights and equality. Some who contribute in this space are primarily partisans in those debates about adult conflicts whose work in the child rights, adoption, or foster care space originates with conflicts like *Fulton*. Even those with long histories of expertise on foster care, adoption, or children's rights are likely to be influenced in this context with their own deeply held views about the proper balance between religious liberty and LGBTQ+ rights and equality.

For example, Professor Netta Barak-Corren and Professor Nelson Tebbe published a short essay online about a week before oral argument in *Fulton* that discussed the "preliminary" results from their incomplete and ongoing research on the impact of religious agencies

closing in various cities.[301] Both professors have been active on the issue of adult conflicts between religious liberty and LGBTQ+ rights and equality, as to cases such as *Masterpiece*, with clear indications of favoring the LGBTQ+ rights and equality side of such conflicts.[302] The purpose of the rush to post their preliminary results before completing their studies and analysis was transparently to influence the course of the *Fulton* litigation. Indeed, the essay concluded, in larger type than most of the essay, as follows:

> In sum, we uncovered evidence that children were not harmed when one of the largest placement agencies in Boston terminated its placement business rather than comply with civil rights protections for LGBTQ couples. Justices of the Supreme Court deciding the Philadelphia case, like other judges and legislators considering religious exemptions for child placement agencies, should not rely on this assumption. In constitutional law as elsewhere, arguments about outcomes should rest on actual data.[303]

The fine print of the essay revealed that the author's strongly stated conclusion that "children were not harmed" was not supported by their data.[304] First, while the large-print states a definite conclusion—"children were not harmed"—the fine-print text more tentatively says "the closing . . . may not have had a negative impact. . . ."[305] Second, a part of the conclusion was based on interviewing two former CSS workers from Massachusetts who opposed the CSS policy—an

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[301] Netta Barak-Corren & Nelson Tebbe, *Does Harm Result When Religious Placement Agencies Close Their Doors? New Empirical Evidence from the Case of Boston Catholic Charities,* BALKINIZATION (Oct. 27, 2020) [hereinafter *Does Harm Result?*], https://balkin.blogspot.com/2020/10/does-harm-result-when-religious.html [https://perma.cc/9EU6-FP3L].

[302] *See* Nelson Tebbe, *Religion and Marriage Equality Statutes,* 9 HARV. L. & POL'Y REV. 25 (2015); Nelson Tebbe & Larry Sager, *The Supreme Court's Upside-Down Decision In* Masterpiece, TAKE CARE, https://takecareblog.com/blog/the-supreme-court-s-upside-down-decision-in-masterpiece [https://perma.cc/8WJU-WUHK] (last visited Apr. 4, 2022); Netta Barak-Corren, *How One Supreme Court Decision Increased Discrimination Against LGBTQ Couples*, THE ATLANTIC, https://www.theatlantic.com/ideas/archive/2021/02/masterpiece-cakeshop-lgbtq-discrimination/617514/ [https://perma.cc/52NV-JV4H] (Feb. 8, 2021, 11:15 AM) ("What were the real-world consequences of *Masterpiece*? In short, the decision seems to have exposed same-sex couples to heightened risk of discrimination in the organization of their weddings."). *See generally* Netta Barak-Corren, *A License to Discriminate? The Market Response to* Masterpiece Cakeshop, BAR-ILAN UNIV. FAC. OF L. (2020), https://law.biu.ac.il/sites/law/files/shared/Masterpiece.pdf [https://perma.cc/DNN6-39GX] (discussing the theory of religious objection and its potential effects on public accommodations).

[303] *Does Harm Result*, *supra* note 301.

[304] *Id.*

[305] *Id.*

interesting source, but hardly bias free and definitive.[306] As to statistical data, the authors highlighted just a few data points. For example, the authors noted that the number of "days in care" (i.e., the total number of days a foster child spends in a foster home) "slightly decreases" after the agency was shut down —purportedly a positive outcome.[307] However, this "slight" change is inherently ambiguous in its connection to closing a religious agency. If the change is viewed positively, that positive change could be caused by changes unconnected to private agencies. It is, after all, the government, not the private agencies, that are responsible to push cases through the legal and bureaucratic processes faster so that children attain permanency goals—hence, the linkage to the work of private agencies is secondary. Indeed, this data point could even be negative rather than positive: the number of "days in care" could drop because of a shortage of foster care parents to provide such care or because children are being inappropriately returned to abusive and neglectful homes. Telling the Supreme Court Justices that this constitutes convincing evidence of a lack of harm to children from the closing of a private religious agency is advocacy rather than social science. Advocacy is fine but cloaking it in the guise of "evidence" and social science data is an inappropriate attempt to cloak conclusory, ideologically-driven reasoning with the prestige of objective social science data.

The authors add this caveat: "None of this is to say that things could not turn out differently in another context where a transition is managed less well."[308] This is a significant admission in a context where child welfare systems notoriously are not managed well.[309] The failures of state child welfare systems are systemic, chronic, and notorious—approximately half of the states either have agreed to operate under a federal court consent decree or are currently in litigation over whether their systems should operate under such a decree due to chronic mismanagement, and an estimated 60,000 children listed as missing from America's foster care systems.[310] Professor Barak-Corren and Professor Tebbe describe a scenario in Boston in which many CSS caseworkers are re-employed by a replacement agency and working literally in the same physical office and managing the same cases.[311]

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[306] *See id.*

[307] *Id.*

[308] *Id.*

[309] *See supra* notes 257–259 and accompanying text; *infra* note 310 and accompanying text.

[310] *See Can You Share A Summary of Child Welfare Consent Decrees?*, *supra* note 258; Denfeld, *supra* note 259; *see also* ABRAMS ET AL., *supra* note 240, at 440.

[311] *Does Harm Result?*, *supra* note 301.

There is no indication that such occurred in Philadelphia, Illinois, or elsewhere.[312]

Other data points relied on by Professor Netta Barak-Corren and Professor Nelson Tebbe are similarly ambiguous and pertain only to Massachusetts: the rates of adoptions, the number of children who spend prolonged periods of time in foster care, and "the length of time clinically disabled children wait for placement."[313] Each of these data points have the same difficulties. Fundamentally, since the government brings termination of parental rights and adoption petitions, changes on the government side, rather than the private agency side, could be primary drivers of such data. Given that the federal government increased financial incentives to states to place foster children for adoption in 2003 and thereafter, adoption statistics in particular could be an indication of states over time responding to these significant financial incentives from the federal government.[314]

As any good researcher knows, correlation does not equal causation—and it particularly does not when there is not a clear chain of causation. If these are the best data points Professor Netta Barak-Corren and Professor Nelson Tebbe could find for demonstrating a lack of harm to children from eliminating CSS in Boston, the evidence is weak indeed. It seems fair to assume that they have picked through the data looking for the best evidence to prove their predetermined point—and rushed to print with incomplete data in order to influence the Supreme Court in *Fulton*.[315] Again, this is more advocacy than social science.

On the other side of the equation, religious liberty proponents have pointed to data from Illinois' decision in 2011 to end its partnership with CSS due to similar LGBTQ+ equality issues.[316] Illinois subsequently lost 1,547 licensed, non-relative foster homes between 2012 and 2017—more than any other state reporting data.[317] In this instance, the data itself comes from sources unrelated to the conflicts between religious liberty and LGBTQ+ claims, and thus as data is presumably free from bias as related to these issues. As a data point, it seems far more relevant than those noted by Professor Netta Barak-Corren and Professor Nelson Tebbe as to Boston. The numbers of non-relative foster homes pertain directly to the exact state interest claimed by the

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[312] *Id.*

[313] *Id.*

[314] *See* Sacha Coupet, *Swimming Upstream Against the Great Adoption Tide: Making the Case for "Impermanence"*, 34 CAP. U. L. REV. 405, 408 (2005); Adoption Promotion Act of 2003, Pub. L. No. 108-145, 117 Stat. 1879 (codified at 42 U.S.C. § 673b (2018)).

[315] *Does Harm Result?*, *supra* note 301 (published on October 27, 2020).

[316] *Testimony of Steven Roach*, *supra* note 300.

[317] *See* KELLY ET AL., *supra* note 240, at 13–14.

City of Philadelphia ("maximizing the number of foster parents") and pertains directly to the specific conclusion of the Supreme Court: "including CSS in the program seems likely to increase, not reduce, the number of available foster parents."[318]

While this single data point is relevant evidence that removal of CSS from the foster care system in Illinois caused the harm of reducing the numbers of available foster parents, it is not in itself definitive. In general, one data point on such a complex question of causation, however suggestive, cannot be definitive because there are always multiple factors that contribute to that data point and because a single data point can often be interpreted either negatively or positively. Again, correlation is not causation—and definitive statistical proof of causation in the complex real world of strained foster care systems will usually be lacking.

5. Informed Common Sense and Legal Implications

The prior section argued that statistical data most likely will not be definitive as to whether removing religious agencies like CSS from the foster care system harms children. How, then, should such questions be determined?

The first answer is that of informed common sense. Keeping in view what is known about the foster care system in the United States, what is the most likely result of removing private agencies that are acknowledged to have performed well over a significant period of time?

We know that to function properly, child protection systems require the participation of large numbers of foster parents willing to temporarily care for children.[319] We know that alternatives to foster homes, such as group homes, congregate care, or institutions, are in most cases inferior choices for children and can be harmful.[320] We know that there is a shortage of foster homes and foster parents.[321] We know many of the disincentives to becoming foster parents.[322] We know of the role of private agencies, and especially religious private agencies, in overcoming those disincentives and motivating people of

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[318] Fulton v. City of Philadelphia, 141 S. Ct. 1868, 1881–82 (2021).

[319] *See* KELLY ET AL., *supra* note 240, at 2.

[320] *See* G.A. Res. 64/142, *supra* note 6, at 2, 6; *What are the outcomes for youth placed in congregate care settings?;* CASEY FAMILY PROGRAMS (Feb. 5, 2018), https://www.casey.org/what-are-the-outcomes-for-youth-placed-in-congregate-care-settings/ [https://perma.cc/4LZQ-9UWS].

[321] *See* KELLY ET AL., *supra* note 240, at 1.

[322] *See supra* notes 240–272 and accompanying text.

similar identity or values to become foster parents.[323] We know that agencies like Catholic Social Services have decades of experience and expertise in positively contributing to the foster care system, which would be lost to the system if they were excluded.[324] We know that the public child welfare systems in the United States are chronically in crisis, overburdened, and often staffed by poorly paid, overwhelmed and highly transient workers—making the role of private agencies even more critical.[325] We know that the children served by the foster care system are often traumatized by both abuse or neglect and their removal from their families, vulnerable due to the deficits in their home-life that led them into the foster care system, and at the mercy of the overwhelmed foster care system that has taken them into care.[326]

Under these circumstances, informed common sense suggests that removal of experienced and competent private agencies is likely to harm children. Harms are likely to occur in the short term due to disruptions which in many instances may not be handled well by systems that are already struggling to meet their obligations. In the long term, the absence of experienced and competent agencies in itself would be a harm. In the short and long term, there will be fewer available foster parents than otherwise would have been available.[327]

This kind of informed common sense in itself is adequate to support the Supreme Court's conclusion that "including CSS in the program seems likely to increase, not reduce, the number of available foster parents."[328] This kind of informed common sense is also far more

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[323] *See supra* notes 273–280 and accompanying text.

[324] *See* Fulton v. City of Philadelphia, 141 S.Ct. 1868, 1882 (2021) ("As Philadelphia acknowledges, CSS has 'long been a point of light in the City's foster-care system.'").

[325] *See, e.g., Can You Share A Summary of Child Welfare Consent Decrees?*, *supra* note 258; Denfeld, *supra* note 259; *see also* ABRAMS ET AL., *supra* note 240, at 440; *Child Welfare Reform: Michelle H. Class Action Lawsuit*, S.C. DEP'T OF SOC. SERVS., https://dss.sc.gov/child-welfare-transformation/ [https://perma.cc/B6WL-XV3P] (last visited Oct. 19, 2021).

[326] *See supra* notes 242–272 and accompanying text; *see also*, *Facts for Families: Foster Care,* AM. ACAD. CHILD & ADOLESCENT PSYCHIATRY, https://www.aacap.org/AACAP/Families_and_Youth/Facts_for_Families/FFF-Guide/Foster-Care-064.aspx [https://perma.cc/PG79-DKMX].

[327] *See* Dwyer, *supra* note 14 (As Professor Dwyer indicates: "After a quarter-century immersed in child welfare law and policy, I have no hesitation siding with Catholic Social Services. I am myself neither religious nor conservative. I strongly support social equality for sexual minorities and same-sex marriage. But my professional focus is on the interests and rights of children. . . . There is no evidence CSS's policy has adversely affected anyone. Yet there is ample evidence CSS has greatly helped an enormous number of children. Intuitively, one has to assume its departure will diminish the quantity of available high-quality foster homes in Philadelphia . . . .").

[328] Fulton v. City of Philadelphia, 141 S. Ct. 1868, 1881–82 (2021).

persuasive than attempts to examine statistical information about foster care systems before and after removal of an agency, given the inherent methodological difficulties in attributing causation to statistical correlations in such a complex, real world environment as state foster care systems. Certainly, this kind of informed common sense is far more persuasive than advocates cherry picking data points to support a predetermined result.

6. Comparative Stigmatic Harm and Actual Exclusion

As persuasive as this informed common sense may be, legal analysis provides an even clearer way of determining the long-term implications of removing agencies like CSS from the foster care system. In order to understand why, it is helpful to remember the conflicting arguments as to whether allowing CSS an exemption would increase or decrease the numbers of persons willing to serve as foster parents. On the one hand, LGBTQ+ proponents can argue that the government working with private religious agencies that discriminate against LGBTQ+ persons would discourage the participation of LGBTQ+ persons and allies from serving as foster parents. On the other hand, religious liberty proponents can argue that the exclusion of CSS or similar religious agencies would lead co-religionists and those of similar values to decide not to participate as foster parents.

Both of these arguments are offense or stigmatic harm arguments pertaining to adults, and as such, win through demonstrating a greater degree of group offense or stigmatic harm. Each side wins by arguing that a group of people for whom they advocate would be more inclined to be offended to the point of withdrawing from participation, even though the system as a whole welcomes them. Assuming prospective or current foster parents really are welcome by the government to participate, and assuming there really are pathways for them to participate, this argument comes down to who is more likely to be offended or traumatized to the point of not being willing to participate. Both arguments can be countered by pointing out that each group should value the good of helping vulnerable children more than they value their own sense of offense.

But what if it turned out that one group really did face a future of exclusion and that they were not truly welcome as foster parents? This is addressed in the next section, on the issue of providing proper care for LGBTQ+ children and youth. This section demonstrates that at least one state and some LGBTQ+ advocates have already sought to exclude religious persons from being licensed or serving as foster or adoptive parents *of any child* due to their views of LGBTQ+ issues, apart from a best interests determination as to placement of a particular

child. This suggests that if excluding agencies like CSS had been constitutionally accepted as a national norm, the next logical step would have been to systemically exclude persons with similar religious views as CSS from becoming foster parents. Such an exclusion would radically reduce the numbers of available foster and adoptive homes.

IV. THE GOVERNMENTAL INTEREST IN ENSURING EQUAL TREATMENT FOR LGBTQ+ CHILDREN AND YOUTH

In *Fulton*, the City relied on the compelling interest of "ensuring equal treatment of prospective foster parents and foster children."[329] The Court did not address the equal treatment of foster children separately from the compelling interest in equal treatment of prospective foster parents.[330] As to both—but apparently focused mostly on equal treatment of prospective foster parents—the Court noted: "The question, then, is not whether the City has a compelling interest in enforcing its non-discrimination policies generally, but whether it has such an interest in denying an exception to CSS."[331] Having thus framed the question, the Court concluded, without explanation, that "[t]he City offers no compelling reason why it has a particular interest in denying an exception to CSS while making them available to others."[332]

The brief and conclusory nature of the Court's treatment of the "equal treatment of . . . foster children" directly is unfortunate.[333] It can, perhaps, be explained by the posture of the case. It may have been unclear to the Court what was meant by denying equal treatment of foster children in a case about how CSS treated prospective foster parents. There was no claim that CSS refused to serve LGBTQ+ children or youth.[334] The lower courts never addressed the question because they held inapplicable the kind of strict scrutiny the Supreme Court ultimately applied.[335] The briefs and opinions concentrated on the questions of whether the City had acted according to a neutral law of general

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[329] *Id.* at 1881.

[330] *Id.* at 1882 ("That leaves the interest of the City in the equal treatment of prospective foster parents *and* foster children.") (emphasis added)).

[331] *Id.* at 1881.

[332] *Id.* at 1882.

[333] *See id.*

[334] *See Fulton*, 141 S. Ct. at 1876 ("The City later explained that the refusal of CSS to certify same-sex *couples* violated a non-discrimination provision in its contract with the City as well as the non-discrimination requirements of the citywide Fair Practices Ordinance.") (emphasis added)); *Id.* at 1875 ("CSS does not object . . . to placing gay and lesbian children.").

[335] *See* Fulton v. City of Philadelphia, 320 F. Supp. 3d 661, 690 (E.D. Pa. 2018); Fulton v. City of Philadelphia 922 F.3d 140, 164 (3d Cir. 2019).

application and whether *Employment Division v. Smith* should be overruled.[336]

Under these circumstances, the claim of discrimination against LGBTQ+ children and youth in *Fulton* involves at least three possible claims.

First, there could be a claim that an agency that does not fully accept same-sex marriage cannot properly serve LGBTQ+ children and youth and implicitly discriminates against them. The City, however, was not in a position to make such a claim because they argued that CSS would have been permitted to continue participating if it had been willing to certify same-sex married couples even though the agency adhered to Roman Catholic teachings that marriage by definition was only between a man and a woman.[337] Indeed, the City argued that CSS was mistaken in its view that certifying same-sex married couples amounted to an endorsement of those relationships and thus argued that there was no burden on CSS's religious view of marriage.[338] Further, the City noted in its own response brief that "[t]o this day, DHS continues to contract with CSS to provide a number of services to children in foster care, including managing group homes and directly providing social services to foster children."[339] The City allowed CSS to work directly with foster children even after excluding CSS due to its refusal to certify same-sex married couples as foster parents.[340] The City maintained that CSS could retain its religious view that same-sex marriage is not truly marriage and still retain its role in the foster care system.[341]

Of course, the City's inability to make this claim does not mean it could not be made in the future. A variant of that question regarding the views on LGBTQ+ topics necessary to adequately affirm LGBTQ+ children and youth in the role of foster parents is discussed below.[342]

Second, the claim of discrimination against LGBTQ+ children and youth could be that allowing CSS to exclude same-sex married couples reduced the availability of suitable foster parents for such children and youth. This claim failed, as the Court accepted—indeed, all nine Justices accepted—that allowing an exemption for CSS and like agencies

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[336] *See supra* notes 15–30 and accompanying text; *see* Fulton v. City of Philadelphia, Pennsylvania, SCOTUSBLOG, https://www.scotusblog.com/case-files/cases/fulton-v-city-of-philadelphia-pennsylvania/ [https://perma.cc/5PHP-WKQD] (last visited Oct. 25, 2021) (collecting briefs from *Fulton*).

[337] *Fulton*, 141 S. Ct. at 1875–76.

[338] *Id.* at 1876.

[339] Brief for City Respondents, *supra* note 21, at 2.

[340] *Id.*

[341] *Id.* at 44–45.

[342] *See infra* note 348 and accompanying text.

would not prevent same-sex married couples from becoming foster parents given the City's non-discrimination policies, the existence of numerous agencies willing to work with same-sex married couples, and CSS's willingness to refer such couples to other agencies.[343] As noted above, the Court concluded that "including CSS in the program seems likely to increase, not reduce, the number of available foster parents."[344]

Third, accommodating an agency that will not certify same-sex married couples as foster parents could be perceived as sending a message of stigmatization and discrimination to LGBTQ+ children and youth. This would be a variant of the argument that allowing the exemption to CSS would discourage LGBTQ+ persons and couples from becoming foster parents, even if the system allows them to, due to the offense involved. This kind of argument in the context of LGBTQ+ children and youth is somewhat more indirect but at the same time is more sympathetic given the great vulnerability of children served in the foster care system. An amicus brief on behalf of numerous organizations that serve LGBTQ+ children made this argument.[345] The Court's unanimous holding applying strict scrutiny implicitly is a rejection of the view that such stigmatic harms, whether against foster parents or foster children, are sufficient to meet strict scrutiny as to whether religious agencies like CSS should be accommodated.[346] Put another way, the Court, by 9-0, held that such stigmatic and offense harms cannot justify refusing to accommodate religious agencies once strict scrutiny is triggered.[347]

V. WHAT DO LGBTQ+ CHILDREN AND YOUTH REQUIRE FOR SAFE AND APPROPRIATE FOSTER CARE?

Apart from the limitations of the *Fulton* litigation, it should be asked what LGBTQ+ children and youth need from the foster care system, in order to receive appropriate and safe care. A number of documents from the federal government, child welfare groups, and LGBTQ+ rights organizations have addressed this question in detail.[348]

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[343] *Fulton*, 141 S. Ct. at 1881–82.

[344] *Id.*

[345] Brief of Organizations Serving LGBTQ Youth as Amici Curiae, *supra* note 208, at 10–11, 14–16.

[346] *Fulton*, 141 S. Ct. at 1881–82.

[347] *Id.*

[348] *See, e.g.*, SUPPORTING LGBTQ+ YOUTH, *supra* note 286, at 6–7; *What Foster Parents Can Do to Affirm Youth Who Are a Part of the LGBTQ+ Community*, CO4KIDS (June 18, 2020), https://co4kids.org/community/what-foster-parents-can-do-affirm-youth-who-are-part-lgbtq-community [https://perma.cc/6RWE-ZQNZ]; CHILD WELFARE LEAGUE OF AM.,

The question is how these needs intersect with the inclusion of agencies and foster parents who have religious or other views of LGBTQ+ issues that are less than completely "affirming."

Examination of this literature and accompanying case law reveals a contradiction and dilemma. On the one hand, LGBTQ+ rights advocates have, in the context of cases like *Fulton*, argued that excluding CSS would not cause any significant loss of prospective or existing foster parents from the foster care system.[349] The foster parents previously served by CSS or similar agencies, it has been argued, would continue with the help of other agencies. The foster care system would welcome co-religionists of such religious agencies, and they would choose to continue their involvement.[350]

However, the writings and actions of some, but not all, LGBTQ+ rights proponents have suggested a contrary view that those who share the religious views of CSS or similar agencies in fact are not fit to be foster parents—indeed of any child.[351] According to this viewpoint, those who cannot fully affirm LGBTQ+ children and youth, as evaluated by a series of questions on a variety of hypothetical LGBTQ+ topics, are not fit to be licensed as foster parents and are unsuitable as foster parents for any child.[352] Further, this viewpoint was implemented when the State of Washington evaluated prospective foster parents according to a series of questions about various LGBTQ+ issues and excluded prospective foster parents if they gave the non-affirming answers to these questions.[353] This led to the significant case of *Blais v. Hunter*.[354]

A. Blais v. Hunter

In *Blais v. Hunter*, prospective foster parents James and Gail Blais were denied a foster care license because they gave unsatisfactory answers to the following sets of questions, propounded at different parts

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RECOMMENDED PRACTICES 9–16 (2012), https://www.childwelfare.gov/pubPDFs/f_profbulletin.pdf [https://perma.cc/J96H-DX9K]; *Getting Down to Basics*, LAMBDA LEGAL (July 31, 2014), https://www.lambdalegal.org/publications/getting-down-to-basics [https://perma.cc/7TEH-6WT4] (collecting multiple resources).

[349] *See Fulton*, 141 S. Ct. at 1881–82.

[350] *See supra* notes 277–280 and accompanying text.

[351] Stephen Vider & David S. Byers, Opinion, *A Supreme Court Case Poses a Threat to L.G.B.T.Q. Foster Kids*, N.Y. TIMES (June 5, 2021), https://www.nytimes.com/2021/06/05/opinion/Supreme-Court-LGBTQ-foster.html [https://perma.cc/448P-FTJB].

[352] *See* discussion *infra* Section V.A.

[353] *See* discussion *infra* Section V.A.

[354] Blais v. Hunter, 493 F. Supp. 3d 984, 990 (E.D. Wash. 2020).

of the process.[355] "H.V." in the questions is their great-granddaughter, who, being an infant, had no known sexual orientation or gender identity beyond her birth assignment as a girl.[356] The first set of questions were these:

> How would we react if H.V. was a lesbian?
>
> Would we allow H.V. to have a girl spend the night at our home as H.V.'s romantic partner?
>
> If at 15 years old, H.V. wanted to undergo hormone therapy to change her sexual appearance, would we support that decision and transport her for those treatments?
>
> If as a teenager, H.V. wanted to dress like a boy and be called by a boy's name, would we accept her decision and allow her to act in that manner?[357]

James and Gail Blais, Seventh-Day Adventist Christians, responded as follows, as recounted by the district court:

> The Blaises informed Sager that their Christian faith obliges them to love and support all people. They conveyed that this tenet especially applies to children who may feel isolated or uncomfortable. As for the specific questions on possible hormone therapy, they "responded that although we could not support such treatments based on our sincerely-held religious convictions, we absolutely would be loving and supportive of H.V." They "also indicated that, in the unlikely event H.V. may develop gender dysphoria (or any other medical condition) as a teenager, we would provide her with loving, medically and therapeutically appropriate care that is consistent with both then-accepted medical principles and our beliefs as Seventh-day Adventists and Christians."[358]

Patrick Sager, the State's foster care licensor, was "alarmed" by these answers.[359] Sager followed up with further questions during a visit with the Blaises, which included the following questions:

> If H.V. had a lesbian girlfriend, would we be willing to have her visit our home and possibly travel with us?
>
> Would we find it acceptable if H.V. dressed like a boy?
>
> Would we find it acceptable if H.V. wanted to be called by a boy's name?
>
> If at age 14, a doctor ordered H.V. to undergo hormone therapy to change her sexual appearance, would we comply with that order?

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[355] *Id.* at 989–91.
[356] *Id.* at 989–90.
[357] *Id.* at 990.
[358] *Id.* (internal citations omitted).
[359] *Id.*

> If at age 14, H.V. said that if we did not agree with her having hormone therapy she would leave our home and run away, how would we respond?[360]

Sager once again was not satisfied with the response of the Blaises and suggested they abandon their request to become foster parents of their infant great-granddaughter.[361] Several days later, Sager and the Department's LGBTQ+ lead, Carissa Stone, "'discussed Policy 6900, . . . [the Department's] policy on how [Department] staff will make sure children who identify as LGBTQ+ have safe and affirming care.'"[362] The Department at that point refused to approve the Blaises' application on these grounds.[363] Ultimately, the Department formally denied the Blaise's application for a foster care license in a letter ruling, which stated in part:

> Despite the Department's multiple efforts to educate the Blaise's [sic] about the risks to the safety of foster children who identify as LGBTQ+ presented by family rejection and a lack of family support, they have been unwilling to agree to provide safe and affirming support to a child who is or may identify as LGBTQ+.[364]

The Blaises eventually sued in federal district court and won a preliminary injunction on religious liberty grounds.[365] What is significant about the case, for our purposes, is that it represents government officials taking the position that all foster care applicants must have approved views on LGBTQ+ issues in order to foster any child—even an infant who is their own great grand-daughter.[366] It is also significant that the State of Washington litigated the issue, and hence defended, as state policy, the exclusion of Jim and Gail Blais as foster parents of an infant child with no known LGBTQ+ identity.

The litigation position articulated by the State and by LGBTQ+ advocates in an amicus brief expressed the following points:

1. It is the obligation of the state to provide a "safe" environment for children who either identify as LGBTQ+ "or may identify as such in the future."[367]

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[360] *Blais*, 493 F. Supp. 3d at 991.

[361] *Id.*

[362] *Id.*

[363] *See id.* (Because the Blaises remained unchanged in their beliefs, "Sager and Stone advised them that they had reached an 'impasse'").

[364] *Id.* at 991–92.

[365] *Id.* at 1001–02.

[366] *See id.* at 991–92.

[367] Declaration of Carissa Stone at 4, Blais v. Hunter, 493 F. Supp. 3d 984 (E.D. Wash. 2020) (No. 2:20-00187).

2. Children may begin "to explore their gender identity as early as three years old."[368] Indeed, "Gender identity is commonly expressed at an even earlier age, most often by age 3."[369]

3. Licensing a foster parent is approval of "that person to care for *any* child[.]"[370]

4. In addition, it would be disruptive and harmful to a child if foster parents proved unable in the future to provide for the needs of child and had to move placements.[371]

5. "LGBTQ+ children are overrepresented in foster care nationally," comprising perhaps 20–25% of children in foster care.[372]

6. Many LGBTQ+ children in the foster care system have experienced homelessness, family rejection, discrimination, and abuse due to their LGBTQ+ identity, and particularly should have their LGBTQ+ identities protected and affirmed while in care.[373]

7. Many LGBTQ+ children experience the following, as summarized by one amici:

> Many foster youth . . . encounter lack of support and outright mistreatment from their foster families as a result of their LGBTQ+ identities . . . such as physical abuse, sexual abuse, public humiliation, ejection from the home, and other forms of direct hostility toward their LGBTQ+ identity. Further, even foster parents who do not commit such acts can create an environment where LGBTQ+ foster youth feel unsupported and not respected. . . . Even people that consider themselves loving and well-meaning can fail to provide a supportive and affirming environment for LGBTQ+ youth and can bring about negative outcomes.[374]

8. Due to the above, the alternatives of addressing issues related to LGBTQ+ identity at a "later, more appropriate age" (other than infancy), at placement, or when issues arise, are inadequate.[375] It is not enough to ensure that foster parents of identified LGBTQ+ children and youth are supportive and affirmative of those identities.[376] Rather, all

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[368] *Id.*

[369] Brief of the Center for Children & Youth Justice et al. as Amici Curiae Supporting Defendant at 14, Blais v. Hunter, 493 F. Supp. 3d 984 (E.D. Wash. 2020) (No. 2:20-00187) (footnote omitted).

[370] Declaration of Pamela McKeown at 7, *Blais*, 493 F. Supp. 3d 984 (No. 2:20-00187).

[371] Declaration of Maya Brown at 7, *Blais*, 493 F. Supp. 3d 984 (No. 2:20-00187).

[372] Declaration of Pamela McKeown, *supra* note 370, at 11.

[373] Brief of the Center for Children & Youth Justice et al. as Amici Curiae, *supra* note 369, at 3.

[374] *Id.* at 12.

[375] *Id.* at 16.

[376] *See id.*

foster parents of any child must have the appropriate supportive and affirmative views regarding LGBTQ+ children and youth.[377]

The culmination of this position is that no prospective foster parent should be granted a license, or allowed to provide foster care for any child, unless they provide appropriately supportive and affirming answers to a comprehensive set of hypothetical questions addressing a range of LGBTQ+ issues. This approach can be termed LGBTQ+ affirming foster parent screening.[378] Such affirming foster parent screening could apply regardless of the age of the foster child and whether or not there was any indication of LGBTQ+ identity. The rule would apply for both relative (kinship) foster care as well as for non-relative foster care. The state would deny a license to foster parents who did not provide LGBTQ+ supportive and affirming answers to the various questions and hypotheticals, in effect removing such persons from the pool of potential foster parents for any child.

B. What Proportion of Prospective or Present Foster Parents Would Be Excluded by Consistently Applying Washington State's Standards in Blais v. Hunter or Similar Standards Requiring Foster Parents to Be "Affirming," "Accepting," and "Supportive"?

Child welfare sources typically use language such as "affirming," "accepting," and supportive" to describe an appropriate foster family for LGBTQ+ children.[379] In *Blais v. Hunter*, the State of Washington expanded those criteria to foster parents of any and all children.[380] Therefore, it is important to determine what proportion of prospective and present foster parents would be excluded by such LGBTQ+ affirming foster parent screening. One way to predict the proportion of potential and present foster parents who would be excluded is to compare the affirming positions presumably required by this approach with polling data on those issues. This section attempts to do so, but two

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[377] *Id.*

[378] Lily Koblenz, *Building the Case for Accepting and Supporting LGBTQ+ Children and Youth in the Child Welfare and Foster Parent Community*, WASH. STATE DEP'T OF CHILD., YOUTH & FAMS. (Sept. 25, 2019), https://www.dcyf.wa.gov/services/foster-parenting/lgbtq [https://perma.cc/CUF4-6PXQ].

[379] *See* J.M. POIRIER ET AL., SAMHSA, A GUIDE FOR UNDERSTANDING, SUPPORTING, AND AFFIRMING LGBTQI2-S CHILDREN, YOUTH, AND FAMILIES 3–5 (2014), https://www.air.org/sites/default/files/A_Guide_for_Understanding_Supporting_and_Affirming_LGBTQI2-S_Children_Youth_and_Families.pdf [https://perma.cc/KL77-NREB]; SUPPORTING LGBTQ+ YOUTH, *supra* note 286, at 1–2, 5–9. *See generally* CHILD WELFARE LEAGUE OF AM., *supra* note 348.

[380] Blais v. Hunter, 493 F. Supp. 3d 984, 990–91(E.D. Wash. 2020).

limitations at the outset must be noted. First, on sensitive issues polling data may be quite variable, as the precise wording of the questions can cause rather different results. In addition, polling may be skewed by the widespread cultural message that anyone who opposes in any way affirming views of LGBTQ+ issues is merely a bigot or the equivalent of a racist,[381] causing people to mask their actual views.

Nonetheless, polling data suggests that LGBTQ+ affirming screening requirements similar to that imposed by Washington State could, if consistently applied, exclude half to two-thirds of prospective and present foster parents.[382] Consider the polling on the following issues.

1. Same-Sex Marriage

Recent polling indicates that support for same-sex marriage is at a new high of 70%.[383] That polling data can be viewed as encouraging for advocates for same-sex marriage, given how rapidly approval has risen. Nonetheless, such polling would still exclude 30% of prospective and present foster parents who fail to affirm that same-sex marriage should be legal. The detailed data indicates even more difficulties. For example, "non-white" approval is lower, at 66%,[384] which is problematic given the over-representation of racial minorities as foster children.[385] Excluding more than a third of prospective racial minorities from serving as foster parents would be quite problematic in general and even more problematic if the criteria were applied to relative or kinship care. Norms in the US and internationally favor the use of relative care.[386] Only 60% of those fifty-five or older approve of same-sex marriage, which could rule out many relative and non-relative placements.[387] Earlier polling indicates that support for same sex marriage is much lower for persons who attend religious services at least weekly (39%).[388] Excluding more than 60% of the most religiously

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[381] *See, e.g.*, Crawford, Jr., *supra* note 96.

[382] *See infra* notes 383–425 and accompanying text.

[383] Justin McCarthy, *Record-High 70% in U.S. Support Same-Sex Marriage*, GALLUP (June 8, 2021), https://news.gallup.com/poll/350486/record-high-support-same-sex-marriage.aspx [https://perma.cc/Y867-PNJ5].

[384] *See* GALLUP, GALLUP POLL SOCIAL SERIES: VALUES AND BELIEFS, SAME-SEX MARRIAGE SURVEY DATA (2021), https://news.gallup.com/file/poll/350549/210608Same-SexMarriage.pdf [https://perma.cc/84QH-QR2J].

[385] AFCARS REPORT, *supra* note 157.

[386] *See* sources cited *supra* note 164.

[387] *See* GALLUP, *supra* note 384.

[388] *Attitudes on Same-Sex Marriage*, PEW RSCH. CTR. (May 14, 2019), https://www.pewforum.org/fact-sheet/changing-attitudes-on-gay-marriage/ [https://perma.cc/6BMP-SSBP].

committed (at least by measure of service attendance) from serving as foster parents would be problematic given research suggesting that the religiously committed are a significant population for recruiting and retaining foster parents.[389]

Most of the polling on same-sex marriage, including the recent Gallup polling finding 70% approval, focuses solely on legality.[390] Hence, Gallup asked: "Do you think marriages between same-sex couples should or should not be recognized by the law as valid, with the same rights as traditional marriage?"[391] Such polling does not answer the question of what individuals think is ethical or moral or compatible with faith for themselves or their family. One could be supportive of the law recognizing same-sex marriage while still viewing same-sex marriage as not really marriage, or as not equal in value to different-sex marriage, as a matter of personal belief. Yet, the personal rejection of same-sex marriage as a matter of ethics and faith could be viewed as not fully LGBTQ+ affirming. The polling does not capture this figure, but comprehensive LGBTQ+ affirming screening of prospective foster families would likely bring this issue to light.

Hence, the same-sex marriage issue alone would likely screen out more than 30% of foster parents and higher proportions of relative foster parents, racial minority families, and the most religiously committed.

2. Pediatric Transgender Medical Issues

Polling results on pediatric transgender issues varies depending on how the questions are worded. For example, the Heritage Foundation in the summer of 2020 asked: "Should minors be allowed to receive medical interventions for the purpose of gender transition, such as puberty blockers, cross-sex hormones, and sex-change surgeries?"[392] Fifty-seven percent said "no" and only 19% said "yes."[393] Hence, only one-fifth of Americans in this question format answered in a clearly "affirming" way.[394] The question could be viewed as skewed by inclusion of surgery, which usually is not done prior to adulthood (although

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[389] *See supra* notes 277–280 and accompanying text.

[390] *Marriage*, GALLUP, https://news.gallup.com/poll/117328/marriage.aspx [https://perma.cc/6KDK-P5JP] (last visited Nov. 10, 2021).

[391] *Id.*

[392] Elizabeth Fender, *Poll: Americans Are Wary of Gender Identity and Sexual Orientation Ideology and Policy's Impact on Minors*, THE HERITAGE FOUND. (Feb. 10, 2021), https://www.heritage.org/gender/report/poll-americans-are-wary-gender-identity-and-sexual-orientation-ideology-and-policys [https://perma.cc/9T6D-BR37].

[393] *Id.*

[394] *Id.*

some still advocate for it); however, the other named medical interventions (puberty blockers and cross-sex hormones) are typically used in pediatric populations.[395]

A PBS/Marist poll focused on "anti-transgender laws"[396]—a label that in itself indicates a negative view of the laws. The poll summary stated that Americans opposed "state laws that prohibit gender-affirming care for minors or that criminalize providers of that care."[397] The exact wording of the question was: "Do you support or oppose legislation that would prohibit gender transition-related medical care for minors?"[398] Twenty-eight percent nationally indicated support for such laws.[399] Two-thirds (66%) opposed such strict laws—the affirming position.[400] The extreme difference in polling results from the Heritage Foundation poll can be caused by the very different questions asked.[401] One can have severe doubts about pediatric transgender interventions but still oppose criminalizing doctors for providing a form of medical care. One can think that much, or even most, pediatric medical interventions are unwise and yet not want to cut off all legal possibility of such. The wording of "prohibit … medical care for minors" is not an attractive position, and the kinds of medical care involved is not specified as it is in the Heritage Foundation poll.[402] The fact that a third

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[395] *See* Jason Rafferty, *Ensuring Comprehensive Care and Support for Transgender and Gender-Diverse Children and Adolescents*, 142 AM. ACAD. PEDIATRICS 1, 6 tbl.2 (2018); Mandy Coles, *I'm a Pediatrician Who Cares for Transgender Kids – Here's What You Need to Know About Social Support, Puberty Blockers and Other Medical Options That Improve Lives of Transgender Youth*, THE CONVERSATION (Apr. 16, 2021, 8:36 AM), https://theconversation.com/im-a-pediatrician-who-cares-for-transgender-kids-heres-what-you-need-to-know-about-social-support-puberty-blockers-and-other-medical-options-that-improve-lives-of-transgender-youth-157285 [https://perma.cc/3RLY-VCJH]; *Gender-Affirming Hormone Therapy Improves Body Dissatisfaction in Youth*, CLEVELAND CLINIC (May 29, 2020), https://consultqd.clevelandclinic.org/gender-affirming-hormone-therapy-improves-body-dissatisfaction-in-youth/ [https://perma.cc/Z8MW-3A2C]; *cf.* Carl Heneghan & Tom Jefferson, *Gender-Affirming Hormone in Children and Adolescents*, BMJ EBM SPOTLIGHT, https://blogs.bmj.com/bmjebmspotlight/2019/02/25/gender-affirming-hormone-in-children-and-adolescents-evidence-review/ [https://perma.cc/8UCQ-UG28] (Apr. 13, 2019) (after review of evidence stating: "The current evidence base does not support informed decision making and safe practice in children").

[396] Matt Loffman, *New Poll Shows Americans Overwhelmingly Oppose Anti-Transgender Laws*, PBS NEWSHOUR (Apr. 16, 2021, 5:00 AM), https://www.pbs.org/newshour/politics/new-poll-shows-americans-overwhelmingly-oppose-anti-transgender-laws [https://perma.cc/9XME-GV9F].

[397] *See id.*

[398] *Id.*

[399] *Id.*

[400] *Id.*

[401] *Compare* Fender, supra note 392, *with* Loffman, *supra* note 396.

[402] *Id.; see also* Fender, *supra* note 392.

failed to provide the affirming answer to such a favorable question suggests a large and significant degree of core opposition to pediatric transgender medical care.[403]

An online survey not based on a probability sample, and hence less likely to be valid, found that 53% of American adults "would support their teenage child's request to transition to another gender."[404] This would indicate that close to half of American adults would fail this test of affirming approaches.[405]

Coupling together these results, it seems likely that somewhere between 45% to 80% of Americans could potentially be excluded from becoming foster parents by LGBTQ+ affirming screening focused on the issues of minors being medically supported to transition.

3. Sports

The polling on transgender student athletes also indicates the gap between what Americans would approve as a matter of prohibitionist laws and as a matter of practice. The PBS/Marist poll found that about two-thirds of Americans would clearly oppose (and 28% support) legislation "that would prohibit transgender student athletes from joining sports teams that match their student identity."[406] But the same poll found that only 47% of adults would affirm that transgender students should be allowed to compete on teams that match their gender identity, while 48% opposed transgender athletes competing on teams that match their gender identity.[407] The poll tested separately grade school, middle school, high school, and college, and got similar results as to each.[408] The Heritage Foundation poll worded the question in what some would view as an anti-transgender way: "Should high school boys be permitted to compete on girls' sports teams if they identify as girls?"[409] With this wording, only 23% said yes, 58% said no, and 19%

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[403] *See* Loffman, *supra* note 396.

[404] American Osteopathic Association, *Survey Finds Over Half of American Adults Would Support Their Teenager's Request to Transition to Another Gender*, CISION (Aug. 16, 2017, 10:00 AM), https://www.prnewswire.com/news-releases/survey-finds-over-half-of-american-adults-would-support-their-teenagers-request-to-transition-to-another-gender-300505118.html [https://perma.cc/VU7J-L2AW].

[405] *See id.*

[406] Danielle Kurtzleben, *Republicans and Democrats Largely Oppose Transgender Sports Legislation, Poll Shows*, NPR (Apr. 16, 2021, 5:00 AM), https://www.npr.org/2021/04/16/987765777/republicans-and-democrats-largely-oppose-transgender-sports-legislation-poll-sho [https://perma.cc/49GZ-F33A]; Loffman, *supra* note 396.

[407] Loffman, *supra* note 396.

[408] *Id.*

[409] Fender, *supra* note 392.

said "don't know / prefer not to say."[410] Here, the gender-affirming response was provided by only 23%.[411]

A poll by Hart Research indicated the capacity to manipulate polling results in a desired direction. In this poll, 38% agreed that "transgender youth being able to participate in sports consistent with their gender identity," while 34% opposed (28% had no opinion).[412] But the pollsters then provided this "small amount of additional information: . . . 'local schools, state athletic associations, and the NCAA have already implemented policies that ensure a level playing field for all students while also protecting transgender youth.'"[413] Obviously, the young women who have sued under Title IX in order to prevent transgender athletes from competing as females disagree with this view that the problem has already been resolved in such a positive way.[414] Having set the stage with this "information," the Hart poll asked the question as follows: "Sports are important in young people's lives. Young transgender people should be allowed opportunities to participate in a way that is safe and comfortable for them."[415] Even with this very sympathetic wording and additional "information," 27% disagreed, and only 41% "strongly agree[ed]" while 32% "somewhat agree[ed]."[416] Hence, by adding this very conclusory "information" and highly sympathetic wording in the question, Hart was only able to reduce opposition from 34% to 27% and clear support from 38% to 41%.[417] It seems the information primarily moved the 28% "no opinion" group into the newly offered "somewhat agree" group.[418]

These combined polls suggest that somewhere between 60% to 40% of adults would be excluded from serving as foster parents by LGBTQ+ affirming criteria focused on sports-related questions.

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410 *Id.*

411 *Id.*

412 Memorandum from Hart Research Associates to Interested Parties 4 (Mar. 16, 2021), https://hrc-prod-requests.s3-us-west-2.amazonaws.com/ME-14049-HRC-Equality-Act-3-16-2021.pdf [https://perma.cc/SW7P-U3RM].

413 *Id.*

414 *See* Lori Riley, *Federal Judge Dismisses Lawsuit Over Transgender Female Athletes Competing in Connecticut Schools*, HARTFORD COURANT (Apr. 26, 2021), https://www.courant.com/sports/high-schools/hc-sp-hs-transgender-case-dismissed-20210425-twgpmkmsrvhnhl64u2tr32tg3y-story.html [https://perma.cc/5HS4-GZMD]; *Connecticut Transgender Policy Found to violate Title IX*, ESPN, May 28, 2020, https://www.espn.com/espn/story/_/id/29234386/connecticut-transgender-policy-found-violate-title-ix [https://perma.cc/D5LS-JKUL].

415 Memorandum from Hart Research Associates to Interested Parties, *supra* note 412.

416 *Id.* at 4–5.

417 *Id.*

418 *See id.*

4. Polling on Foster Care

The Heritage Foundation included a foster care question in their recent poll on LGBTQ+ issues: "Should potential foster parents be required by state or federal government to affirm their foster child's gender identity, or should they be allowed to follow their best judgment about what is best for their foster child?"[419] This wording favors granting discretion to foster parents. As has been seen above in polling on "anti-transgender laws," many Americans tend to react negatively to legal or governmental mandates. In this context, 34% affirmed that foster parents should be required to affirm their foster child's gender identity, 38% supported foster parents following "their best judgment," and 28% voted "don't know / prefer not to say."[420]

The question of what kind of care LGTBQ+ children should receive in foster care is potentially distinguishable from the issue of whether all foster parents for all children should be screened based on LGBTQ+ affirming criteria. But the results, nonetheless, suggest that this question of appropriate care for LGBTQ+ children in foster care could become politically contentious and divisive in the future.

5. African American Views of LGBTQ+ Issues

Polling and commentary indicate that African American views of LGBTQ+ issues are disparate depending on the issue. In general, there is less approval of same-sex marriage, but more or equal support for anti-discrimination laws, as compared with white Americans.[421] Commentary indicates that the former is due to the prevalence of religious views of marriage and the latter due to African American support for civil rights laws.[422] Some claim there is greater hostility to transgender persons among African Americans.[423]

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[419] Fender, *supra* note 392.

[420] *Id.*

[421] *See* Bob Roehr, *Black Attitudes Toward LGBT Community Studied*, PRIDE SOURCE (May 29, 2008), https://pridesource.com/article/30619/ [https://perma.cc/XG8T-XA9A]; Cedric A. Harmon, *The Truth About Homophobia in the Black Community*, HUFFPOST, https://www.huffpost.com/entry/the-truth-about-homophobi_b_9824122 [https://perma.cc/D25P-VRZX] (May 12, 2017).

[422] Harmon, *supra* note 421.

[423] *See* John Eligon, *Transgender African-Americans' Open Wound: 'We're Considered a Joke,'* N.Y. TIMES (Aug. 6, 2017), https://www.nytimes.com/2017/08/06/us/black-transgender-lil-duval.html [https://perma.cc/ZAU7-WXWW] ("Many black people's views on transgender people come in part from the central role that religion and the church play in black life, several transgender people said. It also stems from an emphasis on hypermasculinity in black culture, which has deep roots in black men having to use physical strength to survive generations of oppression, they said.").

If LGBTQ+ affirming screening required affirming answers on all relevant issues, then most likely African Americans would be disproportionately excluded from serving as foster parents. Disproportionately barring Black adults from being foster parents is particularly problematic given the over-representation of Black children in the foster care system.[424] Despite federal rules prohibiting race-matching in the foster care system for Black foster care children, many believe providing Black children and adolescents with Black foster and adoptive parents can further the best interests of the child—and there are indications some foster care systems do some race-matching despite the federal statutes.[425] In addition, disproportionately screening out Black foster parents could have very negative impacts on the availability of relative or kinship foster care for Black children, which would be a significant harm.

CONCLUSION: WHAT POLLING REVEALS ABOUT POTENTIAL IMPACTS OF LGBTQ+ AFFIRMING SCREENING FOR FOSTER PARENTS

The above summary of available polls, while not comprehensive, is sufficient to make predictions about the potential impacts of LGBTQ+ affirming screening for foster parents. Read together, the polls suggest that there is a group of about 30% of American adults who have clearly and strongly held views inconsistent with LGBTQ+ affirming views. The proportion is more likely to be 35% or higher for older adults and African Americans, who play key roles for both relative and non-relative foster care.

Based on the polling data, it is unlikely that LGBTQ+ affirming education of foster parents would radically change these results, although the exact degree of impact is difficult to foresee. Such education could increase the proportion of foster parents that could accurately recite the affirming answer. As to their actual attitudes, most likely 35% to 60% of prospective foster parents would still hold significant views contrary to comprehensive LGBTQ+ affirming criteria.

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[424] *See* AFCARS REPORT, *supra* note 157, at 2; *Black Children Continue to Be Disproportionately Represented in Foster Care*, KIDS COUNT DATA CTR. (Apr. 13, 2020), https://datacenter.kidscount.org/updates/show/264-us-foster-care-population-by-race-and-ethnicity#:~:text=Even%20so%2C%20black%20children%20are,all%20kids%20in%20foster%20care [https://perma.cc/KAM3-WLV4].

[425] Donna B. McElroy, *The Consideration of Race in Child Placement: Does it Serve the Best Interests of Black and Biracial Children?*, 2 U. MD. L. J. RACE, RELIGION, GENDER & CLASS 231, 255, 262–63 (2002) ("While race may be one of the factors considered, it cannot be the only factor considered in child placement. When race is only one of the factors considered in placement, there is no equal protection violation." (emphasis omitted)).

The loss of 30% of potential and present foster parents would be devastating to the foster care system and to the rights and best interests of children; the loss of half or more of potential and present foster parents would be catastrophic. In these areas of foster care, child protection, and adoption, states cannot fulfill their responsibilities without the voluntary participation of large numbers of adults willing to bring related and unrelated children into their homes.

In addition, certain groups would be disproportionately barred from being foster parents, including Black Americans, more religiously committed, and older adults, as those groups have a higher proportion of disagreement with the rights claims of LGBTQ+ advocates on at least some issues.[426] As noted above, excluding African Americans from serving as foster parents would be particularly detrimental due to the over-representation of Black children in foster care.[427] The exclusion of relative foster parents would be particularly destructive.

Excluding evangelicals from foster care could have a disproportionate impact on the numbers of foster parents, given evidence that evangelicals in some locations are more likely to volunteer to become foster parents. In addition, there presumably are substantial numbers of children in the foster care system from evangelical Christian backgrounds, making it important to have foster parents who can understand these religious identities.

Excluding older Americans disproportionately from becoming foster parents could have devastating consequences for relative foster care, which is often preferred under national and international standards. Grandparents, and older relatives particularly, often provide care for family members, both inside and outside of the foster care system.

A. Blais v. Hunter and Hostility to Co-religionists of CSS and Similar Agencies Serving as Foster Parents

The Washington State approach in *Blais v. Hunter* turns on its head the concept that co-religionist foster parents of agencies, like CSS or Bethany, would continue as foster parents if the agencies were removed from the system.[428] To the contrary, prospective foster parents who shared religious identities or ethical viewpoints with agencies like CSS quite often would be ineligible to be foster parents under such standards. With standards such as this, the concept that foster parents could simply shift from CSS to other agencies becomes absurd.

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[426] *See supra* notes 421–423 and accompanying text.

[427] *See supra* notes 424–425 and accompanying text.

[428] *See generally* Blais v. Hunter, 493 F. Supp. 3d 984, 998, 1001 (E.D. Wash. 2020).

Further, it would be logical for those with any personal reservations about the affirming position of any LGBTQ+ issue to proactively withdraw from participation in the foster care system. Given the barriers to recruiting foster parents described above,[429] this additional barrier of facing a gauntlet of questions about hypothetical LGBTQ+ issues would be decisive even for some who might have turned out to be approved.

The hostility of some LGBTQ+ advocates for precisely the foster parents served by agencies such as CSS was illustrated by a June 5, 2021 guest editorial in the *New York Times* on the then-pending *Fulton* decision, co-authored by Dr. Stephen Vider and Dr. David S. Byers.[430] Without citing the *Blais v. Hunter* case, Dr. Vider and Dr. Byers reiterated several points in the literature about the needs of LGBTQ+ foster children, including the disproportionate number of LGBTQ+ children and youth in care, and the need to provide them with a safe and affirming environment.[431] Dr. Vider and Dr. Byers then made the same leap made by the State of Washington in *Blais v. Hunter*, stating that placements should be made "under the presumption that all children and young people could be [LGBTQ+]."[432] The authors addressed foster parents who would work with agencies like CSS with exclusionary policies, stating: "Potential foster parents who agree to be chosen on an exclusionary basis would perpetuate anti-[LGBTQ+] stigmas. They would be unfit to provide foster care to [LGBTQ+] young people—or to their cisgender or straight peers."[433]

Hence, potential foster parents willing to work with CSS or similar agencies would be presumptively unfit to serve as foster parents of any child. Presumably, the same would be true for current foster parents who had chosen to work with CSS. This, of course, is a complete reversal of the view that foster parents who had or would work with CSS could just work with other agencies without loss to the system; instead, such foster parents would be presumptively disqualified from serving as foster parents.

Dr. Vider and Dr. Byers are experts on LGBTQ+ issues. Dr. Vider is a professor at Cornell University with an extensive history of writing

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[429] *See supra* notes 240–280 and accompanying text.

[430] Stephen Vider & David S. Byers, Opinion, *A Supreme Court Case Poses a Threat to L.G.B.T.Q. Foster Kids*, N.Y. TIMES (June 5, 2021), https://www.nytimes.com/2021/06/05/opinion/Supreme-Court-LGBTQ-foster.html [https://perma.cc/448P-FTJB].

[431] *See id.* ("L.G.B.T.Q.-affirming foster parents offer the best chance of providing a supportive home for those children and adolescents if they can't remain with their families.").

[432] *See id.*

[433] *Id.*

and teaching about LGBTQ+ issues.[434] Even more significantly, Dr. Byers is a social work professor at Bryn Mawr Graduate School of Social Work and an expert on LGBTQ+ affirmative social work and psychotherapy.[435] Their implicit agreement with the positions taken by the state of Washington, and supportive amici in *Blais v. Hunter*, underscores significant support for excluding as foster parents for any child anyone who is not in agreement with LGBTQ+ affirming positions.[436] Indeed, Dr. Vider and Dr. Byers go farther and would exclude foster parents who work with agencies like CSS even if those foster parents themselves do not share the views of CSS on same-sex marriage—the mere association is enough to be disqualifying.[437]

This presents a dilemma. If the State of Washington and supporting LGBTQ+ advocates in the *Blais v. Hunter* litigation are correct, then appropriately caring for LGBTQ+ children and youth in foster care would require rules profoundly hurtful to non-LGBTQ+ children by removing a large plurality or majority of otherwise appropriate foster parents from the system. Indeed, given that *Blais v. Hunter* was a case involving kinship foster care, the State's position would exclude both kinship (relative) and non-relative placements.[438] Children who were not identified as LGBTQ+ would be denied placement with their relatives if those relatives were unable to navigate hypothetical questions about LGBTQ+ issues to the satisfaction of the state. Given the view that kinship care is often better for children, such rules would often deny to children the best available placements and increase trauma by removing children from otherwise supportive relatives.

The same dilemma also applies to the best interests of LGBTQ+ children and youth. Eliminating such a large proportion of relative and non-relative foster parents could also have a deeply negative impact on LGBTQ+ children. LGBTQ+ children could be deprived of placements with relatives. LGBTQ+ children also would suffer from the consequent lack of foster homes.

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[434] *Stephen Vider Overview*, CORNELL UNIV., https://history.cornell.edu/-stephen-vider- [https://perma.cc/WXT6-QFTV] (last visited Oct. 13, 2021).

[435] *David S. Byers*, BRYN MAWR COLL., https://www.brynmawr.edu/people/david-s-byers [https://perma.cc/AH4B-YEK7] (last visited Oct. 13, 2021).

[436] *See* Vider & Byers, *supra* note 430.

[437] *See id.* ("Potential foster parents who agree to be chosen on an exclusionary basis . . . would be unfit to provide foster care to L.G.B.T.Q. young people — or to their cisgender or straight peers.").

[438] *See* Blais v. Hunter, 493 F. Supp 3d 984, 1001 (E.D. Wash.) ("By denying their application for a foster license, they have also possibly lost the chance to provide foster care for their great-granddaughter, H.V.").

B. Holistic Screening?

Alternatively, perhaps the State in *Blais v. Hunter* does not intend to comprehensively exclude every prospective foster parent who fails to give comprehensively affirming answers.[439] Perhaps the State intends to do a holistic evaluation of the degree of prejudice against LGBTQ+ persons that might impact a potential LGBTQ+ foster child rather than to decline every prospective foster parent who disagrees with one of the LGBTQ+ rights positions.[440]

Such a "holistic evaluation approach" from a religious freedom perspective would surely trigger strict scrutiny under *Smith* and *Fulton* because it would invite unbridled discretion as to how and when religious beliefs are evaluated to exclude persons as foster parents. Such a holistic evaluation of how religious beliefs impact the suitability of foster parents is the opposite of a neutral law of general application.[441]

Further, since the State in *Blais v. Hunter* applied this screening approach at the licensing stage rather than matching stage, and as to an infant with no known sexual orientation or gender identity, this holistic evaluation would be done without regard to an evaluation of the best interests of an individual child.[442] Doing such a holistic evaluation as to the care of a specific child of known sexual orientation and gender identity would be far different.[443] Instead, the State took the position that this screening be done at the licensing stage and be applicable to fostering any child.[444] If it is a "holistic" evaluation, then it is a holistic evaluation of only the religious and personal beliefs of the prospective foster parents rather than a holistic evaluation of how those religious and personal beliefs would impact a particular child.[445]

Once the State decides that prospective foster parents must pass an LGBTQ+ affirming screening at the licensing stage, in order to foster any child, it is most likely that a substantial number of persons would be excluded by the State from becoming licensed and hence

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[439] *Id.* at 1002 ("The Department must make reasonable accommodations for religion—especially in cases like this one where the potential placement involves a biological family member. As Department guidance suggests, it must evaluate each applicant holistically . . . .").

[440] *Id.*

[441] *See Blais*, 493 F. Supp. 3d at 993.

[442] *See id.* at 999 ("The Department encourages licensors to consider an applicant's religious beliefs and stances on LGBTQ+ rights, and a distinctive feature of the foster care licensing process is the licensor's subjective assessment of various criteria.").

[443] *See id.* ("[T]he Department selectively imposes burdens on only certain religious beliefs at odds with its policy.").

[444] *Id.*

[445] *See id.*

from fostering any child. Further, it would be rational for many to be dissuaded from applying to become foster parents in order to avoid the rather humiliating process of having one's personal and religious beliefs examined in this kind of way.

To the degree the State argues that it can be trusted to make such holistic review of religious and personal beliefs of religious beliefs of prospective foster parents fairly and without prejudice, the facts of *Blais v. Hunter*, the article noted above by Dr. Vider and Dr. Byers, and other related publications, are not encouraging.[446]

For example, in *Blais*, Sager asked James and Gail Blais: "Would we allow H.V. to have a girl spend the night at our home as H.V.'s romantic partner?"[447] This question, asked by a representative of the state of Washington, presumes a norm of parents allowing their minor children to have romantic partners spend the night—a norm which raises many questions. At what age? Where in the house would the "romantic partner" spend the night? It is hence an extremely odd question to ask as a way of getting at attitudes toward LGBTQ+ issues, as it raises issues regarding how to handle a child's romantic interests aside from sexual orientation. This kind of question, whether intentioned or not, seems likely to target those parents who might be more inclined to seek to limit the dating and sexual activities of their minor children.[448] It is also an odd question to ask in a state where the age of consent is sixteen years old for purposes of the State's statutory rape laws.[449] It seems likely that many parents would be reluctant to have a "romantic partner" of their minor child spend the night anywhere in their home—and that this reluctance would be greatest at younger ages. The very asking of this kind of question makes it appear that the State is trying to weed out parents with religious or traditionalist views of parenting.

Similarly, another question asked was, "[i]f at age 14, a doctor ordered H.V. to undergo hormone therapy to change her sexual

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[446] See *supra* notes 428–438 and accompanying text.

[447] *Blais,* 493 F. Supp 3d 984 at 991.

[448] In fact, some studies have found that teens who do not date have better emotional and mental health than teens who do date. *See* University of Georgia, *Teens Who Don't Date are Less Depressed and Have Better Social Skills*, SCIENCEDAILY (Sept. 6, 2019), https://www.sciencedaily.com/releases/2019/09/190906134007.htm [https://perma.cc/WQ3L-BKN9] ("Adolescents who were not in romantic relationships during middle and high school had good social skills and low depression, and fared better or equal to peers who date.").

[449] *Age of Consent in Washington and Statutory Rape Laws*, WILL & WILL (Feb. 18, 2020), https://willdefendwa.com/age-of-consent-in-washington-and-statutory-rape-laws/ [https://perma.cc/7RGG-DM6H].

appearance, would we comply with that order?"[450] This question misstates the nature of medical interventions for minor or adult transgender persons. No doctor would "order" a patient "to undergo hormone therapy to change her sexual appearance . . . ."[451] Rather, a doctor would offer medical interventions based on the goals of the patient, advising patients on the short term and long term risks and benefits of any intervention.[452] The impetus to do something like "change . . . sexual appearance"[453] would have to come from the patient in a transgender context. Where the patient had defined the goal of changing her gender appearance, the risks and benefits involved would make hormone therapy an option offered by a physician, not a required treatment.[454] Even in the context of gender-affirming medical treatment for transgender persons, the question of whether and when to engage each possible medical intervention is for the patient (and possibly parents with a minor patient) to decide within the limits of approved medical options as determined by the physician.[455] In practice, some transgender fourteen-year-olds—or adults—might choose hormone therapy, and others might decline or defer it.[456] Yet, the question is framed in a way that makes it appear that anyone who opposes hormone therapy is opposing a physician's order to the patient, which is inappropriate and misleading terminology.

The question about pediatric transgender hormone therapy may be inappropriate in view of doubts emerging in England over the appropriateness of some transgender medical interventions, as illustrated in

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[450] *Blais,* 493 F. Supp 3d at 991.

[451] *Id.* at 990.

[452] See *supra* notes 392–405 (on standards of care for pediatric transgender treatment).

[453] *Blais,* 493 F. Supp 3d at 991–92.

[454] *See Transition Roadmap*, UCSF GENDER AFFIRMING HEALTH PROGRAM, https://transcare.ucsf.edu/transition-roadmap [https://perma.cc/N6R6-AZ8D] (last visited Oct. 17, 2021) ("[N]one of these steps . . . specifically required to validate your gender identity in the eyes of the medical establishment.").

[455] *See ACOG Committee Opinion 823: Health Care for Transgender and Gender Diverse Individuals,* 137 OBSTETRICS & GYNECOLOGY e75, e80 (2021), https://www.acog.org/clinical/clinical-guidance/committee-opinion/articles/2021/03/health-care-for-transgender-and-gender-diverse-individuals [https://perma.cc/TCY2-QEBY] ("Each individual patient will desire different outcomes.").

[456] *See* Samantha Schmidt, *FAQ: What You Need to Know About Transgender Children,* WASH. POST (Apr. 22, 2021), https://www.washingtonpost.com/dc-md-va/2021/04/22/transgender-child-sports-treatments/ [https://perma.cc/RP5E-S92X] ("Some transgender people do not feel discomfort or distress in their bodies. And not all people diagnosed with gender dysphoria will choose to undergo medical treatments or transition-related surgeries.").

the *Bell v. Tavistock* litigation.[457] The case illustrates that it is possible to be supportive of transgender persons and still have doubts about the appropriateness of some *pediatric* procedures.[458] While some view such questioning as merely prejudice against transgender persons, the British court found otherwise and required court orders for some pediatric transgender medical interventions.[459] Bell, who brought the lawsuit, claimed in a long personal statement that the Gender Identity Development Service at the Portman NHS clinic acted precipitously to provide medical transgender interventions without considering the impact of separate mental health issues.[460] Bell also argued that teens are often unable to appreciate the significance of a possible loss of fertility and other impacts.[461] Whether or not the *Bell v. Tavistock* court is correct, it was overturned on appeal based on the limits of judicial intervention on medical matters but may be appealed yet again.[462] This suggests that it is possible to have doubts about the use of hormone for transition purposes with fourteen-year-olds, regardless of whether one is generally "affirming" of transgender identity.[463] Indeed, some in the medical community have expressed concerns about a lack of an evidence basis for some pediatric transgender medical interventions.[464] The labeling of doubts on pediatric hormone treatments as due to either ignorance or prejudice, in the context of a completely abstract hypothetical, seems like a poor way of screening foster parents, even if one wanted to screen in regard to transgender issues.

The "trust me" viewpoint is also undermined by a recent (June 2021) factsheet by the federal government's Children's Bureau, titled

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[457] Bell v. Tavistock [2020] EWHC (Admin) 3274 [2], [9] (Eng.), https://www.judiciary.uk/wp-content/uploads/2020/12/Bell-v-Tavistock-Judgment.pdf [https://perma.cc/CBT6-EHBP].

[458] *See id.* at [37] (discussing the lack of scientific evidence for potential harm in transgender treatment concerning adolescents).

[459] *Id.*

[460] Keira Bell, *Keira Bell: My Story*, PERSUASION, https://www.persuasion.community/p/keira-bell-my-story [https://perma.cc/LE7X-BAQ8]; *see Bell*, EWHC (Admin) 3274 at [67].

[461] Bell, *supra* note 460; *see Bell*, EWHC (Admin) 3274 at [138].

[462] Bell v. Tavistock [2021] EWCA (Civ) 1363 [91] (appeal taken from Eng.), https://www.judiciary.uk/wp-content/uploads/2021/09/Bell-v-Tavistock-judgment-170921.pdf [https://perma.cc/UZG9-Q6VG]; Eleanor Lawrie, *Ruling Limiting Under-16s Puberty Blockers Overturned,* BBC NEWS (Sept. 17, 2021), https://www.bbc.com/news/uk-58598186 [https://perma.cc/5W3D-7LYN].

[463] *See generally* Hannah Barnes & Deborah Cohen, *NHS Child Gender Clinic: Staff Concerns 'Shut Down'*, BBC NEWS (June 19, 2020), https://www.bbc.com/news/health-51806962 [https://perma.cc/8A2A-BWNF] (discussing concerns that "some patients were referred onto a gender transitioning pathway too quickly").

[464] *See* Heneghan & Jefferson, *supra* note 395.

"Supporting LGBTQ+ Youth: A Guide for Foster Families."[465] The guide states:

> *You do not have to choose between your faith and supporting their LGBTQ+ identity*. Many religious groups embrace LGBTQ+ youth, adults, and their families. There are more and more affirming churches and religious groups that are providing affirming spaces to LGBTQ+ youth and their families.[466]

The guide additionally provides a link to the Human Rights Campaign ("HRC") Foundation's website, which provides a section on its site entitled "Faith Positions" containing separate links for various religious group stances on LGBTQ+ relationships.[467] For example, the summary for the African Methodist Episcopal Church, "a predominantly African American … denomination," notes that "it has long been clear that the church condemns same-sex relationships."[468] The HRC similarly describes less than affirming positions of the Southern Baptist Convention and the Roman Catholic Church.[469] By contrast, there are summaries for religious groups, such as the Episcopal Church and the Metropolitan Community Churches, with affirming stances.[470] The clear message of the United States government in linking to this site is that you can keep your "faith" so long as you change denominations—which of course some would see as a change in faith. It would not normally be the place of the federal government to tell individuals to change their religious affiliation, but that is the central message here. The idea that this was seen as a reasonable message for the federal government to convey on the conflict between the faith of foster parents and LGTBQ+ equality does not engender "trust." Indeed, such a

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[465] SUPPORTING LGBTQ+ YOUTH, *supra* note 286, at 4.

[466] *Id.*

[467] *Faith Positions,* HUM. RTS. CAMPAIGN, https://www.hrc.org/resources/faith-positions [https://perma.cc/NX4K-MDZ9] (last visited Oct. 17, 2021).

[468] *Stances of Faiths on LGBTQ Issues: African Methodist Episcopal Church,* HUM. RTS. CAMPAIGN, https://www.hrc.org/resources/stances-of-faiths-on-lgbt-issues-african-methodist-episcopal-church [https://perma.cc/NM5X-M2BE] (last visited Oct. 17, 2021).

[469] *Stances of Faiths on LGBTQ Issues: Southern Baptist Convention,* HUM. RTS. CAMPAIGN, https://www.hrc.org/resources/stances-of-faiths-on-lgbt-issues-southern-baptist-convention [https://perma.cc/6DE4-AZC6] (last visited Oct. 17, 2021); *Stances of Faiths on LGBTQ Issues: Roman Catholic Church,* HUM. RTS. CAMPAIGN, https://www.hrc.org/resources/stances-of-faiths-on-lgbt-issues-roman-catholic-church [https://perma.cc/Z8PL-YLTH] (last visited Oct. 17, 2021).

[470] *Stances of Faiths on LGBTQ Issues: Episcopal Church*, HUM. RTS. CAMPAIGN, https://www.hrc.org/resources/stances-of-faiths-on-lgbt-issues-episcopal-church [https://perma.cc/QQT4-9HV7] (last visited Oct. 17, 2021); *Stances of Faiths on LGBTQ Issues: Metropolitan Community Churches*, HUM. RTS. CAMPAIGN, https://www.hrc.org/resources/stances-of-faiths-on-lgbt-issues-metropolitan-community-churches [https://perma.cc/36Y7-Y83J] (last visited Oct. 17, 2021).

message, if acted on by government, would seem in itself to violate the First Amendment.

The practice of screening all foster parents at licensing for LGBTQ+ affirming views therefore could have devastatingly negative impacts on the foster care system regardless of whether that screening comprehensively screened out all with some non-affirming view or only screened out foster parents based on a holistic evaluation. Hence, one has to ask if such practices are really necessary in order to meet the goal of providing safe and appropriate foster care for LGBTQ+ children and youth.

C. Can the Dilemma Be Resolved?

National level documents by the Child Welfare League and LAMDBA Defense Fund clearly call for placement of LGBTQ+ children and youth in affirming foster homes but have not gone as far as to argue the necessity of all foster children being placed in such homes.[471] This is not a small distinction for it has huge impact for the future of foster care—for children of all sexual orientations and gender identities. While no movement or group can be expected to speak with one voice, it would be helpful if the national-level LGBTQ+ rights groups and their allies would clearly address the subject. At present, the national groups have been silent while locally and individually LGBTQ+ individuals and groups have been advocating for the broader rule requiring LGBTQ+ affirming screening for all foster parents.[472]

LGBTQ+ rights advocates thus have litigated cases like *Fulton* and *Blais* in contradictory ways. In cases like *Fulton*, LGBTQ+ rights advocates have postured themselves as fully welcoming of the co-religionist foster parents of agencies they seek to exclude. They have even argued that they would fully welcome CSS, despite its non-acceptance of same-sex marriage, so long as CSS was willing to license same-sex married couples as foster parents.[473] On the other hand, in *Blais* and in literature on the needs of LGBTQ+ children and youth, some have supported rules that would exclude as foster parents such co-religionist foster parents and indeed would exclude the much larger proportion of

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[471] *See CWLA and Experts Join in Issuing Recommended Practices for LGBTQ Youth in Foster Care*, LAMBDA LEGAL (June 7, 2012), https://www.lambdalegal.org/news/ny_20120607_recommended-practices-lgbtq-youth [https://perma.cc/JJ2B-T383].

[472] *See supra* notes 428–438 and accompanying text.

[473] *See* Fulton v. City of Philadelphia, 141 S. Ct. 1868, 1871 (2021) (mentioning how the City said that it would not enter a full foster care contract with CSS in the future *unless* the agency agreed to certify same-sex couples).

Americans dissenting from affirming views regarding one or more LGBTQ+ issues.[474]

The dilemma surrounding *Blais* could be resolved if LGBTQ+ advocates would publicly repudiate the State of Washington's position that all foster parents, relative and non-relative, must adhere to safe and affirming views of LGBTQ+ rights issues in order to be licensed as foster parents.[475] This would involve repudiating the view that foster parents of children not known to have LGBTQ+ identity must be screened based on their views of LGBTQ+ issues.

A second, more subtle issue relates to the question of safe and appropriate care for LGBTQ+ children and youth in relative and non-relative foster care. LGBTQ+ advocates have noted clearly abusive behavior targeting LGBTQ+ children and youth in the foster care system.[476] Of course, that kind of behavior, from sexual abuse and battering to badgering, bullying, and belittling, would be harmful to any child.[477] The broader context is that many children of all sexual orientations and gender identities have unfortunately been abused or neglected while in the foster care system.[478] However, LGBTQ+ advocates are pointing toward abuse that particularly targets LGBTQ+ children and youth in care.[479] The need to provide safe care for LGBTQ+ children and youth is compelling.[480]

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[474] *See* Blais v. Hunter, 493 F. Supp. 3d 984 (E.D. Wash. 2020); Vider & Byers, *supra* note 430.

[475] *See Blais,* 493 F. Supp. 3d at 992 (quoting the State as asserting that the Blaises "have been unwilling to agree to provide safe and affirming support to a child who is or may identify as LGBTQ+" (internal quotation marks omitted)).

[476] *See, e.g.,* Sam Terrazas, *Is It Time to Rethink Foster Care for LGBTQ Youth?*, YOUTH TODAY (Mar. 8, 2020), https://youthtoday.org/2020/03/is-it-time-to-rethink-foster-care-for-lgbtq-youth/ [https://perma.cc/DY7X-7NVP] ("As with any group or population that finds itself on the fringes of society, it is important that LGBTQ foster youth have access to support in systemic ways that includes all environments and spaces they find themselves in.").

[477] *Consequences of Foster Care Abuse and Neglect,* DERATANY & KOSNER (Feb. 28, 2017), https://lawinjury.com/consequences-of-foster-care-abuse-and-neglect/ [https://perma.cc/9R3B-YX8K] ("Children who are being victimized by abuse or who live in unstable foster environments do poorly in school, develop a distrust for authority, and may be more likely to engage in harmful behaviors such as alcohol abuse, drug abuse, and promiscuity at a younger age.").

[478] *Id.* ("[O]fficial statistics show as many as 28[%] of kids are abused while in the foster care system.").

[479] Terrazas, *supra* note 476.

[480] *Id.*

However, LGBTQ+ rights advocates have argued for a need, apart from such abusive behavior, for LGBTQ+ children and youth to be in "affirming" forms of care.[481] As an amici stated in the *Blais* case:

> Further, even foster parents who do not commit such [abusive] acts can create an environment where LGBTQ+ foster youth feel unsupported and not respected . . . .
>
> Even people that consider themselves loving and well-meaning can fail to provide a supportive and affirming environment for LGBTQ+ youth and can bring about negative outcomes.[482]

The question then becomes who may foster an LGBTQ+ child? This question would be particularly significant as to kinship or relative care but could also apply to non-relative care. Imagine an LGBTQ+ foster child with a loving grandmother whose religious or personal viewpoints did not accept same-sex marriage as a matter of personal ethics. Similarly, imagine an LGBTQ+ grandparent who doubted that medical gender transition was really the right pathway for their minor teen grandchild. At the same time, imagine that the grandmother continued to support and love their grandchild and did not belittle or badger the child as to such issues. You might call this the "agree to disagree" posture. If the grandmother was the only—or otherwise best—placement to keep the child in relative care, and the child and grandmother had an otherwise positive relationship, would the grandmother be ruled out of fostering her grandchild because she could not provide "affirming" care?[483]

One of the difficulties with the documents concerning appropriate care for LGBTQ+ children and youth is that they posit ideals in a one-dimensional context in which the child's sexual orientation or gender identity is the most determinative factor in making a foster care placement, and in which there are an abundance of available placement options for foster children. Yet, there may be contexts in which other aspects of a child's identity and reality—such as their attachment to extended family members, need to be placed with siblings, desire to live in a certain neighborhood, or attend a certain school—are just as compelling. Foster care decisions are made in the world as it is, and in that world, Americans have mixed views of LGBTQ+ issues, with the majority failing to be fully affirming according to the tests that might

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[481] Vider & Byers, *supra* note 430.

[482] *See* Brief of the Center for Children & Youth Justice et al. as Amici Curiae, *supra* note 369, at 12.

[483] *See generally What Foster Parents Can Do to Affirm Youth Who Are a Part of the LGBTQ+ Community*, *supra* note 348 (discussing that "affirming" care includes at least one adult that is supportive of that child's identification in his or her sexual orientation and/or gender identity).

be created by states, child welfare organizations, and LGBTQ+ advocates.[484]

The concerns with providing appropriate care placements for LGBTQ+ children are real. The question is how best to meet that need in a way that treats LGBTQ+ children and youth as persons, not merely placeholders for LGBTQ+ rights claims. Another issue is how to meet that need without undermining the foster care system for all children, regardless of sexual orientation or gender identity.

Those issues, it would seem, are a long way from resolution.

[484] *See* SUPPORTING LGBTQ+ YOUTH, *supra* note 286, at 6–8.