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Fulton v. City of Philadelphia, And the Rights of Faith-Based Adoption and Foster Care Agencies

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FULTON V. CITY OF PHILADELPHIA, AND THE RIGHTS OF FAITH-BASED ADOPTION AND FOSTER CARE AGENCIES

I. BACKGROUND

In Philadelphia County, Pennsylvania, the Pennsylvania Department of Human Services ("DHS") contracts with 30 private foster care agencies.[1] Each of these private foster care agencies is expected to provide foster care services through a contract with DHS.

In November 2015, DHS and Catholic Social Services ("CSS") entered into such a contract.[2] Under the contract, CSS was to ensure that foster parents were "screened, trained, and certified by the Provider [CSS]."[3] A section of the contract limited the reasons that CSS may refuse to provide the services required under the contract, notably "unless an exception is granted by the Commissioner or the Commissioner's designee, in his/her sole discretion."[4] Article XV of the contract further limited the reasons that CSS could refuse to provide the services required under the contract by incorporating the various laws, notably the Philadelphia Fair Practices Ordinance which provides that the agency would not discriminate on the basis of *inter alia*, "*sex*" or "*sexual orientation*."[5] In the event of CSS's breach, DHS and Philadelphia would be permitted to suspend or terminate the contract.[6]

On March 8, 2018, DHS Commissioner Figueroa ("Figueroa") learned that two of its contracting foster agencies, CSS and Bethany Christian Services ("Bethany"), had policies that denied their publicly-funded services to married same-sex couples.[7] Figueroa formed this belief after discussions with a local news reporter on an upcoming story regarding CSS's policies.[8]

Next, Figueroa contacted Bethany, CSS, various DHS's faith-based foster care agencies, and a nonfaith-based agency to determine what those agencies' policies were regarding serving same-sex couples. James Amato of CSS explained to Figueroa that there were two services that CSS would not provide to same-sex couples: (1) CSS would not certify same-sex couples as prospective foster parents even if the couples were otherwise eligible foster parents under state regulations, and (2) CSS would not provide a same-sex couple with a home study as part of a same-

[1] Fulton v. City of Philadelphia, 922 F.3d 140, 147 (3d Cir. 2019), cert. granted sub nom. Fulton v. City of Philadelphia, Pennsylvania, 140 S. Ct. 1104, 206 L. Ed. 2d 177 (2020) ("Fulton II").

[2] Fulton v. City of Philadelphia, 320 F. Supp. 3d 661, 670 (E.D. Pa. 2018), aff'd, 922 F.3d 140 (3d Cir. 2019), cert. granted sub nom. Fulton v. City of Philadelphia, Pennsylvania, 140 S. Ct. 1104, 206 L. Ed. 2d 177 (2020) ("Fulton I").

[3] *Id*.

[4] *Id*.

[5] *Id.* at 671.

[6] *Id.*

[7] *Id.* at 671–72.

[8] Fulton I, 320 F. Supp. 3d at 672.

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sex couple's application for adoption.[9] Amato recalled that DHS told him "you are discriminating," to which he responded "I am following the teachings of the Catholic Church."[10]

On March 15, 2018, Figueroa closed intake of foster children to CSS. That same day Philadelphia City Council separately passed its own resolution authorizing the Committee on Public Health and Human Services to "investigate [DHS] policies on contracting with social services agencies that either discriminate against prospective LGBTQ foster parents and allow non-LGBTQ foster parents to discriminate against children."

CSS was the recipient of considerable animosity from government officials at each stage of this process. Philadelphia City Council passed a resolution labeling CSS's actions "discrimination that occurs under the guise of religious freedom."[11] The Commissioner told CSS that "times have changed," "attitudes have changed," that it was "not 100 years ago," and that its policy on foster families conflicted with the teachings of the Pope.[12]

It is worth nothing that in the wake of CSS closing its doors to Philadelphia foster placements, the ministry now has dozens of available foster homes sitting empty—even though more children in Philadelphia need foster care now than at any time in the past decade. In 2019, the city confessed that there were 250 children that needed to be moved out from the city's overcrowded congregate care facilities into foster homes, but that it did not have enough available foster homes to meet the demand.[13]

It is also significant that Chief Justice Roberts explicitly predicted that this very type of case would come before the Court in his dissent in the seminal 2015 case of *Obergefell v. Hodges*[14] This illustrates that at least one member of the Court possesses foresight as to how future cases utilizing *Smith*'s rigid framework will continue to pervade almost any government practice that works alongside a faith-based organization.

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[9] *Id*. (*See* Jun. 21, 2018 Hr'g Tr. 3:18–24 (Figueroa); *see also* Jun. 19, 2018 Hr'g Tr. 55:7–20 (Amato) (testifying that Commissioner Figueroa and another DHS officer asked Amato whether CSS would complete a home study for "a same-sex couple or individual" and that Amato confirmed that CSS would not complete such a home study for a couple and would only provide a home study for an individual if that individual was committed to living single.).

[10] *Id.*, citing Jun. 19, 2018 Hr'g Tr. 55:22–25 (Amato).

[11] Respondent's Brief, Fulton v. City of Philadelphia, Pennsylvania, 140 S. Ct. 1104, 206 L. Ed. 2d 177 (2020) ("Fulton III").

[12] *Id.*

[13] *Id*.

[14] 576 U.S. 644, 711, 135 S. Ct. 2584, 2625, 192 L. Ed. 2d 609 (2015) (Noting "[h]ard questions arise when people of faith exercise religion in ways that may be seen to conflict with the new right to same-sex marriage—when, for example . . . a religious adoption agency declines to place children with same-sex married couples.")

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II. PROCEDURAL HISTORY

CSS filed suit on May 17, 2018 in the United States District Court for the Eastern District of Pennsylvania.[15] The district court denied CSS preliminary relief. The court ultimately held that Philadelphia had "a neutral law of general applicability under *Smith*."[16]

CSS appealed and sought emergency relief from the Third Circuit, which was denied, and then from the Supreme Court of the United States. The Third Circuit affirmed the district court's ruling on April 22, 2019.[17] The key question, according to the panel, was whether Philadelphia "treat[ed] CSS worse than it would have treated another organization that did not work with same-sex couples as foster parents but had different religious beliefs[.]"[18]

The court rejected CSS's targeting arguments: the Commissioner's comment that CSS needed to follow the teachings of Pope Francis was merely "an effort to reach common ground."[19] The Mayor's comments were not considered "significant."[20] The City Council's resolution labeling CSS's actions "discrimination that occurs under the guise of" religion were held to fall within a "grey zone."[21]

The Third Circuit thus concluded that Philadelphia was enforcing a neutral and generally applicable policy per *Smith*.[22] To hold otherwise, it warned, would make *Smith* "a dead letter," as well as "the nation's civil rights laws."[23] The court also rejected CSS's free speech claim, holding that because Philadelphia funded aspects of CSS's foster care program, "the [City's] condition pertain[ed] to the program receiving government money."[24]

III. PARTY ARGUMENTS

Petitioners (CSS) sought certiorari, which the Supreme Court of the United States granted.[25] In its brief to the Court**,** Petitioner argued that under *Employment Division* v. *Smith* the city loses because its law is neither "neutral" nor "generally applicable."

Petitioner argued that Philadelphia had no neutral law because it "decided on an outcome and then tried to find a law to fit. When it couldn't, it reverse-engineered policies to justify its actions. This is the inverse of the neutral law in *Smith*."[26]

Petitioner also claimed that Philadelphia did not have a generally applicable law due to its individualized exemptions, and because Philadelphia "granted the Commissioner *carte blanche* to give exemptions."[27] Petitioner pointed out the irony that no such exemption was granted for CSS's

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[15] Fulton I, 320 F. Supp. 3d 661.
[16] Fulton II, 922 F.3d at 153 (citing E*mployment Div.* v. *Smith*, 494 U.S. 872 (1990))**.**
[17] *Id.* at 165.
[18] *Id.* at 156.
[19] *Id.* at 158.
[20] *Id.* at 157.
[21] *Id.*
[22] Fulton II, 922 F.3d at 157.
[23] *Id.* at 159.
[24] *Id.* at 161.
[25] Fulton III., 140 S. Ct. 1104, 206 L. Ed. 2d 177 (2020).
[26] *Id.* at 157.
[27] Petitioner's Brief, Fulton III, 140 S. Ct. 1104, 206 L. Ed. 2d 177 (2020).

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religious exercise in spite of the other exemptions given.[28] Petitioner stated further that the City violates its own rules, and allows other agencies to do so, too by the myriad of exceptions it gives to its own law.[29]

Petitioner also claimed that the City is in violation of the First Amendment due to its attempt to compel a private organization's speech.[30] Petitioner articulated that the City plainly conditions participation in the foster care system on making certain written certifications about marriage.[31]

In the alternative, petitioner argued that *Smith* should be overruled.[32] Petitioner essentially argued that the case provides a perfect example of why *Smith* should be overruled—despite all the alleged constitutional violations of the City, the Third Circuit still ruled against petitioners based on *Smith*.[33] Petitioner opined that *Smith* is unsupported by the text, history, and tradition of the Free Exercise Clause, and offered that "the best approach is to revisit *Smith* and apply strict scrutiny to government actions infringing on religious exercise."[34]

As an alternative to its alternative argument, petitioner argued that if the Court does not *overrule Smith*, it should *clarify* that history must guide the application of the Free Exercise Clause as it does for the Establishment Clause.[35]

Respondent made multiple argument in its merit brief to the Court for the free exercise claim: First, Respondent argued that CSS lacks a constitutional right to demand that DHS offer it a contract that omits the same non- discrimination requirement every other FFCA must follow when performing services for the City.[36]

Respondent reasoned that "[m]echanically transplanting the Court's ordinary free-exercise framework to the managerial context would severely intrude on the flexibility the government requires to manage its workforce." Respondent argued that the Court should give the government greater deference to manage agencies it controls than in other free exercise situations.

Respondent next argued that the non-discrimination requirement falls within the scope of the government's managerial authority. Specifically, it restricts how CSS carries out a contractual responsibility and delegated government power in certifying foster parents but does not affect how CSS speaks or acts in its capacity "as a citizen."[37]

Respondent also argued that under *Smith*, the non-discrimination requirement is also generally applicable and neutral.[38] Respondent argues that the requirement is generally applicable because every FFCA contract contains an identical requirement, which applies the same way to

[28] *Id.*
[29] *Id.*
[30] *Id.*
[31] *Id.*
[32] *Id.*
[33] Petitioner's Brief, Fulton III 140 S. Ct. at 1104.
[34] *Id.*
[35] *Id.*
[36] Respondent's Brief, Fulton III, 140 S. Ct. 1104, citing *Engquist v. Ore. Dep't of Agric.*, 553 U.S. 591, 599 (2008).
[37] *Id.*, citing *Garcetti* v. *Ceballos*, 547 U.S. 410, 422–423 (2006).
[38] *Id.*

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religious and non-religious beliefs.[39] Respondent purported to prove neutrality by claiming that the City's "text and operation" show no religious hostility, and that the record supports this.[40]

Respondent argued that CSS's free speech claim is also without merit.[41] The argument is similar in substance to its free exercise arguments—that the non-discrimination requirement regulates how CSS performs its contractual duties for the government; it does not obligate CSS to make statements about the validity of same-sex relationships; and it is directed at conduct, not speech.[42]

Finally, respondent argued that The Court should not reconsider *Smith*.[43] Respondent opined that this case would be "an extremely poor vehicle" to do so, given that it arises in the government contracting context, and because the non-discrimination requirement satisfies strict scrutiny in any event.[44] Further, respondent argued that the petitioners have not made the showing necessary to justify overturning "Justice Scalia's landmark decision in *Smith*."[45]

IV. PREDICTION

During oral argument, the Justices seemingly showed no serious interest in overruling *Smith* based on (1) their lack of questions on the subject, and (2) petitioner (CSS) leading with the argument that even under *Smith*, CSS would prevail. In fact, Justice Barrett bluntly asked petitioner's counsel "if you're right about that [prevailing even under *Smith*] why should we even entertain the question whether to overrule *Smith*?"[46]

If the Court decides not overrule *Smith*, there are two likely paths of analysis that the Court could take: The first path would result in the Court rendering a narrow, fact-heavy decision based on the evident hostility shown by Philadelphia toward CSS's religious beliefs.[47]

The Court could conclude that this "hostility on the part of the State" fell below the minimum requirements of the Free Exercise Clause.[48] Stanford Law Professor Michael McConnell refers to this potential path as "*Masterpiece 2.0*," because of is striking similarity to the Court's reasoning in *Masterpiece Cakeshop v. Colorado Civil Rights Commission*.[49] There, the Court's reasoning rested on "religious hostility on the part of the State itself," and specifically on "the

[39] *Id.*
[40] *Id.*
[41] *Id.*
[42] Respondent's Brief, Fulton III, 140 S. Ct. 1104.
[43] *Id.*
[44] *Id.*
[45] *Id.*
[46] Transcript of Oral Argument at 29:23, *Fulton v. City of Philadelphia, Pennsylvania*, 140 S. Ct. 1104, 206 L. Ed. 2d 177 (2020).
[47] Michael McConnell, *Prof. Michael McConnell (Stanford) on Fulton v. City of Philadelphia*, REASON (Nov. 6, 2020), https://reason.com/volokh/2020/11/06/prof-michael-mcconnell-stanford-on-fulton-v-city-of-philadelphia/.
[48] *Id.*
[49] *Id.*, citing *Masterpiece Cakeshop v. Colorado Civil Rights Commission*, 138 S. Ct. 1719 (2018).

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Commission's consideration of Phillips' case," which the Court held "was neither tolerant nor respectful of Phillips' religious beliefs."[50]

However, this line of reasoning drew little commentary at oral argument. This could be in part due to the lack of aid that *Masterpiece* provided in helping "reduce the temperature" on gay rights and religious freedom by its implicit suggestion that punitive actions towards those with a minority view on marriage are acceptable so long as the government less explicitly exhibits its hostility.[51] It is also likely that the Court would rather not make the subjective motivations of government actors central to constitutional law.[52]

The other path would be to use *Fulton* as a vehicle to correct the Third Circuit's narrow holding in this case. As shown by *Lukumi*, decided only three (3) years after *Smith*, *Smith* does not have to be a wrecking ball for religious freedom.[53]

In order to correct the Third Circuit's narrow interpretation, the Court could clarify the meaning of the terms "neutral" and "general applicability." The City desires for the Court to focus on only the *evaluations* of foster families by foster agencies and analyze if the City permits other agencies to engage in the same conduct as CSS but for non-religious reasons.

However, whether the City has actually allowed a secular organization to exclude same-sex couples is not the relevant question under *Smith*. Rather, the question here should be whether, by the terms of its policy, the City possesses the *right* to make exceptions.

It is undisputed that the City carves out other exceptions from its nondiscrimination policy, for other foster-care organizations; In *Smith*, in its discussion of *Sherbert*, the Court made clear that regulatory schemes that allow case-by-case discretion are not "generally applicable."[54]

Next, the Court can clarify *Smith*'s "neutrality" standard.[55] Here, CSS had provided foster care services in Philadelphia for 200 years—long before the City became involved and the City had no policy that would exclude CSS.

The City's motives here were certainly not neutral, by whatever ambiguous standard *Smith* sets forth. Philadelphia politicians, in response to the *Philadelphia Inquirer* article on CSS, *instructed* the city's lawyers to find a way to exclude foster care agencies that "discriminate under the guise of religious freedom."[56] In response, the city crafted a policy that effectively excluded CSS without interfering with the ability of other foster care agencies to operate out of compliance with other aspects of the anti-discrimination policy.

The logic of *Smith* is that policies that apply to all parties are not unconstitutional when they *happen* to conflict with one party's religious exercise.[57] That does not license governments to proactively craft policies to exclude religious entities and exempt others.[58]

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[50] Masterpiece Cakeshop, 138 S. Ct. 1719.

[51] McConnell, *supra* note 47.

[52] *Id.*

[53] Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520 (1993); Employment Div. v. Smith, 494 U.S. 872 (1990).

[54] McConnell, *supra* note 47.

[55] Smith, 494 U.S. 872.

[56] McConnell, *supra* note 47.

[57] *Id.*

[58] Smith, 494 U.S. 872.

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Finally, the Court could theoretically find the City's policy Constitutional if it "burdens the free exercise of religion," but "serves a *compelling governmental purpose* in the least restrictive way." It is not likely that the City's policy would satisfy this extremely high standard.[59]

The justification for the City's policy seems to be to prevent the insult to same-sex couples that is implied by their exclusion from CSS's program.[60] However, purely implied impacts are a dangerous ground for compelling governmental interests; people have a fundamental right of free speech to express disapproval of state-approved conduct.[61]

This line of logic was indirectly hinted at during oral argument, principally by Justice Breyer.[62] Justice Breyer asked Petitioner a line of questions related to whether the City could add a blanket disclaimer to its provider application.[63] This hypothetical disclaimer would state that a given religious provider was not acting in opposition to its religious beliefs but rather just following the City's policy.

On one hand, this line of logic proves that the City's policy is not the least restrictive way. Clearly, the City could craft such language into its contract so as to not immediately shut down hundreds of foster homes and leave hundreds more foster children lingering in the system.

On the other hand, this reasoning promotes coercion of religious groups to "*claim*" their religious beliefs by quite literally *disclaiming* them in the same breath. This coercion, even without the disclaimer, was on full display in this case through Bethany's compliance with the City's mandate.[64] The Court has held that coercion by government conduct is a fundamental hallmark of an unconstitutional establishment of religion. Thus, Breyer's hypothetical disclaimer solution would lead to religious organization's beliefs existing in theory and principle only, with an inability to manifest such in its actions.

More important in this analysis are the material *effects*.[65] The City's argument potentially wins if CSS were the *only* foster-care organization or if there were any evidence that same-sex couples were hindered by CSS's policy (as Justice Kavanaugh asked about at oral argument).[66] But this is contrary to the facts of the case where there were 30 providers and no actual evidence of hindrance.

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[59] McConnell, *supra* note 47, quoting *Lukumi* 508 U.S. 520 (1993).

[60] *Id.*

[61] *Id.*

[62] Transcript of Oral Argument at 45:11-46:7, *Fulton v. City of Philadelphia, Pennsylvania*, 140 S. Ct. 1104, 206 L. Ed. 2d 177 (2020).

[63] Transcript of Oral Argument at 103:6-11, *Fulton v. City of Philadelphia, Pennsylvania*, 140 S. Ct. 1104, 206 L. Ed. 2d 177 (2020) (Respondent's Counsel Jeffrey Fisher paraphrasing Breyer's statement as suggesting that CSS "can disclaim that and make very clear that all they're doing is following state law and to carry out a government function on the government's behalf and they're not purporting to speak for themselves in any certifications.").

[64] Fulton I, 320 F. Supp. 3d at 690–91 (explaining that after Philadelphia threatened to close Bethany Christian, the organization relented and agreed to alter its longstanding religious practice).

[65] *Id.*

[66] *Id.*, citing Transcript of Oral Argument at 52:7, *Fulton v. City of Philadelphia, Pennsylvania*, 140 S. Ct. 1104, 206 L. Ed. 2d 177 (2020).

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The true effect of the City's policy is to reduce the availability of foster placements for all children.[67] As Department of Justice attorney Hashim Mooppan argued in support of CSS: "what the City has done is worse than cutting off its nose to spite its face. What it is doing is cutting off homes from the most vulnerable children in the City to spite the Catholic Church."[68]

The City's final argument ducks the Constitutional implications of the case. The argument is that the City did not exclude CSS from the foster care program under its regulatory power but merely refused to enter into a contract with it.

The City has said throughout this dispute that it is enforcing the Fair Practices Ordinance, which applies across the board to private and business conduct and has nothing to do with contracting.[69] If upheld, the City's rule could be applied to religious schools, hospitals, and homeless shelters rather than solely entities required to contract with the City, as implied by Justice Barrett's comments at oral argument.[70] As CSS counsel Lori Windham pointed out, this would mean "the Free Exercise Clause [would] shrink every time the government expands its reach."[71]

In my opinion, the second path is the most persuasive. The City's open hostility towards CSS has its fingerprints on every aspect of the situation-- Philadelphia City Council enacted a resolution rquired DHS to amend the method by which it contracts with prospective foster homes and condemned "discrimination that occurs under the *guise* of religious freedom."[72] Philadelphia's mayor publicly insulted the Archdiocese, calling the Archbishop of Philadelphia's Chaput's conduct "not Christian," and requesting that Pope Francis "kick some ass here!"[73]. The DHS Commissioner urged CSS to follow "the teachings of Pope Francis," and told it that "'times have changed,' 'attitudes have changed,' and CSS should change its policy because it is 'not 100 years ago.'"[74]

While the lower courts concluded that such did not amount to hostility towards religion in large part because of fellow Philadelphia Christian agency Bethany's decision to comply with the City's request, this is hardly a convincing argument. The notion that another Christian succumbing to the state's pressure to mute its sincerely held religious beliefs is evidence that the policy was not hostile is perplexing. I would argue that this is diametrically opposed to such a conclusion under such circumstances and clearly amounts to government coercion, which the Court has held is an unconstitutional establishment of religion."[75]

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[67] *Id.*

[68] Transcript of Oral Argument at 56:18-22, *Fulton v. City of Philadelphia, Pennsylvania*, 140 S. Ct. 1104, 206 L. Ed. 2d 177 (2020).

[69] McConnell, *supra* note 47.

[70] *Id.*, citing Transcript of Oral Argument at 98:14-19, *Fulton v. City of Philadelphia, Pennsylvania*, 140 S. Ct. 1104, 206 L. Ed. 2d 177 (2020).

[71] *Id.*, citing Transcript of Oral Argument at 23:20-23, *Fulton v. City of Philadelphia, Pennsylvania*, 140 S. Ct. 1104, 206 L. Ed. 2d 177 (2020).

[72] Brief for Petitioners at 9, *Fulton v. City of Philadelphia*, No. 19-123 (emphasis added).

[73] *Id.* at 10.

[74] *Id.* at 11, 16.

[75] Am. Legion v. Am. Humanist Ass'n, 139 S. Ct. at 2072 (Thomas, J concurring in judgment).

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V. ARKANSAS IMPLICATIONS

At the time of this writing, approximately 40 percent[76] of foster parents in Arkansas are sourced through The CALL, a faith-based organization that "recruits families out of local churches, trains them[,] and then provides support."[77]

In contrast with CSS's relationship with Philadelphia DHS, The CALL "does not receive a single government dollar for supplying nearly half of Arkansas' foster homes."[78] Thus, The CALL's relationship with Arkansas Department of Children and Family Services (DCFS) is less direct than CSS's with Philadelphia DHS.

The CALL's role is to recruit Christian families to become foster parents, and to provide a state-approved foster care certification training program. The latter came in response to findings from a 2015 review of DCFS commissioned by the governor and conducted by consultant Paul Vincent of the Child Welfare Policy and Practice Group.[79] The study found that DCFS was having trouble moving new foster parents through the certification process.[80]

In response, The CALL began its own, foster parent certification training after obtaining explicit permission from DCFS to create an adapted version of PRIDE.[81] Arkansas requires foster families to undergo a specific 30-hour training model called "Foster/Adopt PRIDE," which DCFS provides through a non-profit contractor. PRIDE classes through DCFS take place over a two-month period in only five locations throughout the state, so families in remote areas have to drive long distances to attend.[82] In contrast, The CALL's training is delivered locally and compresses the PRIDE curriculum into two weekends[83].

DCFS spokesperson Amy Webb stated that DCFS "does not necessarily avoid placing youth who identify as LGBT with CALL-recruited families. It does take into account the preferences of the child and the foster parents, she said, so as to ensure stable placements."[84]

When asked if The CALL "avoids proselytizing to LGBT foster children," Executive Director of The CALL, Laura Currier, stated that "DCFS provides policies and guidelines regarding respecting the beliefs of children and youth in foster care. The families recruited by The CALL follow these policies and guidelines. These families simply live out their Christian faith on a daily basis as an example of a way of living."[85]

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[76] Benjamin Hardy, *In Arkansas, One Faith-Based Group Recruits Almost Half of Foster Homes*, IMPRINT NEWS (Nov. 28, 2017), https://imprintnews.org/featured/arkansas-one-faith-based-group-recruits-almost-half-foster-homes/28821.

[77] Michael Howell-Moroney, Faith-Based Partnerships and Foster Parent Satisfaction, 36 J. HEALTH AND HUM. SERVS. ADMIN. 228, 233 (2013).

[78] Hardy, *supra* note 76.

[79] *Id.*

[80] *Id.*

[81] *Id.*

[82] *Id.*

[83] *Id.*

[84] Hardy, *supra* note 76.

[85] *Id.*

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Arkansas is among thirty-two states that has rejected *Smith* by statute, with legislation passed in the 2019 Legislative Session comprising what is essentially a state equivalent of the federal Religious Freedom Restoration Act (RFRA).[86]

Thus, Arkansas possesses both a (1) well-maintained but hands-off relationship between DCFS and its relevant Christian foster care agency The CALL, as well as (2) recent statutory guidance explicitly rejecting *Smith* in favor of the *Sherbert v. Yoder* and *Wisconsion v. Yoder* decisions.[87]

CSS's relationship with Philadelphia DHS as well as its regulations stands in stark contrast to the Arkansas landscape. CSS acted as a contractor of the state in certification of foster families and signed off on contractual policy that prohibited it from utilizing its discretion to act in accordance with its Christian beliefs when matching families. Additionally, comments by the mayor of Philadelphia that "times have changed," "attitudes have changed," and that it was "not 100 years ago," and that its policy on foster families conflicts with the teaching of the Pope, as well as comments by DHS Director Figueroa reflect a sour relationship between DHS and CSS.

In contrast to Arkansas' recent statutory implementation, intended to "provide a claim or defense to persons whose religious exercise is substantially burdened by government."[88] Philadelphia's regulations prohibited CSS from acting in accordance with its sincerely held religious beliefs in serving as a foster care agency as it had done for over 200 years.

Regardless of whether the Court decides to overrule *Smith*, The CALL is afforded protections in preferential state legislation and a well-maintained, hands-off relationship with DCFS that CSS frankly was not. Thus, the hundreds foster children in waiting in Arkansas will not have to lose sleep at the prospect of 40% of the state's foster homes being shut down overnight. Neither will the foster parents recruited through The CALL, 36% of whom stated would not have become foster parents if not for The CALL.[89]

Minimizing the number of children-in-waiting in foster care is one goal that all can agree is "neutral and generally applicable." Whether the Court's rule of law in this case comes from *Smith*, a new test altogether, or otherwise, the Court's holding should seek to (1) minimize the delay in placing foster children with a family to call home, and (2) maximize the number of otherwise qualified foster placements available.

*William G. McGrath**

[86] Douglas Laycock, Religious Liberty and the Culture Wars, 2014 U. ILL. L. REV. 839, 844 n.22 (2014); ARK. CODE ANN. § 16-123-402(1) (declaring the intent of the act "[t]o restore the compelling interest test as set forth in *Sherbert v. Verner*, 374 U.S. 398 (1963), and *Wisconsin v. Yoder*, 406 U.S. 205 (1972) and to guarantee its application in all cases in which free exercise of religion is substantially burdened.).

[87] *See* ARK. CODE ANN. § 16-123-402(1); *see also* Hardy, *supra* note 76.

[88] ARK. CODE ANN. § 16-123-402(3).

[89] *See* Hardy, *supra* note 76.

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