

Appeal No: 23-4169

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

JESSICA BATES,

Plaintiff-Appellant,

v.

FARIBORZ PAKSERESHT, in his official capacity as Director of the Oregon
Department of Human Resources, et al.,

Defendants-Appellees.

On Appeal from the United States District Court for the
District of Oregon
Case No.2:23-cv-00474-AN

**BRIEF OF LIFELINE CHILDREN'S SERVICES AS AMICUS CURIAE IN
SUPPORT OF PLAINTIFF-APPELLANT AND REVERSAL**

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DISCLOSURE STATEMENT

Pursuant to Rule 26.1 of the Federal Rules of Appellate Procedure, Lifeline Children's Services, by and through its undersigned counsel, certifies that it has no parent corporation and that no publicly held corporation owns 10% or more of its stock.

DATED: January 18, 2024

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IDENTITY AND INTEREST OF AMICUS CURIAE¹

Lifeline Children's Services (Lifeline) is the largest evangelical child-welfare and adoption agency in the United States. Lifeline is a ministry dedicated to providing Gospel-centered service to vulnerable children, women, and men experiencing crisis pregnancies and to broken families in need of restoration. Lifeline provides state-mandated pre-service training, home studies, and continuing education for foster families. Lifeline also places children with foster families.

Lifeline emphasizes family reunification, and to that end, Lifeline has mobilized churches in ten states to provide county and state approved parenting classes as part of reunification plans for foster children. Lifeline licenses its training program to churches on the condition that the churches provide that training to families free of charge.

Lifeline operates nationwide and has offices in 18 states, including Washington State. Lifeline's eligibility to operate in Washington State is possible only because Washington State was enjoined from implementing a state policy (Policy 6900), which would have operated to exclude religious individuals and organizations in the same way and on the same basis that Oregon has excluded Ms. Bates. *See Blais v. Hunter*, 493 F. Supp. 3d 984 (E.D. Wash. 2020). The decision below would limit Lifeline's ability to serve vulnerable children through foster care and domestic adoption in Oregon.

¹ Lifeline states that counsel for Plaintiff-Appellant did not author this brief in whole or in part. Neither did Plaintiff-Appellant nor her counsel contribute any financial support intended to fund the preparation or submission of this brief. No other individual or organization contributed financial support intended to fund the preparation or submission of this brief. All parties have consented to the filing of this brief.

I. SUMMARY OF ARGUMENT

In *Fulton v. City of Philadelphia*, 141 S. Ct. 1868 (2021), the Supreme Court ruled unanimously in favor of two individual foster parents and a religious agency, Catholic Social Services (CSS). While the parties in *Fulton* disagreed on the best way to go about it, in that case, there was no dispute that maximizing the number of available foster parents was important. The Supreme Court shared that view, and the Court's majority opinion emphasized what should go without saying: "maximizing the number of foster families" is an "important goal[]." *Fulton*, 141 S. Ct. at 1881.

The State of Oregon – however – has radically departed from what was agreed by all in *Fulton*. Oregon would exclude religious individuals from being adoptive or foster parents, at the initial application phase, due solely to their religious views on marriage, human sexuality, and gender expression. Oregon argues – and the district court agreed – that its compelling interests require the removal of otherwise appropriate foster parents from the system, making them ineligible to foster or adopt *any child* in the state.

But Oregon and the lower court ignore the issue of paramount importance: the best interest of *all* children. Oregon's categorical exclusion of Ms. Bates – and other religious individuals and agencies – is constitutionally offensive. But, more than that, it will harm children by exacerbating the already alarming shortage of foster families and possible adoptive homes for children in Oregon.

II. ARGUMENT

Lifeline agrees with Ms. Bates that Oregon's policy violates the constitutionally protected rights of religiously motivated individuals and agencies. But Lifeline provides the Court with this brief to highlight a different point: Oregon's policy will compound the state's documented and chronic shortage of foster parents. Its constitutionally offensive policy will increase the number of vulnerable and traumatized foster children experiencing multiple interruptions in placement and spending nights in hotels, caseworker offices, leased facilities, or with uncertified families.

A. **The Supreme Court and all parties in *Fulton* agreed on the importance of increasing the number of foster care parents.**

The issue in *Fulton v. City of Philadelphia* was whether Philadelphia (the City) could exclude Catholic Social Services (CSS) from its long-term role in the foster care system because of the exercise of its religious beliefs, which would not allow CSS to certify same-sex married couples as foster parents. 141 S. Ct. 1868 (2021). The City defended this exclusion despite CSS's willingness to refer same-sex married couples to the numerous other available agencies. Individual foster parents, including Sharonell Fulton, joined CSS's challenge to the City's exclusion because of the key role CSS played in recruiting and supporting foster parents like themselves.

In *Fulton*, the Supreme Court unanimously held that the refusal to grant CSS an accommodation from the City's non-discrimination policies violated the Free Exercise Clause. Its reasoning makes clear that excluding religious agencies or persons from foster care or adoption systems will fail strict scrutiny so long as there are alternative routes for qualified individuals to become foster or adoptive parents, as there were in *Fulton*, or

ways to advance a compelling interest without burdening constitutionally protected activity (and as there certainly are here). *See Fulton*, 141 S. Ct. at 1881–82.

That point is correctly emphasized by Ms. Bates in her brief to this Court. But *Fulton* also emphasizes a more basic point, all but ignored by the lower court and the State of Oregon. That is, in *Fulton*, all parties *agreed* that maximizing the number of available foster parents was an important goal.

The City claimed excluding CSS would maximize the number of foster parents (due to CSS’s exclusionary policy) and maintained that religiously oriented foster parents could simply pursue certification through other agencies. CSS said the City had it exactly backwards: explaining that CSS’s exclusion would meaningfully reduce the number of foster parents because religiously affiliated agencies play a key role in recruiting and supporting foster parents of the same or similar faith and values. The Supreme Court unanimously agreed with CSS, with the majority finding:

Maximizing the number of foster families and minimizing liability are important goals, but the City fails to show that granting CSS an exception will put those goals at risk. If anything, including CSS in the program seems likely to increase, not reduce, the available foster parents.

Fulton, 141 S. Ct. at 1881, 1833 (2021) (majority by Roberts, J. and concurrence by Barrett, Kavanaugh, and Breyer, JJ., joining majority “in full”).

No Justice or party in *Fulton* sought to reduce the number of foster parents. And certainly, no Justice or party in *Fulton* argued for the exclusion of religious foster parents who might share CSS’s beliefs

concerning marriage and human sexuality. Instead, the majority opinion emphasizes what would seem to be a universally held position:

“maximizing the number of foster families” is an “important goal[.]”

Fulton, 141 S. Ct. at 1881, 1883.

Oregon takes the opposite view. And it takes this position because it has determined that religious views like those held by Ms. Bates pose a “real and significant threat to the physical and psychological well-being of the children in the state’s care and custody,” *Bates v. Pakseresht*, 2:23-CV-00474-AN, 2023 WL 7546002, at *18 (D. Or. Nov. 14, 2023) (quoting Oregon’s response brief), because they – again, in the State’s view – do not “respect, accept, and support a child’s sexual orientation, gender identity, and gender expression.” *Id.* Even more, Oregon rejects the suggestion that it can address this concern in a more narrowly tailored way by considering individual foster children and parents at a secondary “matching” stage.

This position is constitutionally offensive for all the reasons Ms. Bates articulates, but also – in simpler terms – it is just not rational.

B. Oregon’s foster-care system has a documented and chronic shortage of foster parents.

Oregon’s effort to exclude Ms. Bates and other like-minded or religiously motivated individuals and agencies comes at a time when the foster care system is in deep crisis. The most recent Adoption and Foster Care Analysis and Reporting System (AFCARS) report identified 407,318 children and adolescents in foster care during Fiscal Year 2021, of which

113,589 awaited adoptions.² The lower court failed to consider Oregon's categorical exclusion in light of this emergency.

Oregon has a chronic foster parent shortage. On top of that, the State has a documented history of placing foster children in hotels, on cots in caseworker offices, with uncertified families, and even in juvenile detention centers.³ The State's practices were so egregious that in 2016 Youth, Rights & Justice, Oregon Law Center, and CASA for Children brought a class-action lawsuit against the Oregon Department of Human Services to end the State's shocking practice of housing children in hotel rooms for long periods of time.⁴ As a result of that litigation, Oregon committed to curtailing the practice in a 2018 settlement. *Id.*

At the same time, the total number of licensed foster homes in Oregon continued to decrease. In 2019, Oregon had 4,220 licensed foster

² *The AFCARS Report: Preliminary FY 2021 Estimates as of June 28, 2022 – No. 29*, U.S. Department of Health & Human Services, <https://www.acf.hhs.gov/sites/default/files/documents/cb/afcars-report-29.pdf>.

³ Laura Gunderson, John Maher, Helen Jung, & Mark Katches, *Time for Oregon's Foster Children to Check out of Hotels: Editorial*, *The Oregonian* (June 30, 2017), https://www.oregonlive.com/opinion/2017/06/time_for_oregons_foster_childr.html; Libby Dowsett, *Lack of placement stability for Oregon foster youth causes traumatic disruptions*, *Street Roots* (Oct. 13, 2021), <https://www.streetroots.org/news/2021/10/13/placement-stability>.

⁴ *Update: DHS Makes Progress on Ending Placement of Foster Youth in Hotels*, Youth, Rights & Justice (Feb. 25, 2021), https://www.oregonlive.com/opinion/2017/06/time_for_oregons_foster_childr.html.

homes; by 2023, that number dropped to only 2,959.⁵ In just the first six months of 2023, 75 vulnerable children were placed in Oregon hotels; ranging in age from 6 to 19 years old. *Id.* Twenty of those children lived in a hotel for more than 60 days. *Id.* And Oregon has spent more than \$25 million housing foster children in hotels since 2018, after promising to limit the troubling practice as part of a settlement.⁶

Washington State, one of the states where Lifeline operates, has also seen decreases in licensed fosters homes. In 2019, Washington had 5,131 licensed foster homes; however, by 2023 that number was down to 4,341.⁷ Moreover, an alarming number of Washington children have been temporarily placed in hotels and offices. In 2022, 4,682 foster children spent the night in “placement exceptions” in Washington.⁸

Even without the Supreme Court’s emphasis in *Fulton*, it would seem obvious that categorically excluding faith-based organizations and individuals will lead to fewer foster homes. But we have an example that

⁵ *Total Licensed Foster Homes*, WHO CARES: A National Count of Foster Homes and Families, <https://www.fostercarecapacity.com/data/total-licensed-foster-homes>.

⁶ Lauren Dake, *Judge-commissioned report examines why Oregon continues to keep foster kids in hotels*, Oregon Public Broadcasting, <https://www.opb.org/article/2023/12/21/judge-commissioned-report-examines-why-oregon-continues-keep-foster-kids-in-hotels/>.

⁷ *Total Licensed Foster Homes*, WHO CARES: A National Count of Foster Homes and Families, <https://www.fostercarecapacity.com/data/total-licensed-foster-homes>.

⁸ *DCFY Use of Hotels and Offices as Placement 2022 Report*, The Washington State Office of the Family and Children’s Ombuds, https://ofco.wa.gov/sites/default/files/2022-10/Placement_Exceptions_Dashboard_August_2022x.pdf.

proves the point: in 2011, Illinois enacted its “Religious Freedom Protection and Civil Union Act,” which effectively prevented the state from partnering with faith-based agencies who hold traditional beliefs on marriage. As a result, Illinois lost 1,547 foster homes in a five-year period—more than any other state reporting data during that time.⁹ Oregon’s policy will have the same result.

Oregon is not alone in experiencing this crisis in foster care. But it is unexampled in its willingness to exacerbate the problem. Washington pursued a similar path until enjoined by a United States District Court in the Eastern District of Washington. *Blais v. Hunter*, 493 F. Supp. 3d 984 (E.D. Wash. 2020). And the U.S. Department of Health and Human Services (HHS) issued proposed rules on federally funded state foster-care agencies and LGBTQ children, which raise Oregon’s concerns but suggest a more narrowly tailored approach. Safe and Appropriate Foster Care Placement Requirements for Titles IV–E and IV–B, 88 Fed. Reg. 66752 (proposed Sept. 28, 2023) (to be codified at 45 C.F.R. pt. 1355). In response to HHS’s suggestion, 19 states provided comment to emphasize that states can and must even more narrowly tailor their policies. Comment by Attorneys General of Alabama and 18 other states (Nov. 27, 2023), <https://perma.cc/XJF5-WPHN>. In making this point, these 19 states emphasized what the lower court and Oregon ignored: “without faith-based organizations and foster homes, the foster care system would face a critical lack of placement options.” *Id.* at 2.

⁹ See John Kelly et al., *Foster Care Housing Crisis*, *The Chronicle of Social Change*, Appendix A at 13-14, <https://perma.cc/9SK8-WFXA>; Comment by Attorneys General of Alabama and 18 other states (Nov. 27, 2023), at 9, <https://perma.cc/XJF5-WPHN>.

C. Religiously-motivated people and agencies have long played an indispensable role in caring for vulnerable children.

Motivated by a sincere faith and sense of calling, religious individuals and groups have served as the backbone of adoption and foster care since our country's founding. Faith-based agencies pioneered the field of care for vulnerable children well before state and local governments were involved.¹⁰ When state and local governments meaningfully entered the field of child welfare after the Civil War, creating county- and state-run asylums¹¹, they did so primarily by funding private (still predominately religious) orphanages and institutions. *Id.* at 31-34. Then, when the modern foster care system began to take shape, faith-based groups continued to play an essential role in child welfare.¹² And the close partnership between faith-based agencies and local governments continues to this day.¹³

¹⁰ See e.g., David Gates, *History of the Orphanage*, Newsweek (Dec. 11, 1994, 7:00 PM) <https://perma.cc/C9XA-B28R>. (describing the work of Ursine nuns); Timothy A. Hacsí, *Second Home: Orphan Asylums and Poor Families in America* 17-18 (1997) (describing the founding of the first orphan asylum by Lutherans and its impact on the Methodist preacher George Whitfield); see also *Fulton v. City of Philadelphia*, 141 S. Ct. 1868, 1884-5, 210 L. Ed. 2d 137 (2021) (Alito, J., concurring) (summarizing role of religious organizations).

¹¹ Timothy A. Hacsí, *Second Home: Orphan Asylums and Poor Families in America* 27 (1997).

¹² Kasia Murray & Sarah Gesiriech, *A Brief Legislative History of the Child Welfare System*, Pew Charitable Trusts.

¹³ Kelsi Brown Corkran, *Principal-Agent Obstacles to Foster Care Contracting*, 2 J.L. Econ. & Pol'y 29, 31-32 (2006) ("Although some states have created public agencies that directly place children in foster homes and employ social workers to monitor their care, most continue to contract these services out to private nonprofit organizations.").

D. Religious individuals and organizations are motivated and sustained by their religious beliefs.

For religiously motivated people and agencies, caring for vulnerable children is a ministry, calling, and command from God. *See Fulton*, 141 S. Ct. at 1884 (Alito, J., concurring). People of faith are not motivated by a generic faith, but by specific religious histories, traditions, and theologies that are embodied in their work. This is exactly the case with Lifeline, whose mission is “to equip the Body of Christ to manifest the gospel to vulnerable children” with a vision to see “vulnerable children and their communities [] transformed by the gospel and [] making disciples.”¹⁴ And it is also the case with Ms. Bates. *Bates v. Pakseresht*, 2:23-CV-00474-AN, 2023 WL 7546002, at *2 (D. Or. Nov. 14, 2023) (“[Ms. Bates] felt called to adopt a child from foster care.”).

E. Religiously-motivated people and agencies play a unique and irreplaceable role in the foster care and adoption system.

State child welfare systems could not operate effectively without the support and resources of faith-based individuals and organizations. They are prolific recruiters of religious foster parents (like Ms. Bates), they provide essential community support that allows families to foster longer and more effectively, and they play an indispensable role appropriately placing children of all religious backgrounds. David M. Smolin, *Kids Are Not Cakes: A Children's Rights Perspective on Fulton v. City of Philadelphia*, 52 *Cumb. L. Rev.* 79, 149 (2022).

¹⁴ *Our Mission and Beliefs*, Lifeline Children’s Services (January 17, 2024) <https://lifelinechild.org/mission-and-beliefs/>.

Since its founding in 1981, Lifeline has placed more than 3,000 children into loving Christian homes. Although Lifeline has only operated in Washington State for 18 months, it has already actively engaged with 7 churches, licensed 15 families to provide foster care, helped foster 16 children, seen 11 children adopted, and had 25 families pre-apply for services.¹⁵

Religious faith is a powerful motivation to serve as a foster parent.¹⁶ In one study more than 90% of people contacted by a faith-based child welfare organization reported that after that contact, they were “highly aware” of a religious mandate to care for orphans and of the need for foster and adoptive families in their community.¹⁷

More than that, faith-based agencies partner with local faith communities to provide tangible support to foster families. In one instance, a partner church approached Lifeline with a vision to help prepare bedrooms in the homes of families that were becoming licensed foster parents. Lifeline connected the church with four families undergoing foster care training with Lifeline. The families’ requests ranged from a single item to an entire room, and the church rallied to supply their needs. In another case, a prospective foster family had to halt their licensing process because

¹⁵ 2022 *Annual Report*, Lifeline Children’s Services (January 18, 2024) [Annual-Report-with-State-Inserts-2022.pdf](#) (lifelinechild.org).

¹⁶ Michael Howell-Moroney, *The Empirical Ties between Religious Motivation and Altruism in Foster Parents: Implications for Faith-Based Initiatives in Foster Care and Adoption*, *Religions*, Vol. 5, No. 3, at 720-737 (2014).

¹⁷ Michael Howell-Moroney, *On the Effectiveness of Faith-Based Partnerships in Recruitment of Foster and Adoptive Parents*, *J. of Pub. Management & Social Policy*, No. 19, Vol. 2, 176 (2013).

they could not afford to put a fence around the pool in their back yard. Lifeline reached out to the family's home church – another Lifeline church partner – and the church stepped up to help the family put up a fence and continue with licensing.

When reflecting on their own fostering experience, Washington State Lifeline alumni, Casey and Stefanie, wrote: “Fostering is hard work and you don't realize how much help and support you need. We know that not only does God have our back, but so does the amazing [Lifeline] staff with their desire to work through God's love as well.”

Faith-based agencies are effective recruiters precisely because they are religiously motivated. But it doesn't stop at recruitment, they are also uniquely effective at keeping foster families open, again, because of their religious faith.¹⁸

F. Faith-based agencies – like Lifeline – are essential for respecting the free exercise rights of children and parents.

In addition to the many other roles faith-based agencies play, these organizations are indispensable if a state is going to meaningfully respect the religious beliefs and free exercise of the children and families it serves. This is because, of course, some children share Ms. Bates' beliefs and would be appropriately placed in homes with traditional religious views on marriage, human sexuality, and gender identity. When raised below, the lower court dismissed this point as “misstat[ing] the inquiry,” which it

¹⁸ Mary Ellen Cox, Cheryl Buehler, & John Orme, *Recruitment and Foster Family Service*, J. Soc. & Soc. Welfare Vol. 29, No. 3, 166-168 (2002) (Families who hear about fostering through a church or religious organization foster for years longer than other foster parents).

viewed as solely “whether denying plaintiff’s application is necessary to further the government’s interest in protecting LGBTQ+ youth in its care from invalidating and disaffirming environments.” *Bates v. Pakseresht*, 2:23-CV-00474-AN, 2023 WL 7546002, at *22 (D. Or. Nov. 14, 2023).

Faith-based agencies are more likely to recruit foster families of the same faith, which gives states a viable pool of potential placements and streamlines the process of finding a religiously compatible placement. For example, if a state must place a Jewish child into a foster home, it is orders of magnitude more efficient to call a Jewish adoption and foster agency, rather than contact dozens of organizational partners who will then comb through their list of families to find a compatible placement.

Any government body – like Oregon – that would require faith-based agencies and religious motivated individuals to abandon their most fundamental commitments will jeopardize a healthy stream of potential foster families and robust base of support for current foster families. And it will do so to the detriment of the children the government purports to serve.

G. Oregon’s policy would have the impact of excluding a significant portion of the population.

While polling data is not comprehensive, there is strong evidence that if Oregon were to consistently enforce its policy of excluding potential caregivers who held religious beliefs the State deemed to be insufficiently respectful, affirming, and supportive of the identities of children “who are, or may later identify as LGBTQ+,” *Bates v. Pakseresht*, 2:23-CV-00474-AN, 2023 WL 7546002, at *28 (D. Or. Nov. 14, 2023), it would disqualify 35-60% of prospective foster parents. David M. Smolin, *Kids Are Not Cakes: A*

Children's Rights Perspective on Fulton v. City of Philadelphia, 52 Cumb. L. Rev. 79, 149 (2022). This exclusion would have a disproportionate impact on certain groups, including Black Americans, those more religiously committed, and older adults. *Id.* (comparing polling on same-sex marriage, pediatric medical interventions for the purpose of gender transition, and transgender student athletes joining sports teams that correspond with their gender identity). “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.” *Id.* at 150.

III. Conclusion

In 2020, Lifeline joined other religiously affiliated agencies and law professors as amici curae in support of Sharonell Fulton and CSS. Their brief, presciently stated:

If the City declares that the Catholic Church is unfit to find foster families because of its views on marriage, it unavoidably sends the message that families who share that same view of marriage are unfit to be foster families. The government cannot send the message that certain religious views are unwelcome by maintaining a passive monument. *McCreary Cty., Ky. v. Am. Civil Liberties Union of Ky.*, 545 U.S. 844 (2005). Surely it cannot send the message that certain religious views are unwelcome by stating outright, through its express motivation for excluding CSS from child welfare.

Brief for the Coalition for Jewish Values, et al. as Amicus Curiae, p. 32, *Fulton v. City of Philadelphia*, 141 S. Ct. 1868, 210 L. Ed. 2d 137 (2021).

Only four years later, Oregon has done just that. No one is served by closing doors to people and agencies who, inspired by and informed by their faith, seek to care for vulnerable children. Allowing Oregon to exclude Ms. Bates from the child welfare system sends an ominous message to all people of faith serving in any social service ministry: fall in line. And it sends that message at the expense of vulnerable children, who Oregon would prefer to sleep in hotels than the loving and supportive home offered by Ms. Bates. The judgment below should be reversed.

RESPECTFULLY SUBMITTED THIS 18th day of January, 2024

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CERTIFICATE OF SERVICE

I hereby certify that on January 18, 2024, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the CM/ECF system, which will accomplish service on counsel for all parties through the Court's electronic filing system.

DATED: January 18, 2024

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UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

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