

WHO CARES ABOUT FOSTER CARE? HOW HHS’S “SAFE AND PROPER” REGULATION HURTS FOSTER CHILDREN

UPDATE

Since this Article was written in the spring of 2024, the proposed regulation has been published as a final rule by the Children and Families Administration of the Department of Health and Human Services (HHS) on July 1, 2024, as Designated Placement Requirements under Titles IV-E and IV-B for LGBTQI+ Children at 45 C.F.R. pt. 1335. In the final rule, HHS makes clear that foster families are not required to become a Designated Placement, yet each foster family must be safe and appropriate for all foster children, including those who identify as LGBTQI+.¹ Despite the changes in the published rule, this Article remains an important piece of literature in this discussion as states continue to determine the status of LGBTQI+ foster youth and foster families.

INTRODUCTION

From sea to shining sea, foster parents are being denied licensure because of ideological differences with the state.² On the East Coast, a Massachusetts couple—Mike and Kitty Burke—were denied a license to serve as foster parents.³ “Even though Massachusetts has a foster care crisis, state officials refused to let the Burkes foster any children in the state.”⁴ Despite their willingness to help mitigate this crisis, the Burkes were denied licensure after not only completing several hours of training, but also expressing a desire to care for foster youth from diverse backgrounds, including special needs children or a sibling group.⁵ During an interview in their home, the Burkes were asked numerous questions by the state agent about their Catholic beliefs—specifically on marriage and sexual orientation.⁶ After hours of training, interviews, and home

¹ *Designated Placement Requirements under Titles IV-E and IV-B for LGBTQI+ Children*, 89 Fed. Reg. 34818, 34859 (Apr. 30, 2024) (to be codified at 45 C.F.R. pt. 1355).

² Ryan Colby, *Massachusetts Bans Faithful Catholics from Adopting Children*, BECKET L. (Aug. 8, 2023), <https://www.becketlaw.org/media/breaking-massachusetts-bans-faithful-catholics-from-adopting-children/>; *Oregon Officials Put Politics Above Children’s Welfare*, ALL. DEFENDING FREEDOM (Apr. 3, 2023), <https://adflegal.org/press-release/oregon-officials-put-politics-above-childrens-welfare> [hereinafter *Politics Above Children’s Welfare*].

³ Colby, *supra* note 2.

⁴ *Id.*

⁵ *Id.*; Case Detail of *Burke v. Walsh*, BECKET L., <https://www.becketlaw.org/case/burke-v-walsh/> (last visited Aug. 16, 2024).

⁶ Colby, *supra* note 2.

studies to become foster parents, the Burkes were denied a license because of their Catholic views on gender identity.⁷

On the opposite side of the country, Oregon mother Jessica Bates was denied licensing to adopt through state foster care.⁸ Why? Because she did not agree to “respect, accept, and support . . . the sexual orientation, gender identity, [and] gender expression” of a child that the department may place in her home.⁹ Despite her assurances that she would love, care for, and support any child placed with her, her application was rejected.¹⁰ The *Bates* case is currently on appeal to the Ninth Circuit.¹¹ Both the Burkes and Bates were prospective foster parents who, when asked by the state, stated that they would refuse to give LGBTQI+ affirming care to future—hypothetical—foster children.¹² These parents were denied licensure and the opportunity to foster or adopt any child (LGBTQI+ identifying or otherwise) through state foster care.¹³

On September 27, 2023, the Biden Administration published a fact sheet announcing, “New Actions to Support Children and Families in Foster Care.”¹⁴ The factsheet describes how the Administration hopes to support kinship caregivers, expand access to legal services, and “protect LGBTQI+ youth” through new policies.¹⁵ The fact sheet goes on to proclaim that, “LGBTQI+ youth face profound disparities in the foster care

⁷ *Id.*

⁸ *Politics Above Children’s Welfare*, *supra* note 2.

⁹ *Id.*

¹⁰ *Id.*

¹¹ *Oregon Mom Appeals to 9th Circuit: End Ideological Litmus Test, Let Children Find Forever Homes*, ALL. DEFENDING FREEDOM (Dec. 13, 2023), <https://adflegal.org/press-release/oregon-mom-appeals-9th-circuit-end-ideological-litmus-test-let-children-find-forever> [hereinafter *Oregon Mom Appeals to 9th Circuit*].

¹² Abby Patkin, *Lawsuit: Mass. Catholic Couple Says They Were Barred from Fostering Children over LGBTQ+ Beliefs*, BOSTON.COM (Aug. 11, 2023), <https://www.boston.com/news/local-news/2023/08/11/lawsuit-catholic-couple-says-they-were-barred-from-fostering-children-lgbtq-beliefs/>; *Oregon: Adopt Gender Ideology Before Adopting Children*, ALL. DEFENDING FREEDOM (Dec. 21, 2023), <https://adflegal.org/article/oregon-adopt-gender-ideology-adopting-children> [hereinafter *Oregon: Adopt Gender Ideology*].

¹³ These two couples are just an example of the many prospective foster parents who have been denied licensure. In Washington, one couple who were already licensed as foster parents (for nine years) were denied renewal of their license. See Kendall Tietz, *Washington Couple Claims State Denied Foster-Care License over Belief that Gender is Fixed*, FOX NEWS (Apr. 1, 2024), <https://www.foxnews.com/media/washington-couple-claims-state-denied-foster-care-license-belief-gender-fixed.print>.

¹⁴ *Fact Sheet: Biden-Harris Administration Announces New Actions to Support Children and Families in Foster Care*, THE WHITE HOUSE (Sept. 27, 2023), <https://www.whitehouse.gov/briefing-room/statements-releases/2023/09/27/fact-sheet-biden-harris-administration-announces-new-actions-to-support-children-and-families-in-foster-care/> [hereinafter *Fact Sheet*].

¹⁵ *Id.*

system.”¹⁶ The Biden Administration’s goal to protect LGBTQI+ foster youth is furthered by President Biden’s executive order on June 15, 2022 aimed at “Advancing Equality for Lesbian, Gay, Bisexual, Transgender, Queer, and Intersex Individuals,”¹⁷ which directed the Department of Health and Human Services (HHS) to “protect LGBTQI+ youth in the foster care system.”¹⁸ The Executive Order purports to address the “disparities” that LGBTQI+ youth face in a child welfare system.¹⁹ Further, the Executive Order states that “the misuse of State and local child welfare agencies to target LGBTQI+ youth and families” must be addressed.²⁰ Though the Executive Order does not address particular examples, it generally suggests that state and local child welfare agencies target LGBTQI+ youth and families in their care.²¹ The fact sheet and Executive Order demonstrate that the Biden Administration is concerned with the wellness of LGBTQI+ youth in state care across the country.

In an effort to advance the goals expressed in the President’s Executive Order, HHS has proposed a federal regulation, entitled “Safe and Appropriate Foster Care Placement Requirements for Titles IV-E and IV-B,” that would *require* all states’ child welfare systems that receive Title IV-E funding to ensure that LGBTQI+ foster youth are placed with foster families and in foster homes that are supportive of their gender identity.²² This proposed regulation would further require that caregivers of LGBTQI+ foster youth receive extra, specialized training on how to help meet the needs of LGBTQI+ youth, as well as make sure that LGBTQI+ foster youth have access to necessary services.²³ For a placement to be considered “safe and appropriate,” the foster home must have an environment free from hostility (based on LGBTQI+ status) and the foster parent must undergo additional training and be willing to facilitate the child’s access to resources and activities.²⁴ This proposed rule hopes to safeguard LGBTQI+ youth from being placed in foster homes where they may be mistreated on the basis of their sexual orientation or gender

¹⁶ *Id.*

¹⁷ *Id.*; Exec. Order No. 14075, 87 Fed. Reg. 37189, 37189 (June 15, 2022) [hereinafter Executive Order].

¹⁸ *Fact Sheet*, *supra* note 14.

¹⁹ Executive Order, *supra* note 17 at 37189, 37191. While both the factsheet and the executive order refer broadly to disparities faced by LGBTQI+ foster youth, neither specifically states what constitutes these disparities. *Id.*; *Fact Sheet*, *supra* note 14.

²⁰ Executive Order, *supra* note 17.

²¹ *Id.* at 37189–90.

²² Safe and Appropriate Foster Care Placement Requirements for Titles IV–E and IV–B, 88 Fed. Reg. 66754, 66757–58 (proposed Sept. 28, 2023) (to be codified at 45 C.F.R. pt. 1355) [hereinafter Placement Requirements].

²³ *Id.* at 66754, 66757–58.

²⁴ *Id.* at 66768.

identity.²⁵ The focus of the proposed regulation is on the health and safety of LGBTQI+ youth in the foster system—finding its authority in Title IV-E of the Social Security Act, which requires state and tribal child welfare agencies that receive federal funding to conduct case plans including “safe and proper” placements for foster children.²⁶

Adding requirements for states’ welfare systems in licensing foster families may hurt foster youth—LGBTQI+ or otherwise—more than it helps them. States are in crisis. There are not enough foster homes for the number of children in foster care.²⁷ Over 100,000 children are waiting for a permanent home across the United States.²⁸ Children in foster care are sleeping in state and county offices, hospital rooms, and psychiatric wards.²⁹ As of 2022, in Philadelphia, up to ten children were sleeping in the childcare room at the child welfare agency most nights.³⁰ Nevertheless, states are denying foster parent licensure to families who want to provide a home for foster children because of the parents’ ideology surrounding gender and sexual identity, as opposed to the usual home safety qualifications for foster parents. States, and the federal government, are failing to provide affirming, supportive homes to *all* foster children in an effort to find supportive homes for LGBTQI+ foster youth. By refusing to license foster families over ideological differences (what the Alliance Defending Freedom refers to as an “ideological litmus test” in the *Bates* case³¹), this federal regulation would only further harm all children in foster care by increasing the number of children without stable homes. Rather than helping children into safe homes, HHS’s regulation (and others like it) will decrease the number of possible homes for all foster children. Foster children need safe and loving homes. Federal and state governments adding additional requirements for potential foster parents to gain licensure hurts foster children, including LGBTQI+ foster children.

This Article argues that the Biden Administration’s proposed regulation hurts foster children by lowering the number of potential foster homes. Part I is an overview of the historical background of foster care in the United States, including the religiosity in most of its history. Part I

²⁵ *Fact Sheet*, *supra* note 14.

²⁶ Placement Requirements, *supra* note 22, at 66752, 66755–56.

²⁷ Colby, *supra* note 22; *Heart Gallery Mission*, HEART GALLERY OF AM., <https://heartgalleryofamerica.org/about-heart-gallery/mission-history/> (last visited Sept. 20, 2024).

²⁸ *Heart Gallery Mission*, *supra* note 27.

²⁹ Colby, *supra* note 2; Sean Hughes, *Why Foster Children Are Sleeping in Offices and What We Can Do About It*, AM. ENTER. INST., 1–2 (Apr. 2023), <https://www.aei.org/wp-content/uploads/2023/04/Why-Foster-Children-Are-Sleeping-in-Offices-and-What-We-Can-Do-About-It.pdf>.

³⁰ *Id.*

³¹ *Oregon: Adopt Gender Ideology*, *supra* note 12.

also discusses the history of LGBTQI+ youth in foster care and their disproportionate representation therein. Part II describes the current status of foster care, both the crisis throughout the country of a lack of foster homes and the general demographics of those licensed to be foster or adoptive parents. Part III addresses the proposed regulation itself, focusing on how the language in the statute hurts foster children. States across the country are facing a crisis in foster care, and *all* children need welcoming and supportive homes. From coast to coast, families who want to care for these children are being denied licensure. The proposed federal regulation fails to promote foster children's best interests by denying licensure to safe and appropriate prospective foster homes, thereby decreasing the number of available foster homes.

I. BACKGROUND

A. Historical Overview

While foster care today is a state-run public service, the Christian church widely, and the Catholic Church especially, has taken care of orphans for hundreds of years, and taught their adherents to continue to do so.³² "Caring for the orphan and the marginalized has been part of the Catholic Church's fundamental makeup from the very beginning."³³ During the early days of the Church, under the Roman Empire, children were often abandoned or "expos[ed]."³⁴ Early Christians refused to practice infanticide and provided care for those children who were left outside to die.³⁵ The Church became known for its care of abandoned children, with Christians showing their "love [for] one another" through their care for the abandoned orphan.³⁶ The Catholic Church would

³² Brief of the United States Conference of Catholic Bishops and Pennsylvania Catholic Conference as Amici Curiae in Support of Petitioners at 8, 12, 17–18, *Fulton v. City of Philadelphia*, 593 U.S. 522 (2021) (No. 19-123).

³³ *Id.* at 9.

³⁴ *Id.* at 9–10; Judith Evans Grubbs, *Infant Exposure and Infanticide*, in *THE OXFORD HANDBOOK OF CHILDHOOD AND EDUCATION IN THE CLASSICAL WORLD* 83, 83–84 (Dec. 16, 2013).

³⁵ Joanie Gruber, Assistant Professor of Soc. Work, Mount Vernon Nazarene Univ., Presentation at North American Association of Christians in Social Work Convention: Orphan Care in the Early Church—A Heritage to Recapture (Oct. 21, 2011) (available online at <https://nacsww.org/Publications/Proceedings2011/GruberJOrphanCareE.pdf>).

³⁶ Brief of the United States Conference of Catholic Bishops, *supra* note 32, at 10 (quoting Aristides, *Apology* XV, in 9 ANTE-NICENE FATHERS: TRANSLATIONS OF THE WRITINGS OF THE FATHERS DOWN TO A.D. 325 at 514 (A. Roberts & J. Donaldson eds., Buffalo, N.Y., Christian Literature Publ'g Co. 1885)).

continue to be known for its care for orphans past ancient times and into American history.³⁷

Christians follow a biblical mandate when caring for the orphans and the fatherless.³⁸ Religious texts, including the Christian Bible, contain early documentation of “foster care.”³⁹ Throughout scripture, from the Old Testament to the New Testament, the Church is commanded to care for the orphan and the widow. “Do not take advantage of the widow or the fatherless;”⁴⁰ “Take up the cause of the fatherless;”⁴¹ “Religion that God our Father accepts as pure and faultless is this: to look after orphans and widows in their distress.”⁴² The Bible highlights the importance for Christians to care for children in their society, and Christians have faithfully fulfilled that role for two thousand years.

In the United States in the mid-nineteenth century, Minister Charles Loring Brace founded the “Children’s Aid Society.”⁴³ The Society cared for poor and homeless children in New York City, operating “lodging houses, fresh air programs, and industrial schools.”⁴⁴ The Society cared for 30,000 children and started the Orphan Trains,⁴⁵ which sent thousands of children westward to be adopted by farmers over the course of twenty years.⁴⁶ In the early twentieth century, states began to pass the first laws preventing child abuse and neglect, and the federal government established the first children’s bureau.⁴⁷ The state continued to become more involved with foster care as “social agencies began to supervise and screen foster parents.”⁴⁸

In 1935, the landscape of child welfare changed dramatically. Part of President Roosevelt’s New Deal was the Social Security Act of 1935 which

³⁷ *Id.* at 12; Suzy Farren, *The Sisters Knew a Child Needs a Home*, HEALTH PROGRESS 15, 15 (June 2011), <https://www.chausa.org/docs/default-source/health-progress/the-sisters-knew---a-child-needs-a-home-pdf.pdf>.

³⁸ Gruber, *supra* note 35.

³⁹ Ashika Sethi, *A Brief History of Foster Care in the United States*, CASA TRAVIS CNTY. (May 24, 2021), https://www.casatravis.org/a_brief_history_of_foster_care_in_the_united_states.

⁴⁰ *Exodus* 22:22 (NIV).

⁴¹ *Isaiah* 1:17 (NIV).

⁴² *James* 1:27 (NIV).

⁴³ Sethi, *supra* note 39.

⁴⁴ *A History of Innovation*, CHILDREN’S AID, <https://www.childrensaidnyc.org/about/history-innovation> (last visited Sept. 20, 2024).

⁴⁵ *Id.*

⁴⁶ Sethi, *supra* note 39.

⁴⁷ Kaia O’Neill Murray & Sarah Gesiriech, *A Brief Legislative History of the Child Welfare System*, PEW CHARITABLE TRS. 1 (Nov. 1, 2004), <https://www.pewtrusts.org/en/research-and-analysis/reports/2004/11/01/a-brief-legislative-history-of-the-child-welfare-system>.

⁴⁸ Sethi, *supra* note 39.

contained Title IV.⁴⁹ By providing states with funding for welfare systems, Title IV allowed states to give cash welfare payments to families with dependent children.⁵⁰ Title IV is now titled “Grants to States for Aid and Services to Needy Families with Children and for Child-Welfare Services,”⁵¹ and is the authoritative basis for HHS’s proposed regulation.⁵² While foster care started as mission of Christians to the abandoned child, foster care is now a state-run, federally subsidized system.

B. Modern-Day Foster Care

Traditionally, states control child welfare issues within their borders.⁵³ “However, the federal government’s role in the modern child welfare system has increased as federal funding augmentations are accompanied by new rules and requirements emphasizing greater accountability on the part of states in achieving positive child outcomes.”⁵⁴ Caring for poor or needy children was mainly accomplished by private organizations through the nineteenth century; the dawn of the twentieth century saw the states begin to step into the role of caring for children.⁵⁵ With the Social Security Act of 1935, the federal government became involved in the child welfare system by providing federal grants to state welfare systems to help care for needy and dependent children.⁵⁶ Federal government intervention has continued to grow with additional legislation through the late twentieth century and into the twenty-first century.⁵⁷ In this way, there continues to be a “federalization” of family law in the United States,⁵⁸ despite the fact that “[d]omestic relations have traditionally been governed by state law,” and Congress generally lacks

⁴⁹ Social Security Act of 1935, tit. IV, ch. 531, 49 Stat. 620, 627–29 (codified as amended at 42 U.S.C. §§ 301–1397mm); Becky Little, *Why Social Security Was the Cornerstone of FDR’s New Deal*, HIST. (Apr. 11, 2023), <https://www.history.com/news/social-security-history-fdr-new-deal>.

⁵⁰ Social Security Act of 1935, tit. IV ch. 531, 49 Stat. 620, 627–29.

⁵¹ 42 U.S.C. §§ 601–687.

⁵² Placement Requirements, *supra* note 22, at 66752, 66755–56.

⁵³ Murray & Gesiriech, *supra* note 47.

⁵⁴ *Id.*

⁵⁵ *Id.*

⁵⁶ *Id.*

⁵⁷ See generally *id.* at 1–6 (identifying child welfare programs created by the government through legislation from the time of the Social Security Act of 1935 to the early 2000s).

⁵⁸ Linda D. Elrod, *The Federalization of Family Law*, AM. BAR ASS’N (July 1, 2009), https://www.americanbar.org/groups/crsj/publications/human_rights_magazine_home/human_rights_vol36_2009/summer2009/the_federalization_of_family_law/.

power over domestic relations.⁵⁹ Family law remains traditionally within the realm of the state courts.⁶⁰

In 1997, the Adoption and Safe Families Act (ASFA) was passed.⁶¹ Among other provisions, it regulates how long children may spend in foster care before adoption or reunification.⁶² This federal law expands family preservation services through additional funding to states to “prevent child abuse and neglect and to assist families in crisis.”⁶³ Further, ASFA requires states to document their efforts to place children in adoptive or otherwise permanent homes.⁶⁴ ASFA also expands healthcare coverage, gives new funding to states for technical assistance in promoting adoption, requires background checks, and addresses geographical barriers by conditioning funding on states not denying placement when it is available out of state.⁶⁵

Perhaps most importantly, ASFA sets time frames. First, for filing termination of parental rights actions: if a child has been in foster care for fifteen of the last twenty-two months, the state must file a petition to terminate parental rights.⁶⁶ Second, for permanency planning hearings: every foster child must have a permanency planning hearing within twelve months of entering foster care to determine whether the child will be returned home, placed for adoption, or given another permanent living arrangement.⁶⁷ States are only bound to follow the guidelines in ASFA if they accept Title IV-E funding; there is a clear monetary incentive for states to prioritize adoption as millions of dollars are funneled to states whose adoption numbers increase over the previous fiscal year.⁶⁸ Additionally, ASFA requires that states make “reasonable efforts” to reunify and preserve families in order to continue to receive federal funding.⁶⁹ Through both incentives and requirements for receiving federal

⁵⁹ *Haaland v. Brackeen*, 599 U.S. 255, 276 (2023).

⁶⁰ *Id.*

⁶¹ Adoption and Safe Families Act of 1997, Pub. L. No. 105-89, 111 Stat. 2115.

⁶² *Summary of The Adoption and Safe Families Act of 1997*, ADOPTION.COM (Aug. 27, 2016), <https://adoption.com/summary-adoption-and-safe-families-act-of-1997> [hereinafter *Summary of ASFA*]; Adoption and Safe Families Act, sec. 103(c)(1)–(2).

⁶³ *Summary of ASFA*, *supra* note 62; Adoption and Safe Families Act, sec. 201, § 473A(a), sec. 305(a).

⁶⁴ *Summary of ASFA*, *supra* note 62; Adoption and Safe Families Act, sec. 203 § 479A.

⁶⁵ *Summary of ASFA*, *supra* note 62; Adoption and Safe Families Act, secs. 106(B), 201 § 473A(i), 202(a)–(b), 306(3).

⁶⁶ *Summary of ASFA*, *supra* note 62; Adoption and Safe Families Act, sec. 103(a).

⁶⁷ *Summary of ASFA*, *supra* note 62; Adoption and Safe Families Act, sec. 302.

⁶⁸ *Summary of ASFA*, *supra* note 62; Adoption and Safe Families Act, sec. 201 § 473(a)–(b).

⁶⁹ *Summary of ASFA*, *supra* note 62; Adoption and Safe Families Act, secs. 101(a)(B), 201 § 473A(a).

funding, ASFA promotes stability for foster youth through state child welfare agencies.

Besides ASFA and other Title IV conditions on funding, states generally control their own child welfare (foster care) systems, not the federal government. For example, Title IV requires states receiving funding to check criminal records and the child abuse registry for a relative guardian and any other adult in the home.⁷⁰ While all fifty states require background checks for prospective foster or adoptive parents, each state has different requirements for what a “background check” entails.⁷¹ State statutory and regulatory requirements differ on who needs a background check (some require background checks for any adult living in the prospective foster or adoptive home) and what types of records must be checked (“nearly all States also require checks of national criminal records”).⁷² Many states outsource licensing and training to state- or city-licensed “child placing agencies.”⁷³ While the federal government has some control through funding, foster care largely remains within each state’s control.⁷⁴

C. LGBTQI+ Youth in the Foster System

As of 2020, there were approximately 170,000 youth between the ages of ten and twenty in foster care according to HHS.⁷⁵ Several studies have shown that around thirty percent of foster youth identify as LGBTQI+, resulting in the percentage of youth in foster care who identify as LGBTQI+ being greater than the percentage of LGBTQI+ youth in the general population.⁷⁶ There is link between a child’s sexuality and entering the foster care system, as gay and lesbian teens are more likely

⁷⁰ See 42 U.S.C. § 671(a)(20)(A)–(C).

⁷¹ *Background Checks for Prospective Foster, Adoptive, and Kinship Caregivers*, CHILD WELFARE INFO. GATEWAY: CHILD’S BUREAU 1–3 (Sept. 2018), <https://cwig-prod-prod-drupal-s3fs-us-east-1.s3.amazonaws.com/public/documents/background.pdf>.

⁷² *Id.* at 2–3.

⁷³ *E.g.*, S.C. Code Regs. § 114–550; see also *Fulton v. City of Philadelphia*, 593 U.S. 522, 548 (2021) (Alito, J., concurring).

⁷⁴ *Foster Care*, CHILD WELFARE INFO. GATEWAY, <https://www.childwelfare.gov/topics/permanency/foster-care/> (last visited Oct. 11, 2024).

⁷⁵ *Supporting LGBTQ+ Youth: A Guide for Foster Parents*, CHILD WELFARE INFO. GATEWAY: CHILD’S BUREAU 1 (June 2021), <https://www.childwelfare.gov/resources/supporting-lgbtq-youth-guide-foster-parents/>; U.S. DEP’T OF HEALTH & HUM. SERVS., AFCARS REPORT No. 27, 1 (2020).

⁷⁶ *Supporting LGBTQ+ Youth: A Guide for Foster Parents*, *supra* note 75, at 1, 5 (collecting studies); *LGBTQ+ Youth in Foster Care: Fact Sheet*, CHILD’S RIGHTS (Jan. 2023), <https://www.childrensrights.org/wp-content/uploads/2023/01/CR-LGBTQ-Youth-in-Foster-Care-2023-Fact-Sheet.pdf> (“A 2019 study found that 30.4 percent of youth in foster care identify as LGBTQ+ and five percent as transgender, compared to 11.2 percent and 1.17 percent of youth not in foster care.”).

to have contact with “the system.”⁷⁷ LGBTQI+ youth enter the foster care system at a disproportionate rate because of neglect or abuse at home because of their sexual orientation, conflict with parents over sexual orientation, a lack of acceptance in the families of origin, or for skipping school because of harassment at school.⁷⁸ Between twenty and forty percent of homeless youth are LGBTQI+ according to the National Network of Runaway and Youth Services.⁷⁹

State laws and regulations related to LGBTQI+ foster youth are varied across the country. Although the Biden Administration has stated a desire to combat sexual-orientation discrimination and focus on LGBTQI+ children in the foster system,⁸⁰ currently, there are no federal statutory barriers to states receiving funding that are tied to the care of LGBTQI+ foster youth.⁸¹ Several states have non-discrimination policies prohibiting discrimination and harassment based on sexual orientation.⁸² Other states have “no explicit protection against discrimination on the bases of sexual orientation or gender identity for youth in the child welfare system.”⁸³ While some states like California require LGBTQI+-inclusive training for foster care agencies, other states provide, but do not require, such training.⁸⁴ Idaho and other states do not have statutory prohibitions but have policies or regulations prohibiting discrimination on the basis of sexual orientation and gender identity.⁸⁵ The Biden Administration, through HHS’s proposed regulation, is striving for a more cohesive way to protect LGBTQI+ foster youth apart from the states’ piece-meal approach.

D. The Proposed Regulation

In September 2023, HHS proposed a regulation requiring state and tribal child welfare agencies to place LGBTQI+-identifying foster children

⁷⁷ Colleen A. Sullivan, *Kids, Courts, and Queers: Lesbian and Gay Youth in the Juvenile Justice and Foster Care Systems*, 6 TUL. J.L. & SEXUALITY 31, 34–35 (1996).

⁷⁸ *LGBTQ Youth in the Foster Care System*, NAT’L CTR. FOR LESBIAN RTS. 1 (June 2006), https://www.nclrights.org/wp-content/uploads/2013/07/LGBTQ_Youth_In_Foster_Care_System.pdf.

⁷⁹ *Id.*

⁸⁰ *Fact Sheet*, *supra* note 14.

⁸¹ *Annual Review of Gender and the Law: Adoption and Foster Care*, 25 GEO. J. GENDER & L. 303, 313–14 (Alexis Pollitto et al. eds, 2024).

⁸² *Id.* at 312–13 (noting such policies in California, New Jersey, and Massachusetts).

⁸³ *LGBTQ Youth: State Laws, Regulations, or Agency Policies Related to LGBTQ Youth in the Child Welfare System*, MOVEMENT ADVANCEMENT PROJECT (Mar. 6, 2023), <https://www.lgbtmap.org/img/maps/citations-adoption-youth-in-child-welfare.pdf> (noting states lacking such protections include Alabama, Alaska, Arkansas, Georgia, Kansas, Nebraska, Pennsylvania, and Texas).

⁸⁴ *Id.*

⁸⁵ *Id.*

in pre-approved LGBTQI+ foster homes.⁸⁶ Through this proposed regulation, the Biden Administration is seeking to prioritize and promote LGBTQI+ rights, particularly for foster youth who identify as LGBTQI+.⁸⁷ The states that accept Title IV-E funding from the federal government will be required to implement this proposed regulation should it go into effect. “Under this proposed rule, agencies must ensure that a safe and appropriate placement is available for and provided to any child in foster care who identifies as LGBTQI+ and requests such a placement.”⁸⁸ What does “safe and appropriate” mean? The language is statutory; it has been in Title IV of the Social Security Act since 1997, but this proposed regulation changes what it means for a foster home to be “safe and proper.”⁸⁹ Prior to this proposed regulation, states had greater control over what was “safe and proper” for each child’s case plan because it is a child-by-child best interest determination.⁹⁰ While the Secretary of HHS has oversight over the implementation of “safe and proper” case plans, courts have declined to decide whether the implementation of the case plan is “appropriate” because it is such an individualized standard.⁹¹ To build a case plan, a caseworker may work with parents, foster parents, and the foster youth (if he or she is fourteen years old or older) to determine what is best for that individual child.⁹²

Though the statutory language is “safe and proper,” the proposed regulation would require “safe and appropriate placements” for LGBTQI+ children. According to the proposed regulation “safe and appropriate” means foster parents that (1) maintain an environment free of hostility, abuse, and mistreatment based on sexual orientation; (2) have additional training for the foster parent; and (3) are able and willing to “facilitate the child’s access to age-appropriate resources, services, and activities” regarding the child’s gender identity.⁹³ These three requirements define

⁸⁶ Placement Requirements, *supra* note 22, at 66752.

⁸⁷ Executive Order, *supra* note 17, at 37189–91, 37193.

⁸⁸ Placement Requirements, *supra* note 22, at 66756.

⁸⁹ *Id.* at 66752, 66757.

⁹⁰ See, e.g., *Common Terms*, IND. DEPT OF CHILD SERV., https://www.in.gov/dcs/policies/administrative-policies/common-terms/#_S (last visited Oct. 18, 2024); see also *Placement Requirements*, *supra* note 22, at 66752.

⁹¹ See *Charlie H. v. Whitman*, 83 F. Supp. 2d 476, 488, 490 n.3 (D.N.J. 2000); *Blessing v. Freestone*, 520 U.S. 329, 344–45 (1997); *Del A. v. Romer*, 777 F. Supp. 1297, 1309 (E.D. La. 1991).

⁹² See *Foster Care 101: MO CARE Pre-Service Training*, MO. DEPT SOC. SERVS., <https://dss.mo.gov/cd/mo-care/files/Foster-Care-101-presentation-facilitator-guide.pdf> (last visited Mar. 28, 2024); OFF. CHILD. & FAMS. CTS., *Overview of Federal and State Child Welfare Legislation*, in PENNSYLVANIA DEPENDENCY BENCHMARK 1–2, 19 (3d ed. 2019) (available at <https://ocfcpacourts.us/wp-content/uploads/2020/05/ZC-Chapter-21-Overview-Of-Federal-And-State-Child-Welfare-Legislation-LM-Nfinal-6-4-19-002438.pdf>).

⁹³ Placement Requirements, *supra* note 22, at 66752, 66757.

what constitutes a “safe” placement for an LGBTQI+-identifying foster youth. The proposed regulation relies on the LGBTQI+ foster child to self-identify and request a “safe and appropriate” placement.⁹⁴ A foster youth fourteen years or older, who are already required to be a part of developing his or her case plan, will have to be notified by the agency how to request a safe and proper placement.⁹⁵

Title IV of the Social Security Act requires the “case plan” to describe the place where the child is placed as well as a plan for ensuring “the child receives safe and proper care” and addresses the child’s need “including a discussion of the appropriateness of the services that have been provided to the child under the plan.”⁹⁶ Stating that “nothing in this part shall be construed as precluding State courts from exercising their discretion to protect the health and safety of children in individual cases,”⁹⁷ Title IV gives states the discretion to decide what is in the best interest of the children in their state by allowing states to determine what is safe and proper care. Nevertheless, in this proposed regulation, the federal government is attempting to define what constitutes “safe and proper” for every single state across the nation, not allowing states to use their discretion in determining how to best protect the health and safety of children in individual cases.

Before the proposed regulation’s comment period was closed in November 2023, the Department received nearly 14,000 comments. One notable comment was from Roger Marshall, M.D., a United States senator from Kansas, who, along with five other senators wrote first that the proposal would “undermine the ability of states to provide safe, stable, and loving homes to our most vulnerable children,” before adding that the “proposal goes beyond statutory requirements.”⁹⁸ HHS’s proposed regulation would require states to “implement specific processes and requirements to ensure children in foster care who identify as LGBTQI+ are provided with placements the [state] agency designates as safe and appropriate for an LGBTQI+ child, and with services that are necessary to support their health and wellbeing.”⁹⁹ The proposed regulation works off of pre-existing statutes requiring states to place children in “safe and proper” placements, as well as the general requirements for the case

⁹⁴ *Id.* at 66768.

⁹⁵ *Id.* at 66758.

⁹⁶ 42 U.S.C. § 675(1)(B).

⁹⁷ 42 U.S.C. § 678.

⁹⁸ Letter from Roger Marshall, M.D., U.S. Sen., to The Hon. Xavier Becerra, Sec’y, Dep’t Health and Hum. Servs. (Jan. 11, 2024) (Senators Tom Cotton (Ark.), John Barrasso (Wyo.), Markwayne Mullin (Okla.), Michael S. Lee (Utah), and Cindy Hyde-Smith (Miss.) also signed this letter).

⁹⁹ *Placement Requirements*, *supra* note 22, at 66755.

review systems.¹⁰⁰ What the regulation claims to propose is only an implementation change of the requirements (not a fundamental definitional change).¹⁰¹ Roger Marshall and the other Senators disagree:

Federal law requires that state and tribal Title IV–E . . . agencies develop a case plan for each child . . . to receive ‘safe and proper care.’ The intent of this language is to ensure that the well-being of foster children remains of utmost priority . . . the proposal . . . would undermine state and tribal statutory authority to determine what is in the best interest of a child in their care.¹⁰²

The proposed regulation gives more power to the federal government—rather than state governments—to determine how and by whom foster children will be cared for within each state.

II. CURRENT STATUS OF FOSTER CARE

A. *States in Crisis*

Across the nation, thousands of youth and children languish in foster care, often without a safe foster home placement.¹⁰³ In 2022, HHS’s Adoption and Foster Care Analysis and Reporting System (AFCARS) reported that there were approximately 391,098 children and youth in foster care in 2021, with sixteen percent of those children not in a foster or pre-adoptive home.¹⁰⁴ Approximately two percent of foster youths have a case plan for long-term foster care, and another five percent have a plan for emancipation.¹⁰⁵ Almost twenty percent of all foster youth spend at least three years in the foster care system.¹⁰⁶

States are struggling to recruit and retain foster homes for the youth and children in their care. As one author writes, “bed shortages have long plagued child welfare systems.”¹⁰⁷ Child welfare systems are in disarray across the country with many foster children sleeping in offices, hotels,

¹⁰⁰ *Id.* at 66756.

¹⁰¹ *Id.* (framing requirements as fulfilling “existing case review system requirements and other statutory requirements that require that all children in foster care are appropriately placed in a safe setting consistent with the best interest and special needs of each child” rather than creating new fundamental definitions).

¹⁰² Letter from Roger Marshall to Xavier Becerra, *supra* note 98.

¹⁰³ See Hughes, *supra* note 29, at 1–2.

¹⁰⁴ DEP’T HEALTH & HUM. SERVS., AFCARS REPORT NO. 29, 1 (2022).

¹⁰⁵ *Id.*

¹⁰⁶ *Id.* at 1–2.

¹⁰⁷ Hughes, *supra* note 29, at 1.

and hospitals.¹⁰⁸ The deinstitutionalization of foster care and juvenile justice systems is leading to this increase of older children without homes to sleep in.¹⁰⁹ In these situations, “safety concerns—including assault, vandalism, and trafficking—are rampant.”¹¹⁰ Children sleeping in offices (often state child welfare offices) have less oversight which can be dangerous for children.¹¹¹ In Texas, children are “warehous[ed]” in hotel rooms, even when “the facilities lacked services, at times lacked readily available food, and consistent supervision for the state’s most vulnerable foster children.”¹¹² Texas is offering incentives to encourage licensed foster care placements,¹¹³ but others worry about the vulnerability to predators that these children face in the meantime.¹¹⁴

Texas is not the only state with a foster care placement crisis. Michigan,¹¹⁵ Illinois,¹¹⁶ West Virginia,¹¹⁷ and South Carolina¹¹⁸ have all faced crisis situations in the last few years. New Mexico is placing children in homeless shelters.¹¹⁹ In North Dakota, a lack of foster home placements

¹⁰⁸ *Id.*

¹⁰⁹ *Id.* at 1–3.

¹¹⁰ *Id.* at 2.

¹¹¹ *Id.* (recounting situations in West Virginia and Montana where less oversight led to unsafe and abusive situations).

¹¹² Paul Flahive, *Texas Spent Over \$250 Million Housing Foster Kids in ‘Dangerous,’ Unregulated Places*, TEX. PUB. RADIO (Jan. 12, 2024, 2:18 PM), <https://www.tpr.org/news/2024-01-12/texas-spent-over-250-million-housing-foster-kids-in-dangerous-unregulated-places>.

¹¹³ *Id.*

¹¹⁴ See Paul Flahive, *Is Texas Foster Care’s Placement Crisis Inviting Predators?*, TEX. PUB. RADIO (Dec. 4, 2023, 1:10 PM), <https://www.tpr.org/criminal-justice/2023-12-04/critics-of-texas-foster-cares-placement-crisis-worry-it-may-invite-predators>.

¹¹⁵ Jennifer Brookland, *Michigan Has Nowhere to Send Vulnerable Kids as Placement Crisis Builds*, DETROIT FREE PRESS (Oct. 6, 2022, 12:56 PM), <https://www.freep.com/story/news/local/michigan/2022/10/06/michigan-abused-children-placement-crisis/69540669007/>.

¹¹⁶ David Jackson & Rachel Hinton, *Foster Children Held in Jails, Shelters—Workers Threatened, Attacked: A State Agency in Crisis*, ILL. ANSWERS PROJECT (May 26, 2022), <https://illinoisanswers.org/2022/05/26/foster-children-held-in-jails-shelters-workers-threatened-attacked-a-state-agency-in-crisis/>.

¹¹⁷ Amelia Ferrell Knisely & Molly Born, *West Virginia’s Reliance on Out-of-State Group Homes Leaves Some Foster Kids in Unsafe, Abusive Situations*, MOUNTAIN STATE SPOTLIGHT (Sept. 21, 2021), <https://mountainstatespotlight.org/2021/09/21/west-virginia-foster-care-out-of-state-homes/>.

¹¹⁸ Lauren Sausser, *South Carolina Needs 1,300 More Foster Homes for Children in State Custody, New Report Shows*, POST & COURIER (Nov. 1, 2017), https://www.postandcourier.com/news/south-carolina-needs-1-300-more-foster-homes-for-children-in-state-custody-new-report/article_66c2cc02-be60-11e7-91f3-f703caf20311.html.

¹¹⁹ Ed Williams, *Child Welfare Experts Say New Mexico Can’t Put Kids in Homeless Shelters Just Because It Lacks Other Beds*, SEARCHLIGHT N.M. (Dec. 7, 2022), <https://searchlightnm.org/report-confirms-new-mexico-fosters-teens-homeless-shelters/>.

leaves children with nowhere to stay except in hotels and offices.¹²⁰ The shortage of foster families is a nationwide crisis.¹²¹ Children across the country wait to be adopted out of the foster care system.¹²²

Sean Hughes at the American Enterprise Institute blames the federal government for the housing crisis because of the federal Family First Prevention Services Act that required “congregate care” (generally group homes) to be used only as short-term placements by restricting federal funding for such congregate care (generally limiting funding to no more than a two-week stay in congregate care).¹²³ Changing federal funding to promote foster homes over congregate care seemed like the best way to prevent “warehousing” children, but it ended up leading to a greater housing crisis.¹²⁴ Hughes encourages the federal government to invest in alternative forms of placement and increase federal investment in congregate care that can serve older youth (as approximately one third of those in foster care are over twelve years old).¹²⁵ States had warned “about potential unintended consequences, including placement shortages” before the Act was passed and funding for congregate care was cut.¹²⁶ The Act has caused group homes to close across the country, and without enough foster homes, states’ placement crises only worsened.¹²⁷ Federal laws and regulation aimed at prioritizing children can have incredible unintended fallout that harms children and youth in foster care.

B. Foster Parent Demographics

While there are evidently not enough foster homes,¹²⁸ faith-based organizations and individuals have been and continue to be an essential

¹²⁰ April Baumgarten, *Lack of Emergency Foster Care Means Some North Dakota Kids Must Stay in Hotels, Offices*, INFORUM (June 4, 2022, 5:04 AM), <https://www.inforum.com/news/north-dakota/lack-of-emergency-foster-care-means-some-north-dakota-kids-must-stay-in-hotels-offices>.

¹²¹ Scott Simon, *There's a Nationwide Shortage of Foster Care Families*, NPR (July 15, 2023, 8:05 AM), <https://www.npr.org/2023/07/15/1187929875/theres-a-nationwide-shortage-of-foster-care-families>.

¹²² *Heart Gallery Mission*, *supra* note 27.

¹²³ Hughes, *supra* note 29, at 4.

¹²⁴ *Id.*

¹²⁵ *Id.* at 5–6.

¹²⁶ *Id.* at 4.

¹²⁷ See Teresa Wiltz, *The Feds are Cutting Back on Group Homes, Some Say that is a Big Mistake*, HUFFPOST (July 9, 2019, 3:09 PM), https://www.huffpost.com/entry/feds-funding-cuts-group-homes-children_b_5d238202e4b06dc407fc6907; Sean Hughes & Naomi Schaefer Riley, *Five Years On, The Family First Act Has Failed in Its Aims*, THE HILL (Apr. 18, 2023, 7:30 AM), <https://thehill.com/opinion/civil-rights/3951473-five-years-on-the-family-first-act-has-failed-in-its-aims/>.

¹²⁸ Simon, *supra* note 121.

part of caring for the youth and children in child welfare systems.¹²⁹ Local governments and child welfare agencies continue to partner with religious organizations in support of foster youth.¹³⁰ In fact, “[s]tate child welfare systems could not operate effectively without the support and resources of faith-based individuals and organizations.”¹³¹ Thirty-two states have some faith-based targeted recruiting efforts for foster parents.¹³² Whether the partnership is initiated by the state or by the faith community, these collaborations are impacting the foster care system.¹³³ Two programs, one in Colorado and one in Arkansas, are examples of local governments partnering with religious organizations to increase foster parent recruitment.¹³⁴ In Colorado, Project 1.27 is a group of churches committed to providing adoptive homes for children and youth in state care whose parental rights have been terminated.¹³⁵ “The empirical results demonstrate that both programs [in Colorado and in Arkansas] are very successful at building awareness about the need for foster/adoptive parents and the biblical mandate for serving as caregivers.”¹³⁶ State partnerships with religious organizations benefit foster children by providing licensed foster homes.

Maintaining relationships between religious agencies and state welfare departments is vital to growing the number of licensed foster parents. Religious persons may trust a religious organization when they would be wary of the state, fearing that their faith may not be compatible.¹³⁷ Further, “[r]ecruiting 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.”¹³⁸ Religious agencies partnering with state

¹²⁹ Brief for Lifeline Children’s Services as Amicus Curiae Supporting Plaintiff-Appellant at 8, *Bates v. Pakseresht*, No. 23-4169 (9th Cir. Jan. 18, 2024).

¹³⁰ *Id.*

¹³¹ *Id.* at 9.

¹³² 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, 721 (2014) [hereinafter *Empirical Ties*].

¹³³ *Id.* at 733.

¹³⁴ Michael Howell-Moroney, *On the Effectiveness of Faith-Based Partnerships in Recruitment of Foster and Adoptive Parents*, 2 J. PUB. MGMT. & SOC. POL’Y 168, 168 (2013) (introducing the programs and generalized results of the subsequent survey data) [hereinafter *Effectiveness of Faith-Based Partnerships*].

¹³⁵ *Empirical Ties*, *supra* note 132, at 721.

¹³⁶ *Effectiveness of Faith-Based Partnerships*, *supra* note 134.

¹³⁷ David M. Smolin, *Kids Are Not Cakes: A Children’s Rights Perspective on Fulton v. City of Philadelphia*, 52 CUMB. L. REV. 79, 124 (2022).

¹³⁸ *Id.* at 125.

welfare agencies encourage those with religious beliefs to become foster parents.

Not only are religious organizations important for recruiting foster parents, but religious individuals are more likely to be adoptive parents.¹³⁹ Between 2013 and 2015, ninety-two percent of adoptive mothers (of unrelated children) were religious, compared to the general United States population being slightly less than eighty percent religious in 2014.¹⁴⁰ According to one research organization, Christians are twice as likely to adopt as non-Christians.¹⁴¹ In another study, “for each unit increase in religiosity, women were 1.3 times more likely to consider adoption.”¹⁴² Further, several studies found that “religious reasons” were one of the top five of foster parents’ motivations to foster.¹⁴³ Religious beliefs were a motivation to foster for twenty-two percent of those considering becoming foster parents, and were a motivation to adopt for fifty-seven percent of those already open to adoption.¹⁴⁴ Understanding foster parents’ motivations for fostering “is crucial because it has an impact on outcomes for foster parents and their foster children.”¹⁴⁵ Of those fostering, sixty-one percent of “traditional” foster parents (non-relatives) attend weekly religious services, as compared to only thirty-six percent of kinship foster parents (relatives of the foster youth).¹⁴⁶ Foster parents—as many as eighty percent—look to faith as the reason for their success in fostering.¹⁴⁷ All of these statistics point to one conclusion: religious individuals are heavily involved in the success of state child welfare systems.

According to an NCHS 2009 report, about two million people have adopted children, which is about two percent of the adult-population (ages eighteen to forty-four).¹⁴⁸ Generally, those interested in adoption are over the age of thirty, currently or formerly married (“ever-married”), and have already had a biological child or used an infertility service.¹⁴⁹ Ever-

¹³⁹ Emily Helder & Elisha Marr, *Religiosity and Adoption*, in THE ROUTLEDGE HANDBOOK OF ADOPTION 291, 294 tbl. 21.1 (1st ed. 2021).

¹⁴⁰ *Id.*

¹⁴¹ *Five Things You Need to Know About Adoption*, BARNA RSCH. (Nov. 4, 2013), <https://www.barna.com/research/5-things-you-need-to-know-about-adoption>.

¹⁴² Helder & Marr, *supra* note 139, at 298.

¹⁴³ *Id.* at 300 (collecting studies).

¹⁴⁴ *Id.*

¹⁴⁵ *Empirical Ties*, *supra* note 132, at 722.

¹⁴⁶ Jill C. Schreiber & Michael J. Culbertson, *Religious Socialization of Youth Involved in Child Welfare*, 38 CHILD ABUSE & NEGLECT 1208, 1214 (2014).

¹⁴⁷ Naomi Schaefer Riley, *New White House Proposal to Further Alienate Religious Foster Parents*, NY POST (Oct. 7, 2023, 9:08 AM), <https://nypost.com/2023/10/07/new-wh-proposal-will-further-alienate-religious-foster-parents/>.

¹⁴⁸ Jo Jones, *Who Adopts? Characteristics of Women and Men Who Have Adopted Children*, at 1 (Ctr. Disease Control, Nat’l Ctr. Health Stat. Data Brief No. 12, 2009).

¹⁴⁹ *Id.* at 2.

married men adopt more often than never-married men or women of any marital status.¹⁵⁰ Approximately half of adoptive mothers are between forty and forty-four years old.¹⁵¹ Compared with twenty-seven percent of biological mothers, only three percent of adoptive mothers are between ages eighteen and twenty-nine.¹⁵²

What about LGBTQI+ foster parents? Over the last two decades, legal battles have been won and lost over the question of whether those identifying as LGBTQI+ can be foster parents and who can be required to license them. Perhaps most famously, in *Fulton v. City of Philadelphia*, the Supreme Court held that a Catholic agency licensed through the local city government could not be forced to license gay couples as foster parents.¹⁵³ *Fulton* was decided by using the neutral law of general applicability test from *Employment Division v. Smith*¹⁵⁴ for the free exercise of religion, focusing on religious liberty and LGBTQI+ rights rather than on children's rights and the foster care system.¹⁵⁵ Rather than focusing on the impact the case outcome may have on children and the overall child welfare system, *Fulton* was argued and decided on a First Amendment argument similar to *Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Commission*,¹⁵⁶ assuming that foster care is covered by public accommodation law.¹⁵⁷ While First Amendment religious freedom is not the main subject of this Article, religious liberty arguments are often intertwined with LGBTQI+ rights.¹⁵⁸ The majority of states now prohibit discrimination based on sexual orientation, with twenty-eight states specifically prohibiting discrimination in foster care licensing based on sexual orientation and gender identity, and an additional six states protecting against sexual orientation discrimination only.¹⁵⁹ Sixteen

¹⁵⁰ *Id.* at 5.

¹⁵¹ *Id.* at 2.

¹⁵² *Id.*

¹⁵³ *Fulton v. City of Philadelphia*, 593 U.S. 522, 542–43 (2021).

¹⁵⁴ *Emp. Div. v. Smith*, 494 U.S. 872 (1990).

¹⁵⁵ Smolin, *supra* note 137, at 81.

¹⁵⁶ *Masterpiece Cakeshop, Ltd. v. Colo. Civ. Rts. Comm'n*, 584 U.S. 617, 631–34 (2018) (discussing whether the sale of a specialized cake service fell under the law of public accommodation).

¹⁵⁷ Smolin, *supra* note 137, at 82–83.

¹⁵⁸ For more information on this argument about public accommodation law, LGBTQI+ rights, and religious freedom, compare Smolin, *supra* note 137 (drawing attention to the focus on religious liberty and LGBTQ+ rights rather than children's rights), with Jordan Blair Woods, *Religious Exemptions and LGBTQ Child Welfare*, 103 MINN. L. REV. 2343 (2019) (discussing the history of religious exemptions and the potential harm to LGBTQ children in the child welfare system in the United States).

¹⁵⁹ *Child Welfare Nondiscrimination Laws*, MOVEMENT ADVANCEMENT PROJECT, https://www.lgbtmap.org/equality-maps/foster_and_adoption_laws (last visited Nov. 6, 2024).

states have no explicit prohibitions against discrimination, with fourteen states allowing state-licensed agencies to refuse to place or provide services to children and families “if doing so conflicts with their religious beliefs.”¹⁶⁰ Such blanket religious exemptions for agencies have generally been upheld by the Supreme Court, although the Court has refused to uphold exceptions that remain solely within a city’s or state’s sole discretion (rather than a blanket religious exemption).¹⁶¹

III. PROPOSED REGULATION

A. *The Interests of the Child*

Across the United States, the primary legal standard for children’s rights is “the best interest of the child.”¹⁶² Until the late nineteenth century, children’s rights were more often determined by economics: when children are seen as property, each child’s worth was determined by “his or her economic productivity.”¹⁶³ Now, “[a]lthough there is no standard definition of ‘best interests of the child,’ the term generally refers to the deliberation that courts undertake when deciding what type of services, actions, and orders will best serve a child as well as who is best suited to take care of a child.”¹⁶⁴ This standard allows judges to make individualized decisions for children in state care rather than applying a rigid standard across different, unique cases.

Unfortunately, “best interest” is not a clear standard. “The best interests of the child doctrine is at once the most heralded, derided and relied upon standard in family law today.”¹⁶⁵ Despite statutory guidance, the standard inherently relies on the judge in each individual case to determine what is in the best interest of each and every child who enters his or her courtroom. The standard developed over time as Western culture began to see a child not as an object or a commodity, but as a human being with rights of his or her own.¹⁶⁶ As early as 1834, the best interest of the child standard began to be cemented in American jurisprudence, with the Supreme Court of Massachusetts declaring “the

¹⁶⁰ *Id.*

¹⁶¹ *See* *Fulton v. City of Phila.*, 593 U.S. 522, 542 (2021); *see also* *Masterpiece Cakeshop*, 584 U.S. at 644 (2018).

¹⁶² Lynne Marie Kohm, *Tracing the Foundations of the Best Interests of the Child Standard in American Jurisprudence*, 10 J.L. & FAM. STUD. 1, 2–3 (2008).

¹⁶³ Kaitlin M. Ball, *The Rights-Bearing Child’s Best Interests: Implications of the European Court’s Rejection of a Child-Return Order in X v. Latvia*, 1 REGENT J. GLOB. JUST. & PUB. POL’Y 163, 174–75 (2015).

¹⁶⁴ *Determining the Best Interests of the Child*, CHILD WELFARE INFO. GATEWAY 2, https://www.pafamilylawyers.com/documents/best_interest.pdf (June 2020).

¹⁶⁵ Kohm, *supra* note 162, at 1.

¹⁶⁶ *Id.* at 4, 12–13.

good of the child is to be regarded as the predominant consideration.”¹⁶⁷ Though not a clear standard, it is ingrained in American jurisprudence, allowing judges to decide what is truly *best* for each individual child.¹⁶⁸

Generally, a judge considers a multitude of factors in determining what is truly in the best interest of the child in the case.¹⁶⁹ The overarching principles of best interest may be in a state statute; for instance, twenty-eight states list the importance of family-integrity and avoiding removal from the home when possible as a factor in determining a child’s best interest.¹⁷⁰ Other principles include the health and safety of the child (twenty-one states); the timeliness of permanence (nineteen states); and the assurance that the child will be given care and treatment to become a self-sufficient adult (twelve states).¹⁷¹ States may codify a list of factors or allow individual judges to base decisions off of case law and the surrounding circumstances.¹⁷² For example, South Carolina codified a list of seventeen factors to be considered in determining the child’s best interest, including the child’s needs, the parent’s capacity, the child and that parent’s preferences, any manipulation by the parents, the child’s background, abuse, and “other factors as the court considers necessary.”¹⁷³ While the specifics of what “best interest” means vary, the prevailing standard of children’s rights in the United States is whatever is in the child’s best interest.

The best interest of the child standard is often used in determining placement (including custody, visitation, adoption, etc.).¹⁷⁴ “Best interest” is similar to “safe and proper” used in Title IV of the Social Security Act, in that it is a moldable standard that can be used by each judge to find the right placement for each child. Traditionally, states and tribes have had the authority to determine what is in the “best interest” of children in their care—not the federal government.¹⁷⁵ Rather than being decided on a child-specific level by states, this proposed federal government regulation would force judges to accept a national definition of what is a “safe and proper” placement. While often critiqued,¹⁷⁶ the “best interest” of the child standard allows judges the flexibility to care for each child individually, rather than applying a national, potentially ill-fitting, standard to all children across the nation.

¹⁶⁷ *Id.* at 24.

¹⁶⁸ *Id.* at 40.

¹⁶⁹ *Determining the Best Interests of the Child*, *supra* note 164.

¹⁷⁰ *Id.*

¹⁷¹ *Id.*

¹⁷² *Id.*

¹⁷³ S.C. CODE ANN. § 63-15-240 (LEXIS through 2024 Act 250).

¹⁷⁴ Kohm, *supra* note 162, at 1.

¹⁷⁵ See Letter from Roger Marshall to Xavier Becerra, *supra* note 98.

¹⁷⁶ Kohm, *supra* note 162, at 1.

B. Placements

After *Fulton v. City of Philadelphia*, the Supreme Court's reasoning was critiqued because it ignored the underlying issue—finding foster homes for neglected and abused youth.¹⁷⁷ One critic argued that *Fulton* should have focused on the rights of the children rather than on a placement agency's First Amendment right (to free exercise of religion).¹⁷⁸ Although *Fulton* was a case about the foster system, some claimed that “all of the Supreme Court Justices treated children as proxies for other issues—particularly religious liberty, LGBTQI+ rights, and clashes between these rights.”¹⁷⁹ Children are not a commodity or good (like cakes); the focus of these cases should be on them.¹⁸⁰

Focusing on children and their rights, rather than on the foster parents or state-licensed agencies, begs the question: what are the rights of children in the foster care system? When children enter the foster care system, it is because the state has found the child's parents to be unfit—or at least accused them of being unfit.¹⁸¹ American law recognizes “that fit parents are vested with the authority to make all decisions concerning their children's upbringing.”¹⁸² Repeatedly, the Supreme Court has recognized fundamental parental rights—mainly to conceive and to raise one's children.¹⁸³ This right is violated only when the parent fails in his or her responsibility to care for the child (a court finds that the parent is “unfit” to care for his or her child).¹⁸⁴ Consequently, the state steps in to care for the child; but rather than raise the children itself, the state sends the children to private homes to be raised by foster parents who step into the parenting role.¹⁸⁵ States choose whom to license as foster parents and the licensing process, with varying regulations and statutory guidelines.¹⁸⁶

The purpose of the foster care system is to provide a safe home for children when their parents are unable to care for them. Children are not—and should not be viewed as—a good or a service for adults.¹⁸⁷ “The

¹⁷⁷ Martin Guggenheim, *Fulton v. City of Philadelphia: How No One Paid Any Attention to Children's Rights*, 60 FAM. CT. REV. 23, 23–24 (2022) (arguing that “*Fulton* should have been viewed first and foremost as a foster care case.”).

¹⁷⁸ See *id.* at 24.

¹⁷⁹ Smolin, *supra* note 137, at 81.

¹⁸⁰ *Id.* at 82.

¹⁸¹ Guggenheim, *supra* note 177, at 25.

¹⁸² *Id.*

¹⁸³ See *id.* nn. 9–15 and accompanying text (collecting cases).

¹⁸⁴ Guggenheim, *supra* note 177, at 25.

¹⁸⁵ *Id.*

¹⁸⁶ See *supra* notes 169–173 and accompanying text.

¹⁸⁷ Smolin, *supra* note 137, at 83.

constitutional rights of children . . . have been largely eclipsed” by larger discussions about LGBTQI+ and religious liberty rights.¹⁸⁸ The duty of the state is to the child’s best interest, finding a home for the child to grow and flourish in.¹⁸⁹ Placement bans only hurt children; by removing potential homes, states fail to serve the child’s best interest.¹⁹⁰ Removing a whole group of people—those who identify a certain way or believe a certain way—hurts children by “depriving them of a placement option.”¹⁹¹

Forcing potential foster homes to follow a state ideology will harm children in state care that are already without a home. “[W]hen faith-based providers are excluded, there are fewer good homes.”¹⁹² In cities and states that have already stopped partnering with religious agencies, children are facing the effects of fewer foster and adoptive homes. In the six years following Illinois’ ending its faith-based agency partnerships,¹⁹³ the state lost over 5,000 foster homes,¹⁹⁴ which was “the most significant decrease in any state that reported that data.”¹⁹⁵ Boston stopped partnering with faith-based agencies in 2006, after Catholic Charities in Boston had found homes for thousands of children over its years as a licensed partner with the city.¹⁹⁶ From 2013 to 2015, when the number of children in foster care in Massachusetts rose by thirty percent, the state granted fifty percent more “overcapacity” waivers to existing foster homes over a twelve month period.¹⁹⁷ In Arkansas, thirty-six percent of foster families recruited by one Christian foster care licensing agency reported they would not have fostered or adopted without exposure to the need for foster parents by the agency.¹⁹⁸ Faith-based agency partnerships impact foster youth as faith-based agencies are able to recruit and equip foster parents in addition to the state’s efforts.

¹⁸⁸ Tanya Washington, *Suffer Not the Little Children: Prioritizing Children’s Rights in Constitutional Challenges to “Same-Sex Adoption Bans,”* 39 CAP. UNIV. L. REV. 231, 232 (2011).

¹⁸⁹ *Id.* at 233.

¹⁹⁰ *Id.* at 233–34.

¹⁹¹ *Id.*

¹⁹² Letter from Roger Marshall to Xavier Becerra, *supra* note 98.

¹⁹³ Joel Hannahs, *Religious Freedom?*, WORLD (Nov. 1, 2011), <https://wng.org/sift/religious-freedom-1617430231>; Natalie Goodnow, *The Role of Faith-Based Agencies in Child Welfare*, THE HERITAGE FOUNDATION: BACKGROUNDER 1, 6 (May 22, 2018), <https://www.heritage.org/civil-society/report/the-role-faith-based-agencies-child-welfare>.

¹⁹⁴ *Non-Relative Homes*, WHO CARES: A NATIONAL COUNT OF FOSTER HOMES AND FAMILIES, <https://www.fostercarecapacity.com/states/illinois> (last visited Oct. 14, 2024) (showing that the number of licensed non-relative foster homes fell from 11,386 in 2012 to 6,034 in 2019 in Illinois).

¹⁹⁵ Letter from Roger Marshall to Xavier Becerra, *supra* note 98.

¹⁹⁶ Goodnow, *supra* note 193, at 6.

¹⁹⁷ *Id.* at 6–7.

¹⁹⁸ *Effectiveness of Faith-Based Partnerships*, *supra* note 134, at 176, 177 tbl. 5.

Children deserve a home—not an office or a hospital bed. States are not equipped to care for children on their own but rely on individuals and families to care for children. Implementing placement bans hurts children by removing potential homes. One author goes so far as to argue that such bans violate children’s due process rights.¹⁹⁹ Another author writes that “the parentless child has a fundamental right to a permanent family relationship, and laws that interfere with the attainment of such a relationship must survive strict scrutiny in order to pass muster.”²⁰⁰ The proposed HHS regulation would interfere with this fundamental right.

The Biden Administration alleges that LGBTQI+ foster youth have been targeted by state child welfare agencies in the past, but it does not provide specifics on what “targeting” has occurred.²⁰¹ The Administration argues that “[t]he Federal Government must take action to address the significant disparities that LGBTQI+ youth face in the foster care system.”²⁰² While some states have no explicit protection for children in the child welfare system against discrimination on the basis of sexual orientation or gender identity, other states have comprehensive policies to protect LGBTQI+ children in their care.²⁰³ This proposed regulation does not effectively care for foster youth who identify as LGBTQI+, because it hurts all foster youth by removing potential foster parents and foster homes. Though LGBTQI+ foster youth are often overrepresented in foster care,²⁰⁴ the best care for foster children is still foster homes, not group homes.²⁰⁵ When the federal government began to require states to have fewer group homes (based on another federal regulation tied to state child welfare funding), there were not enough foster homes to keep up with number of children then without placements.²⁰⁶ Federal regulations that require states to shrink the potential foster homes for foster youth hurt LGBTQI+ foster youth by restricting the number of placements.²⁰⁷

While this proposed regulation is not the answer, states can, and should, implement their own regulations to help the most vulnerable children in their care—including foster youth identifying as LGBTQI+.

¹⁹⁹ Washington, *supra* note 188, at 233–34.

²⁰⁰ Joseph S. Jackson & Lauren G. Fasig, *The Parentless Child's Right to a Permanent Family*, 46 WAKE FOREST L. REV. 1, 3 (2011).

²⁰¹ Executive Order, *supra* note 17.

²⁰² *Id.*

²⁰³ *LGBTQ Youth: State Laws, Regulations, or Agency Policies Related to LGBTQ Youth in the Child Welfare System*, *supra* note 83.

²⁰⁴ Placement Requirements, *supra* note 22, at 66753.

²⁰⁵ See ANNIE E. CASEY FOUND. & JIM CASEY YOUTH OPPORTUNITIES INITIATIVE, WHEN CHILD WELFARE WORKS: A WORKING PAPER 6–7 (2013), <https://assets.aecf.org/m/resourcedoc/aecf-WhenChildWelfareWorks-2013.pdf>.

²⁰⁶ Hughes, *supra* note 29, at 4.

²⁰⁷ See *id.*

This Article does not argue that LGBTQI+ foster youth should not be supported or cared for in their respective foster placements. Foster children, including LGBTQI+ children, have been abused in foster homes in the past.²⁰⁸ Nevertheless, the federal government requiring more of state welfare agencies to receive federal funding is not furthering these children's best interests. If state welfare agencies refuse to follow the regulation, they lose federal funding, which will only hurt foster youth by removing access to therapy, accommodations, and post-care assistance, as well as the myriad of other ways states care for foster youth. When religious families are unable to care for foster children in their homes due to pervasive federal regulations, foster youth will be harmed by the shrinking number of available foster parents. States have always had sovereignty over domestic relations—throughout its history, the federal government, and especially the Supreme Court, has declined to intervene in the family whenever possible.²⁰⁹

States already offer additional funding and training to foster families that are willing to be licensed as therapeutic foster homes (foster parents with additional training and resources to care for children with greater need).²¹⁰ Other states have separately licensed bilingual foster homes.²¹¹ In a similar manner, states could incentivize foster families to receive additional training to care for LGBTQI+ youth. These families could get a certification, similar to a therapeutic foster home license, to care for LGBTQI+ foster youth in their state. This would allow states to care for the incredible number of LGBTQI+ youth in their care without compromising individuals' religious beliefs or involving the federal government. A voluntary certification program, run similarly to a therapeutic licensing program, would still allow families not interested in this certification to care for foster youth in their state. *Requiring* such a certification for all foster parents, or a promise to care for children in a certain way which violates religious beliefs, removes needed potential

²⁰⁸ Placement Requirements, *supra* note 22, at 66753.

²⁰⁹ See Sharon Elizabeth Rush, *Domestic Relations Law: Federal Jurisdiction and State Sovereignty in Perspective*, 60 NOTRE DAME L. REV. 1, 1 (1984).

²¹⁰ *What is Therapeutic Foster Care?*, FOSTERING GREAT IDEAS (Jan. 26, 2020), <https://fgi4kids.org/what-is-therapeutic-foster-care/>.

²¹¹ See, e.g., Keyris Manzanares, *Commonwealth Catholic Charities in Need of Bilingual Foster Parents*, VPM NEWS: FOCAL POINT (Nov. 17, 2022, 4:57 PM), <https://www.vpm.org/news/2022-11-17/commonwealth-catholic-charities-in-need-of-bilingual-foster-parents>; *Bilingual Foster Parents Needed in Ohio*, CHOICES, <https://www.choicesohio.org/bilingual-foster-parents-needed-in-ohio/> (last visited Nov. 9, 2024); Laura Vallejo, *Foster Care Program Seeks Spanish-Speaking Families*, INTERMOUNTAIN CATH. (Oct. 30, 2020), <http://www.icatholic.org/article/foster-care-program-seeks-spanishspeaking-families-26714312>.

foster parents (as seen in *Burke* and *Bates*).²¹² Under principles of federalism, states are supposed to control child welfare. This proposed regulation takes that power away from the states to the detriment of foster youth.

In a letter written by the Alabama Attorney General, and signed by seventeen other state Attorneys General, eighteen states argue that HHS should reject the proposed regulation because it contravenes the Supreme Court's decision in *Fulton v. City of Philadelphia*, discriminates against religion, endangers foster youth, and harms states.²¹³ The state Attorneys General write that "[s]tate foster care systems already are stretched to capacity."²¹⁴ Further, the Attorneys General are concerned about the costs that states will have to incur to recruit more foster families, apart from faith-based providers.²¹⁵ States are required to implement this rule handed down from the federal government—not with an increase of funding to recruit more foster families, but with the threat of removing funding if they fail to find non-religious foster families.

Filing as Amici Curiae in *Bates v. Pakseresht*, the state of Idaho, along with nineteen other states, addresses similar concerns, but also raises the issue of the Interstate Compact on the Placement of Children (ICPC).²¹⁶ The ICPC requires states to work together to place children across state lines.²¹⁷ All fifty states are members of the ICPC.²¹⁸ These states argue that they are directly impacted by Oregon's "unconstitutional policy excluding, on account of their faith, otherwise qualified and well-suited families from fostering children."²¹⁹ States have a legitimate interest in other states' child welfare agencies because of the ICPC. A federal requirement with a similar effect as Oregon's would only exacerbate this problem by expanding it to all states.

²¹² See *supra* notes 2–13 and accompanying text.

²¹³ Letter from Steve Marshall, Att'y Gen. Ala., to Aysha E. Schomburg, Ass. Comm'r Childs. Bureau Admin. on Child. (HHS) (Nov. 27, 2023), https://www.alabamaag.gov/wp-content/uploads/2023/11/2023.11.27-Foster-Care-Comment-FINAL.pdf?utm_medium=email&utm_source=govdelivery (the letter was also signed by the Attorneys General of Alaska, Arkansas, Georgia, Idaho, Indiana, Iowa, Kentucky, Louisiana, Mississippi, Missouri, Montana, Nebraska, Ohio, South Carolina, Tennessee, Texas, Virginia, and West Virginia).

²¹⁴ *Id.* at 9.

²¹⁵ *Id.* at 9–10.

²¹⁶ Brief for Idaho et al. as Amici Curiae Supporting Plaintiff-Appellant at 1, *Bates v. Pakseresht*, No. 23-4169 (9th Cir. Jan. 18, 2024).

²¹⁷ Abigail Lindner, *Understanding the Interstate Compact on the Placement of Children*, NAT'L COUNCIL FOR ADOPTION (May 4, 2022), <https://adoptioncouncil.org/publications/understanding-the-interstate-compact-on-the-placement-of-children/>.

²¹⁸ *Id.*

²¹⁹ Brief for Idaho et al., *supra* note 216.

The proposed federal regulation allows for a religious liberty exception.²²⁰ On its face, it does not *require* every potential foster family to be a “safe and proper” placement for an LGBTQI+ identifying foster youth. The proposed regulation claims that it is not an infringement on religious liberty. While this Article does not focus on the First Amendment religious liberty claim that *Bates* makes, it is a relevant piece of the discussion surrounding this regulation and policy matter. There is a religious liberty problem if states are denying foster families licensure over purely religious beliefs.²²¹ On the other hand, proponents of such regulations argue that individuals and families do not have a *right* to foster, so they are not being denied a right in violation of the First Amendment.²²² The proposed regulation allows HHS and state child welfare agencies an incredible amount of discretion in implementation. Deciding whether a placement is “free from hostility” and whether the foster parents will “facilitate . . . access to age-appropriate resources” for the foster youth²²³ gives governmental agencies the ability to decide what constitutes “hostility” as well as what is truly “age appropriate.” While foster families have been given “prudent parent” authority in the past,²²⁴ this regulation would take away the ability of a foster parent to parent the child, and instead give it to the state. States outsource parenting of foster youth and children to foster parents because states are not equipped to parent children.²²⁵ This broad regulation will allow government officers broad discretion, which may lead to discrimination in its application. Even if a regulation is neutral on its face, if it is applied in a discriminatory manner, it is unconstitutional.²²⁶

CONCLUSION

States need foster families to care for children and youth in foster care. States are not equipped to care for children without foster families. The cost of turning away families who want to foster children will only further harm the children in the state’s care. When the Adoption and Safe Families Act requires foster youth to have “safe and proper” placements,²²⁷ it requires states to have *placements* for foster children.

²²⁰ Placement Requirements, *supra* note 22, at 66751.

²²¹ *Oregon Mom Appeals to 9th Circuit*, *supra* note 11.

²²² See Jessica Berman & Kenneth Leichter, *Adoption and Foster Care*, 6 GEO. J. GENDER & L. 667, 668–69 (2005).

²²³ Placement Requirements, *supra* note 22, at 66757–58.

²²⁴ *E.g.*, S.C. CODE ANN. § 63-7-20 (LEXIS through 2024 Act 250).

²²⁵ See Guggenheim, *supra* note 177, at 25.

²²⁶ See *Fulton v. City of Philadelphia*, 593 U.S. 522, 534 (2021) (citing *Church of Lukumi Babalu Aye, Inc. v. Hialeah*, 508 U.S. 520 (1993)).

²²⁷ 42 U.S.C. § 675.

Foster children and youth need foster families and foster homes—not jail cells,²²⁸ hospitals, or offices.²²⁹ In the United States, children’s rights are framed under the best interest of the child standard. That best interest undoubtedly includes having a safe home.²³⁰ The proposed federal regulation will remove potential foster parents from receiving licensure in their state. Children deserve safe and proper homes. LGBTQI+ foster youth deserve safe homes. Instituting additional, arbitrary licensure requirements will harm foster children by decreasing the number of foster homes available. The proposed regulation fails to promote foster children’s best interest by denying licensure to safe and appropriate foster homes, thereby decreasing the number of available homes for the nation’s most vulnerable.

--Anne Darby Keating*

²²⁸ Letter from Steve Marshall to Aysha E. Schomburg, *supra* note 213, at 9.

²²⁹ Hughes, *supra* note 29, at 1.

²³⁰ See Washington, *supra* note 188, at 233–34; *Determining the Best Interests of the Child*, *supra* note 164, at 2.

* Anne Darby Keating earned her J.D. from Regent University School of Law in May 2025. She would like to thank Professors Lynne Marie Kohm and Jeffrey Brauch for their mentorship and guidance in all things, but particularly this Note. She also thanks her parents for their support and proof-reading skills.