

No. 23–4169
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

JESSICA BATES,

Plaintiff-Appellant,

v.

FARIBORZ PAKSERESHT, LIESL WENDT, APRILLE FLINT-GERNER,
REBECCA HARRISON, and CECILIA GARCIA,

Defendant-Appellees.

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

BRIEF OF CHRISTIAN ALLIANCE FOR ORPHANS
AS *AMICUS CURIAE* IN SUPPORT OF PLAINTIFF-APPELLANT’S
APPEAL FOR REVERSAL OF THE DISTRICT COURT’S DENIAL
OF PRELIMINARY INJUCTIVE RELIEF

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Fed. R. App. P. 26.1, *amicus curiae*, by and through undersigned counsel, certifies that it has no parent corporation and that no publicly held corporation owns ten percent (10%) or more of its stock.

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STATEMENT OF IDENTITY AND INTEREST

Founded in 2004, the Christian Alliance for Orphans (“CAFO”) is a nationally recognized non-profit devoted to the protection of vulnerable children, particularly orphans and those in need of foster care. CAFO leads and coordinates a global network of more than 250 churches and other organizations in developing effective responses to the plight of the world’s most vulnerable children. CAFO’s ultimate goal is to ensure that every child—and particularly orphans and foster children—are able to experience God’s unfailing love in the context of a thriving family.

In service of this mission, CAFO is spearheading several major initiatives designed to respond to the needs of vulnerable orphans and foster children. Among CAFO’s primary efforts is the “More than Enough” (“MTE”) initiative. MTE works to help start and grow local networks in counties nationwide that draw upon the distinctive strengths of dedicated Christian organizations, churches, and families working together to provide ample resources for children and families in foster care—including well-supported foster, kinship, adoptive, and biological families. This and other CAFO initiatives unite an immense variety of faith-motivated organizations to bring good to vulnerable children and families across the United States and around the world.

In this brief, CAFO seeks to inform the Court about the broad negative impact the actions of the Oregon Department of Health Services (“ODHS”)—and the

District Court’s refusal to enjoin those actions—is likely to have on vulnerable children in the State of Oregon. Unless the ODHS is enjoined from applying to others the “active support” litmus test for sexual identity and sexuality issues it used to disqualify Jessica Bates, it will dangerously constrain the already too-small pool of caregiving resources available to vulnerable children. Of most concern to CAFO is that ODHS’s actions threaten the viability of kinship adoption and fostering by willing, loving relatives if those relatives happen to be traditionally religious. In fact, the ODHS litmus test, if applied generally, would disqualify all of the individuals who share Ms. Bates’s religious beliefs from foster or adoptive caregiving in Oregon entirely, and would undermine the vital participation of religious institutions and organizations in meeting the needs of vulnerable children. CAFO’s brief thus focuses on matters neither squarely at issue nor squarely addressed by the named parties.

Pursuant to Fed. R. App. P. 29(a)(4)(E), counsel for *amicus curiae* certify that this brief was not authored in whole or in part by counsel for any party and that no person or entity—other than *amicus curiae*, its members, and its counsel—has made a monetary contribution to its preparation or submission. Pursuant to Fed. R. App. P. 29(a)(2), all parties have consented to this filing.

SUMMARY OF ARGUMENT

ODHS’s application to other of Oregon Administrative Rule § 413-300-0308(2)(k) (“the Rule”) in the manner applied to Ms. Bates would exclude more than ten percent (10%) the general population from participating as foster or adoptive caregivers in the State of Oregon. Willing caregivers are already scarce, and ODHS’s stark application of the Rule as a litmus test for certain widely held beliefs related to sexuality and gender identity threatens to make them even scarcer. The litmus test excludes a large number of otherwise qualified caregivers, threatens kinship care, and threatens to bar religious organizations from helping vulnerable children. Finally, the litmus test makes vulnerable children less safe by requiring potential caregivers to agree in advance to actively participate in a host of activities—without consideration of a child’s individualized circumstances, health, or best interest. In other words, the litmus test denies caregivers the ability to use discretion and individualized judgment. The Rule and its litmus test harm at-risk children and should be enjoined.

ARGUMENT

I. THE ODHS LITMUS TEST UNDULY RESTRICTS RESOURCES FOR VULNERABLE CHILDREN.

This appeal concerns the application of the Rule to Appellant Jessica Bates. As applied to Ms. Bates by ODHS, the Rule required her to agree in advance that she would actively participate in and support a number of potential actions forbidden

by her religious beliefs—without reflection, question, or consideration of a foster child’s personality, particular circumstances, or individualized best interests. These actions include calling the child by preferred pronouns, taking the child to LGBTQ+ affirming events, keeping the child away from any religious experience that might be considered “unsupportive” of an LGBTQ+ identity, and complying with any future ODHS orders to medically transition the child’s gender. (Dkt. 47 at 4–5.)

Ms. Bates affirmed her ability to love and accept any child regardless of sexual characteristics, desires, or spiritual circumstances, but refused the indiscriminate advance commitment that ODHS required. Her reason was simple: the categorical commitments demanded by ODHS could foreseeably require her to violate her religious beliefs. (*Id.*) Those commitments might also conceivably—for reasons wholly unrelated to religious belief—prevent Ms. Bates from acting in a particular child’s best interests after considering that child’s circumstances, history, and temperament. ODHS disqualified Ms. Bates from caregiving based solely on her refusal, turning the Rule into a *de facto* litmus test keyed to traditional religious beliefs on matters of gender and sexuality. Of dire concern to CAFO is the simple fact that this litmus test, if applied broadly by ODHS, would disqualify a significant portion of the American population from participating as foster or adoptive caregivers in Oregon.

A. THE ODHS LITMUS TEST EXCLUDES A LARGE NUMBER OF OTHERWISE QUALIFIED CAREGIVERS.

Ms. Bates is not alone in her predicament. Dozens of Christian denominations with tens of millions of adherents share Ms. Bates’s views. The Southern Baptist Convention—the largest U.S. Protestant denomination—has over 13.2 million members and 47,198 churches.¹ More than seventy-five percent (75%) of American evangelical protestants believe that gender is biologically determined by sex assigned at birth.² Half of that same group affirmed that their view on sex and gender is “greatly influenced by their religious beliefs.”³ Forty one percent (41%) of U.S. adults say that religion has a great deal of influence on their view of transgender issues.⁴ Because twenty-four percent (24%) of the U.S. population describes itself as evangelical Christian, the number of people believing gender is biologically

¹ Aaron Earls, *In 2022, baptisms, giving and attendance rose within the Southern Baptist Convention, while membership and the number of congregations fell*, LIFEWAY RESEARCH, May 9, 2023 (available at <http://tinyurl.com/4w54nn3r>) (last visited Jan. 16, 2024).

² Michael Lipka et. al. *Attitudes About Transgender Issues Vary Widely Among Christians, Religious ‘Nones’ in U.S.*, PEW RESEARCH CENTER, Jul. 7, 2022 (available at <http://tinyurl.com/yfer5arj>) (last visited Jan. 16, 2024).

³ *Id.*

⁴ Kim Parker, et al. *Americans’ Complex Views on Gender Identity and Transgender Issues*, PEW RESEARCH CENTER, Jun. 28, 2022 (available at <http://tinyurl.com/3dt582cm>) (last visited Jan. 16, 2024).

determined by sex assigned at birth as a matter of religious belief in *this single religious tradition alone* exceeds 30 million—or 10% of the population.⁵

And this 10% figure does not even account for the many Catholics, Jews, and Muslims who share a similar view on matters of gender and sexuality. The ODHS litmus test thus threatens to exclude a staggering number of people from foster and adoptive caregiving. Due to Oregon’s participation in the 50-state Interstate Compact on the Placement of Children, this impact threatens to be felt well beyond Oregon’s borders. The ODHS litmus test will exclude caregiver candidates who share Ms. Bates’s religious beliefs in all 50 states. Indeed, the sweeping interstate breadth of Oregon’s actions in this case motivated twelve states⁶ to file an *amicus* brief before the District Court supporting Ms. Bates’s motion for a preliminary injunction.

This exclusion of otherwise qualified caregivers is alarming because caregiving resources are already too sparse. Indeed, virtually every U.S. state faces shortfalls in such resources—from well-qualified foster and kinship families to willing adoptive families to supportive services for struggling biological families to

⁵ See Gregory A. Smith, *About Three-in-Ten U.S. Adults Are Now Religiously Unaffiliated*, PEW RESEARCH CENTER, Dec. 14, 2021 (available at <http://tinyurl.com/ycyptav9>) (last visited Jan. 16, 2024).

⁶ Alabama, Arkansas, Idaho, Iowa, Kansas, Kentucky, Mississippi, Missouri, Montana, Nebraska, South Carolina, and Virginia.

court-appointed special advocates (“CASAs”) and mentors for children in foster care and those who are aging out. These resources are not merely “products” that can be manufactured in greater numbers with government funds and systems. Rather, they require highly relational—and often sacrificial—involvement from individuals and families, typically one caring person at a time. Regardless of what the Court thinks of Ms. Bates’s religious beliefs, there are many in America who share them who would be similarly excluded by the ODHS litmus test. In CAFO’s view, it would be disastrous to disqualify over 10% of the population from caregiving, categorically, based solely on their sincere adherence to traditional religious views. Yet, this is what the ODHS litmus test threatens. The interstate impact of the ODHS litmus test underscores the degree to which it is likely to negatively impact the already too-scarce caregiver resources available to vulnerable children. The litmus test is thus devastating for at-risk children who desperately need caregivers.

B. THE LITMUS TEST THREATENS KINSHIP CARE.

One of the most important resources available to vulnerable children is kinship adoption and kinship foster care. The emphasis and reliance of the U.S. child welfare system upon kin-based care has grown significantly over the past decade, reflective of a broad consensus that it is best for children to be placed with caregivers that already know and love them whenever that is safely possible. In fact, the number

of relatives adopting a child from foster care has increased thirty-one percent (31%) since 2011.⁷

Too often, limited foster resources force social workers to place a child wherever there is an open bed, regardless of the suitability of the environment. Kinship placements, by contrast, often offer the best solution to a vulnerable child's needs. Kinship placements preserve the child's connection to their biological family, maximize the chances siblings can remain together, and give the child the best possible chance at a loving and supportive environment. In fact, the Biden Administration explicitly recognizes that:

“...[K]inship caregivers help children stay connected to their families and cultural identity, and research shows that children in foster care who are able to live with their kin experience less trauma. But for too long, federal regulations imposed significant burdens on these kinship caregivers by making it harder for them to become foster families.”⁸

The ODHS litmus test would not just exclude large numbers of individuals from caregiving—it would, as applied by ODHS to Ms. Bates—specifically prevent willing and loving grandparents, aunts, uncles, and adult siblings who share Ms. Bates's religious views from caring for their vulnerable younger relatives. In these

⁷ *Updated Adoption Stats for Kids in Foster Care*, Sept. 17, 2018 (available at <http://tinyurl.com/mr2ttafw>) (last visited Jan. 16, 2024).

⁸ White House Fact Sheet, Sept. 27, 2023 (available at <http://tinyurl.com/yckw5p3h>) (last visited Jan. 16, 2024).

cases, the ODHS litmus test would force social workers to place a vulnerable child in the home of a stranger rather than with the child's loving and willing relative solely because that relative espouses traditional religious views on gender and sexuality.

Most egregiously, the ODHS's application of the litmus test takes no account of the individual child or his relationship to a potential kinship caregiver. For example, if a fifteen-year-old child with no LGBTQ+ identity and no expressed transgender wishes who espouses traditional religious views, including on matters of sexuality and gender, found himself in need of foster or adoptive services, his grandparents—who share his views and belong to the same religious denomination—would be deemed unsuitable as caregivers by ODHS under the Rule. Clearly, such a result would not be in the child's best interest. In short, ODHS's litmus test will force some vulnerable children through the trauma of living with strangers and being separated from siblings rather than offering them the help and healing of family, all without any individualized consideration of what is best for those specific children. Kinship caregiving is a bright spot in the lives of vulnerable children. ODHS's actions will harm vulnerable children by constraining that precious resource on ideological grounds and without individualized consideration of the child(ren) involved.

C. THE LITMUS TEST THREATENS TO BAR RELIGIOUS ORGANIZATIONS FROM HELPING VULNERABLE CHILDREN.

Religious organizations and families are among the most important contributors to America’s child protection system—from foster and kinship care to adoption and family strengthening. While under forty percent (40%) of Americans attend church services weekly, a full sixty-five (65%) of foster parents do.⁹ Barna Research reported in 2014 that practicing Christians are twice as likely to foster or adopt than the general population.¹⁰ They are also more likely to welcome sibling groups, older youth and children with special needs.¹¹ Faith communities provide critical material, emotional, and spiritual support to adoptive, foster, and biological families.¹² According to Barna Research, more than forty percent (40%) of congregations offer some form of organized foster and/or adoption support, and virtually all provide at least some form of this help organically.¹³ This is at least part of why a 2002 study found that people who learn about fostering through a church

⁹ Jill Schreiber, *The Role of Religion in Foster Care*, NACSW CONVENTION 2010, Nov. 2010 (available at <http://tinyurl.com/zft6jjrn>) (last visited Jan. 16, 2024).

¹⁰ JEDD MEDEFIND, ET AL., *BECOMING HOME: ADOPTION, FOSTER CARE, AND MONTORING—LIVING OUT GOD’S HEART FOR ORPHANS* (2014).

¹¹ *Id.*

¹² *Id.*

¹³ *Id.*

or religious organization foster for 2.6 years longer than others.¹⁴ Many churches provide extensive support to struggling biological families as well, from material needs to childcare to addiction recovery communities and more.¹⁵

People of faith make outsized contributions to child welfare in many other ways. For example, faith-motivated individuals give at significantly higher rates to both faith-based *and* non-religious charities, including a wide diversity of child and family services.¹⁶ People rooted in deep faith play an indispensable role in child and family welfare, from foster parenting to CASAs to support of struggling families.

Many Christian religious organizations—as well as committed believers in other faith traditions—share Ms. Bates’s views on the ethics and praxis of gender and sexuality issues.¹⁷ These views are not uniquely evangelical, or even uniquely

¹⁴ Mary Ellen Cox, et al, *Recruitment and Foster Family Service*, THE JOURNAL OF SOCIOLOGY AND SOCIAL WELFARE, Sept. 2002, Article 9 (available at <https://perma.cc/P4SV-MTP4>) (last visited Jan. 16, 2024).

¹⁵ *Id.*

¹⁶ See, e.g., Michael Lipka, *How highly religious Americans’ lives are different from others*, PEW RESEARCH CENTER, Apr. 12, 2016 (available at <http://tinyurl.com/3cdpc2zf>) (last visited Jan. 16, 2024).

¹⁷ See, e.g., *Homosexuality*, POSITION STATEMENT OF THE CHRISTIAN REFORMED CHURCH (available at <http://tinyurl.com/4ejcpj66>) (last visited Jan. 16, 2024); see also *Southern Baptist Convention Faith & Message 2000*, Southern Baptist Convention, §§ XV and XVII (available at <https://bfm.sbc.net/bfm2000/>) (last visited Jan. 16, 2024).

Christian. Many religious traditions outside of Christianity have a view of gender and sexuality issues that would prohibit them from the kind of categorical and indiscriminate commitment to “active support” required by the ODHS litmus test. For example, certain orthodox Jewish and Islamic traditions would consider it sinful to actively participate in a child’s gender transition or to encourage a child in extra-marital or homosexual activity.¹⁸ Many religious organizations would fail the ODHS litmus test as it was applied to Jessica Bates. If ODHS continues to press this application of the Rule, it will compel organizations who hold doctrinal beliefs incompatible with categorical active support of LGBTQ+ and transgender issues to cease (at least in Oregon) most direct work on behalf of vulnerable orphans.

The whole-cloth exclusion of religious organizations espousing traditional beliefs would not just remove an important source of resources for vulnerable children, it would place a state-sanctioned barrier between vulnerable children and

¹⁸ See, e.g., Jessie Maier, *Queering Eve: Imagining Transgender Acceptance in Orthodox Judaism*, WOMEN IN JUDAISM (available at <http://tinyurl.com/bdfr2rvk>) (last visited Jan. 16, 2024) (describing the wide spectrum of views on transgenderism across Reform, Conservative, and Orthodox Judaism, and noting Orthodox Judaism’s continuing unsupportive stance towards active support of transgenderism); Rabbi Avraham Peretz Friedman, *Martial Intimacy*, NISHMAT’S WOMAN’S HEALTH AND HALACHA (available at <https://www.yoatzot.org/intimacy/648/>) (last visited Jan. 16, 2024); Mobeen Vaid, *Can Islam Accommodate Homosexual Acts? Qur’anic Revisionism and the Case of Scott Kugle*, 34(3) AMERICAN JOURNAL OF ISLAM AND SOCIETY, 45–97 (Jul. 1, 2017).

those religious experiences. It is well-recognized that “devotion to one’s religious beliefs is considered to make one a more ethical, intelligent, useful member of society.” *Brown v. Peyton*, 437 F.2d 1228, 1230 (4th Cir. 1971). Religious participation—including participation in religious traditions that share Ms. Bates’s beliefs—is an important source of joy, cultural richness, stability, and relationship for millions. The ODHS litmus test threatens to eliminate the positive influence of religious belief, community, ritual, and practice from the lives of many foster children. It thus threatens to impoverish the cultural and social diversity of the pool of adoptive and foster parents, as well as the cultural, social, and spiritual experiences to which foster and adoptive children are exposed. This undue and myopic separation of vulnerable children from the vast range of religious traditions and organizations which would fail the ODHS litmus test harms vulnerable Oregonian children on a level difficult to quantify.

II. THE ODHS LITMUS TEST MAKES VULNERABLE CHILDREN LESS SAFE.

The ODHS required Jessica Bates to commit in advance, sight unseen, to actively participate in a number of social, culturally, emotionally, and physically consequential actions with respect to any foster or adoptive child. ODHS refused to grant her any leeway to make even hypothetical reservations for individual children or individual circumstances. Ms. Bates was presented with a categorical demand and

left with no room or discretion to base future decisions on an individual child's particular temperament, capabilities, personality, and needs.

A core job of parenting (the task engaged by biological parents, adoptive parents, and those who, like guardians or foster parents, act *in loco parentis*) is to exercise discernment and discretion to determine what is best for a specific child at a specific time. This task nearly always requires careful consideration of the child's unique attributes, character, and circumstances. No responsible caregiver would uncritically accede to the desires of a child known to be immature, capricious, or acting out of anger or spite. Any competent caregiver weighs a child's expressed desires against the circumstances and the child's history and nature to determine if meeting the desire in that moment and in the way the child requests is healthy or harmful. It is this form of judgment that causes caregivers to forbid a fourth piece of candy, require the eating of disliked vegetables, set bedtimes, and limit contact with friends who are bad influences. Using this judgment, caregivers can discern that sometimes, even seemingly good things can be bad for a specific child in a specific moment. The benefits of individualized judgment are a core benefit of foster care, as opposed to mass care within orphanages.

Yet, the ODHS litmus test requires potential caregivers to agree in advance that they will—without consideration of a child's individualized circumstances, health, or best interest—support and participate actively in a host of activities that

may or may not be in a specific child's best interest at a specific time. The litmus test as applied denies a caregiver's ability to use individualized judgment, even when the issue is as drastic as whether to engage in gender-changing medical procedures with irreversible effects. In short, the ODHS litmus test requires an abdication of the judgment necessary for a foster or adoptive parent to act in a vulnerable child's best interest. By doing so, it creates real danger for vulnerable orphans and foster children.

Many of these vulnerable children are challenged with mental health issues and need a caregiver to help them discern healthy from unhealthy desires. Children facing mental health issues need more—not less—help from caring and healthy adults in determining which desires to pursue, which to delay, and which to abandon. To provide this help to a vulnerable child, and particularly one with mental health issues, the caregiver must exercise careful judgment in a manner specifically tailored to the specific child and the specific circumstances. Yet, when it comes to matters of sexuality and gender identity, this form of loving, careful, and individualized guidance is explicitly forbidden by the ODHS Rule. The Rule thus intensifies rather than mitigates some of the considerable and unique dangers vulnerable children face.

CONCLUSION

Foster and adoptive resources are critical to vulnerable orphans and foster children, and those resources are in critically short supply. The ODHS Rule

endangers vulnerable children in Oregon. It renders ineligible a large number of potential foster and adoptive caregivers, functionally outlaws kinship care by traditionally religious relatives without regard for the compatibility or desires of the child, pushes significantly contributing religious organizations out of the caregiving system entirely, and removes caregivers' ability to provide individualized consideration to each child's best interests. For these reasons, the CAFO, acting as *amicus curiae*, respectfully requests that this Court reverse the District Court decision and grant a preliminary injunction in Jessica Bates's favor.

DATED this 18th day of January, 2024.

Respectfully Submitted,

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STATEMENT OF RELATED CASES

To the best of undersigned counsel's knowledge, there are no related cases within the meaning of Cir. R. 28–2.6.

CERTIFICATE OF COMPLIANCE

9th Cir. Case Number No. 23–4169

I am the attorney or self-represented party.

This brief contains 3,595 words, including 0 words manually counted in any visual images, and excluding the items exempted by Fed. R. App. P. 32(f). The brief's type size and typeface comply with Fed. R. App. P. 32(a)(5) and (6).

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