

No. 23-4169

**IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT**

JESSICA BATES

Plaintiff-Appellant,

v.

FARIBORZ PAKSERESHT, et al.,

Defendants-Appellees.

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

**BRIEF OF THE FREEDOM FROM RELIGION FOUNDATION AND
AMERICANS UNITED FOR SEPARATION OF CHURCH AND STATE AS
AMICI CURIAE IN SUPPORT OF APPELLEES**

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CORPORATE DISCLOSURE STATEMENTS

The Freedom From Religion Foundation, Inc. (“FFRF”) is a nationally recognized 501(c)(3) educational nonprofit incorporated in 1978. FFRF has no parent corporation and issues no stock.

Americans United for Separation of Church and State is a nationally recognized 501(c)(3) nonprofit incorporated in 1948. Americans United has no parent corporation and issues no stock.

INTERESTS OF AMICI

Amicus curiae Freedom From Religion Foundation (FFRF) is the largest national association of freethinkers, representing atheists, agnostics, and others who form their opinions about religion based on reason, rather than faith, tradition, or authority. Founded in Madison, Wisconsin in 1978 as a 501(c)(3) nonprofit, FFRF has over 40,000 members, including members in every state and the District of Columbia. Twelve percent of FFRF’s membership also identifies as LGBTQIA+. Its purposes are to educate about nontheism and to preserve the cherished constitutional principle of separation between religion and government. FFRF ends hundreds of state/church entanglements each year through education and persuasion, while also litigating, publishing a newspaper, and broadcasting educational programming. FFRF, whose motto is “Freedom depends on freethinkers,” works to uphold the values of the Enlightenment. As a secular organization that promotes freedom of

conscience for those who do not practice religion, FFRF offers a unique viewpoint on erosion of civil rights and preferential treatment of religious organizations by the government.

Amicus curiae Americans United for Separation of Church and State is a national, nonpartisan organization that for over seventy-five years has brought together people of all faiths and the nonreligious who share a deep commitment to religious freedom. Since its founding in 1947, Americans United has participated as a party, counsel, or amicus curiae in many of the leading church-state cases decided by the U.S. Supreme Court, this court, and federal and state appellate and trial courts across the country, including several cases involving the interaction between state foster-care programs and religious beliefs. Consistent with its support for the separation of church and state, Americans United has long fought to uphold the First Amendment guarantees that prohibit the government from imposing substantial harms on third parties in the name of accommodating religion.

All parties consented to the filing of this amicus brief. No party's counsel in this case authored this brief in whole or in part. No party or party's counsel contributed any money intended to fund preparing or submitting this brief. No person other than amici, their members, or their counsel contributed money that was intended to fund preparing or submitting this brief.

SUMMARY OF ARGUMENT

The battle over LGBTQIA+ rights is not a new one in the United States, but rarely has it dominated the American political consciousness as it has in recent years. As public understanding of the lives and needs of LGBTQIA+ individuals and communities has expanded, so has the law, particularly in the areas of anti-discrimination and child welfare. As with any progression in civil rights, however, this expansion of protections has led to significant backlash from those who were comfortable with the status quo.

Many individuals with religious beliefs that direct them to reject LGBTQIA+ identities have found themselves in conflict with this recent evolution of civil rights. One of the ways that this has manifested is the increasing number of cases brought by religious individuals and entities seeking exceptions to anti-discrimination and other laws meant to protect LGBTQIA+ individuals and communities. Across a wide variety of contexts, some people of faith wishing to avail themselves of the benefits of public systems have begun to request that their individual religion be a trump card against any and all law that might burden their beliefs, no matter how incidental that burden might be.

Laws and regulations regarding foster care present special considerations that are not implicated by public-accommodations and other anti-discrimination laws that have been challenged or limited due to their burden on religious practice.

The state of Oregon, as acting parent of children in the public foster system, has a critical interest in ensuring that the children in its care are given the best possible opportunity to grow up to be healthy, well-adjusted adults. The state's decisions in this context are made based on secular, scientific evidence regarding what is best for children's health and development, and involve nearly every aspect of a child's life. Should the requested preliminary injunction be granted, the state of Oregon will be required to privilege the religious beliefs of an individual adult over the statutory and regulatory protections promulgated to protect the state's most vulnerable children. As a result, children in the state's care would be placed at risk of grave harm, with lifelong consequences. Now, this Court has the opportunity to uphold the district court's denial of the injunction, and ensure that the State of Oregon is able to continue to best serve and protect the children in its care.

ARGUMENT

I. Granting the preliminary injunction would radically undermine Oregon's interest in protecting the children in its care, and would have consequences that reach far beyond this individual case.

A. Granting the requested injunction would undermine the state's critical interest in protecting the foster children in its care.

If Bates's request is granted, Oregon will be placed in a position where it will be unable to implement policy decisions that are in the best interests of a highly vulnerable, but not readily identifiable, population of children under its

care. Instead, the state will be required to ignore the opinions of experts in favor of the subjective religious beliefs of any individual foster parent.

Children in foster care are completely reliant on the state to place them in homes in which they can thrive in the wake of an already traumatic experience. LGBTQIA+ children and teenagers—who make up at least *thirty percent* of foster youth—are at particular risk of harm when raised in homes that do not affirm their lives and identities. *Child Welfare*, Youth.gov, (last accessed Feb. 15, 2024) bit.ly/48nAQBw. There is a well-established body of research demonstrating that parental rejection of LGBTQIA+ youth has a direct connection to an increased risk of depression, anxiety, suicide, drug use, and contracting HIV and other sexually transmitted diseases. *See, e.g., Supportive Families, Healthy Children: Helping Families with Lesbian, Gay, Bisexual, and Transgender Children*, The Family Acceptance Project, 5 (2009), bit.ly/4bDP3x0. Additionally, LGBTQIA+ youth are at a significantly increased risk of experiencing violence and homelessness, much of which is directly connected to familial rejection. *See generally* Alex Abramovich, *Preventing, Reducing and Ending LGBTQ2S Youth Homelessness: The Need for Targeted Strategies*, 4 *Social Inclusion* 86-96 (2016), bit.ly/3HmNICz; *see also* Joseph G. Kosciw, Caitlin M. Clark, Nhan L. Truong & Adrian D. Zongrone, *The 2019 National Climate Survey: The Experiences of*

Lesbian, Gay, Bisexual, Transgender, and Queer Youth in Our Nation's Schools, GLSEN (2020), bit.ly/3HJiKPP.

In its position of acting parent, Oregon bears the responsibility of minimizing the risk that any of its foster children experience the well-documented negative outcomes associated with parental rejection. The State can only accomplish this by creating a strong standard of care for LGBTQIA+ youth that follows the recommendations of reputable medical and psychological experts. Although the care and treatment of transgender and gender-nonconforming children has been deemed “controversial” in the realm of popular discourse, it is far from controversial among secular, mainstream researchers and care providers. The standards of care presented by the American Medical Association, the American Psychological Association, and the American Psychiatric Association, among others, have made clear for decades that the most beneficial course of treatment for children experiencing gender dysphoria is to take a gender-affirming approach. *See, e.g., AMA to States: Stop Interfering In Health Care of Transgender Children*, American Medical Association (April 2021), bit.ly/48cLdYO; *Guidelines for Psychological Practice With Transgender and Gender Nonconforming People*, American Psychological Association (Dec. 2015), bit.ly/49seCze; *Position Statement on Treatment of Transgender (Trans) and Gender Diverse Youth*, American Psychiatric Association (July 2020),

bit.ly/483RaHr. The recommended standard of care includes using the child's expressed name and pronouns, allowing the child to dress and style their hair in accordance with their expressed gender identity, and allowing the child to access medical interventions appropriate for their age and maturity level, such as puberty blockers or hormone replacement therapy. *Id.* Bates, however, explicitly stated that she is unwilling to follow *any* of these medical recommendations. *See* App's. Opening Br. at 10–12.

Bates demands that the Court force the state to ignore the wealth of data showing that LGBTQIA+ youth have the best chance of growing up to be healthy and successful adults when raised in affirming homes. Instead, she would have Oregon privilege the subjective religious belief of individual adults over all standards of care for vulnerable youth. To justify her demand, Bates points to a series of anti-discrimination cases that have tackled the growing conflict between LGBTQIA+ rights and religious liberty. *See* App's. Opening Br. at 23–28. In each of these three cases, the government's stated interest in protecting LGBTQIA+ people from the inherent harm caused by discrimination was undermined by the government's own inconsistent application of or exemption from the policy, and in one case, the government's demonstrated hostility towards religious belief. *See, Masterpiece Cakeshop, Ltd. v. Colorado C.R. Comm'n*, 183 S. Ct. 1719 (2018); *Fulton v. City of Philadelphia*, 141 S. Ct. 1868 (2021); *Fellowship of Christian*

Athletes v. San Jose Unified Sch. Dist. Bd. of Educ., 82 F.4th 664 (9th Cir. 2023).

But the present case shares neither of the characteristics that undermined the governmental interests in the cited cases. Bates has provided no evidence that exceptions have ever been made from Or. Admin. R. § 413-200-0308(2)(k), only hypotheticals; nor has she provided any evidence that she was treated with *hostility* regarding her religious beliefs.

This case is further distinguishable from Bates’s cited cases because the group that Oregon’s regulation is designed to protect is categorically different from the groups meant to be protected under the anti-discrimination laws at issue in those cases. In each of the cited cases, the individuals being protected by the challenged prohibition against discrimination had a choice to engage with the business or organization that had a religious objection to serving or including LGBTQIA+ people. This is not the case, however, when it comes to foster youth. Children in the foster care system do not choose to enter it, nor do they have a choice in where they are placed.

Bates also argues that Oregon’s approach to protecting LGBTQIA+ youth is overbroad, and that Oregon should treat her objections the same as preferences that are expressed at the placement stage, rather than barring parents who cannot “accept and support” LGBTQIA+ youth from the public foster/adoption system completely. App’s. Opening Br. at 45–48. Though that approach may have surface

appeal, there is no way for Oregon to utilize it without endangering the very children the state seeks to protect. There is no test that can determine whether a child is or will later identify as LGBTQIA+. From the beginning, Bates has repeatedly emphasized her desire to adopt a sibling set under the age of ten, and stated that her beliefs regarding LGBTQIA+ identities should not come into play for children that young. *See generally* App's. Opening Br. What Bates has failed to take into consideration, however, is that children under the age of ten do not permanently remain under the age of ten. Children grow, develop, and come to understand their gender and sexual orientations at radically different times and rates. Some children may know from a young age that they are gay or transgender, but others might not come to that realization until adolescence, or even later. *A Survey of LGBT Americans Chapter 3: The Coming Out Experience*, Pew Research Center, (June 2013) pewrsr.ch/3w8EamG.

Similarly, Bates's argument that Oregon could simply match her with a child with compatible religious and spiritual beliefs regarding gender and sexuality fails to meet reality. Being raised in a non-affirming faith community does not prevent a child from identifying as LGBTQIA+. In fact, there is emerging evidence that shows that LGBTQIA+ individuals disproportionately experience trauma as a result of being raised in such faith communities. Timothy W. Jones, Jennifer Power, & Tiffany M. Jones, *Religious Trauma and Moral Injury From LGBTQIA+*

Conversion Practices, 305 Social Science & Medicine 115040, (July 2022)

bit.ly/3SuvMp6. Children raised in these environments often spend months, or even years attempting to “pray the gay away” before ever coming out to a parent or loved one. Spencer McNaughton, *Religious Trauma Still Haunts Millions of LGBTQ Americans*, NBC News, (Jan. 2024) nbcnews.to/3uA2JbH. If the state were to utilize the framework that Bates has proposed, it would only be able to take steps to protect the children under its care *after* lifelong physical and psychological damage has already occurred.

Oregon is not preventing Bates from pursuing a home study exemption in the *independent* adoption process, a separate system in which the state’s role as parent/guardian is diminished and Or. Admin. R. § 413-200-0308(2)(k) does not apply. Or. Admin. R. § 413-200-0308(2)(k) exists to meet the needs of children who are in the uniquely vulnerable situation of not having a parent or other relative who is suitable to give input regarding their placement, and therefore are wholly reliant on the state. When a state is the sole party responsible for a child’s health and safety, it must promulgate secular regulations that go above and beyond to ensure that said child has the ability to grow up to be a healthy and well-adjusted member of society. Any framework that would privilege the religious inclinations of adults over the secular medical needs of children would amount to unconstitutional government preference for religious belief.

B. The consequences of granting an exemption to the plaintiff reach beyond the needs of LGBTQIA+ foster youth.

Placing an individual's religious beliefs above Oregon's interest in preserving the safety of foster children would impact more than the circumstances of this individual case. Or. Admin. R. § 413-200-0308(2)(k) is not the only regulation regarding the safety of foster youth that would be imperiled if an individual's religious beliefs are found to trump Oregon's interests.

The rights of Oregon foster youth are clearly outlined in the Oregon Foster Children's Bill of Rights (Children's Bill of Rights), and include the rights to self-determination of sexual orientation and gender expression. *The Oregon Foster Children's Bill of Rights*, Oregon Dep't of Hum. Servs. (last accessed Feb. 9, 2024), bit.ly/48aW9pZ. The Children's Bill of Rights lists many other rights that a potential foster parent may find objectionable on the basis of religion. Should Bates's request be granted, Oregon will be required to prioritize religious objections over these rights, opening the door for potential foster parents to be permitted to engage in more traditionally recognizable forms of abuse and neglect. This would have disastrous effects on children in one of the most vulnerable positions a child could be in.

Religious belief is frequently used to mask abuse and neglect. To name just one example, *To Train Up A Child*, by Michael and Debi Pearl, is a popular

Christian fundamentalist parenting book, in which parents are directed to an interpretation of the Bible that encourages them to physically abuse their children. The methods outlined in this book—which include withholding food, hosing children down for potty training accidents, and beating children with thin tubing used for plumbing—have been directly tied to multiple child abuse deaths in the United States, including a number of cases where the victim was an adopted child. Erik Eckholm, *Preaching Virtue of Spanking, Even as Deaths Fuel Debate*, N.Y. Times (Nov. 6, 2011), [nyti.ms/49gRtjB](https://www.nytimes.com/2011/11/06/us/06spanking.html).

Foster families are also required to provide the youth in their care with age-appropriate educational opportunities, and foster youth have certain rights to make choices about their classes and schools. *Oregon Foster Children's Bill of Rights*. These rights would be drastically undermined if the religious beliefs of adults could override them. As just one example, the Institute for Basic Life Principles and its associated homeschool curriculum, the Advanced Training Institute, is wildly popular among American Christian fundamentalists, and has come under intense scrutiny in recent years due to claims that the program fails to meet basic educational standards and encourages abuse. *Shiny, Happy and Homeschooled: The Duggar Family and the Need to Regulate Homeschooling*, Child Welfare Monitor (July 2023), bit.ly/48nAQBw. In order to meet its basic responsibilities to the youth in its care, Oregon must be able to intervene in cases of educational

neglect, so that these children are able to enter adulthood as productive members of society.

Indeed, if religious objections are permitted to override Oregon laws that protect foster youth, children would likely face an increased risk of sexual abuse should they be placed with a family whose religious beliefs require that allegations of abuse be kept within their religious community, contradicting the mandatory sexual-abuse reporting requirement under Or. Rev. Stat. § 419B.100. *See* Michael Rezendes, *Churches Defend Sex Abuse Reporting Loophole*, PBS NewsHour (Sept. 18, 2022), bit.ly/3UAMqWH. In one recent case from Oregon, it took more than twenty-five years and multiple victims for the pastor of a southwest Portland church to be convicted of sexual assault, in large part because the pastor maintained the support of the congregation. Zane Sparling, *Oregon Church Leader Gets 13 Years in Long-Running Child Sex Abuse Case*, *The Oregonian* (June 2023), bit.ly/4b3YbuQ.

The long-term effects of experiencing childhood sexual abuse are well documented, and a potential religious exemption to the mandatory-reporting requirement would result in grave harm. *Effects*, National Child Traumatic Stress Network, (last accessed Feb. 12, 2024), bit.ly/49wH6rB. Though mandatory reporting requirements do not guarantee that every sexual-abuse case will be

reported, they do increase the chances that authorities will be notified, and help hold foster parents accountable for the vulnerable young people in their care.

Religious foster parents must not be exempted from state-mandated safety regulations based upon their personal religious beliefs, just as an abusive foster parent must not be given a “get out of jail free card” after subjecting a foster child to abusive or negligent practices in the name of their religion. Yet both results are equally justifiable under the logic set forth in Bates’s legal arguments. Bates’s requested exemption must not be permitted, both due to the potential harm it could cause in this specific case, and the potential harm it would cause through the precedent it would create.

Moreover, if this Court were to grant the requested preliminary injunction the potential for harm to vulnerable youth would be real and immediate, while the potential harm to Bates as a result of denying the injunction is decidedly lower. If the preliminary injunction is *not* granted and the regulation in question is later determined to be unconstitutional as the case proceeds, Bates’s ability to access the public foster/adoption system would merely be delayed. In contrast, if the preliminary injunction is granted and the regulation in question is later upheld, Oregon would then be required to remove any children placed in her care in the interim, disrupting the lives of children who have already experienced the trauma of being removed from their homes and families, and at no point chose to be

involved in this litigation or its consequences. Given the vulnerability of the groups implicated by this case, special care and consideration should be taken to ensure that the least amount of harm occurs as a result of these proceedings.

CONCLUSION

For the above reasons, this Court must affirm the denial of Plaintiff's preliminary injunction motion by the United States District Court for the District of Oregon.

Respectfully submitted this 15th day of February, 2024.

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CERTIFICATE OF SERVICE

I certify that on February 15, 2024, I electronically filed the foregoing document with the Clerk of Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system. I certify that the foregoing document is being served on this day to all counsel of record registered to receive a Notice of Electronic Filing generated by CM/ECF.

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**UNITED STATES COURT OF APPEALS
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