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## BENCH MEMOS

## LAW &amp; THE COURTS

# In Deciding *Fulton v. Philadelphia*, the Supreme Court Should Remember That Foster Care Is for the Children

By JAMES DWYER | May 6, 2021 6:30 AM

May is **National Foster Care Month**, and it provides an important opportunity to reflect on how we as a nation serve the most vulnerable in our midst. A debate over this very issue is playing out before the Supreme Court right now. In *Fulton v. city of Philadelphia*, Philadelphia's government is trying to exclude a Catholic foster-care agency from serving foster children because the agency's religious beliefs prevent it from endorsing same-sex couples as foster parents.

Some **argue** that excluding Catholic Social Services will make it harder for children to find loving homes; others **argue** the opposite. Who is right? While I don't share this Catholic agency's beliefs about same-sex marriage, as a child-welfare expert who has studied this issue for over a quarter-century, I strongly believe that the city's actions are harmful to children in need of loving homes.

Philadelphia has chosen to put concerns about offending some adults ahead of what is in the best interest of the children in its care. To justify this decision, Philadelphia relies on its public-accommodation law. But foster care is not a public accommodation nor a service to "the public." Children are not generic goods for sale (like donuts or cups of coffee), to which everyone has an equal right. Instead, when the government is making decisions on behalf of foster children, it is obligated to act only in *that child's* best interest.

In this rare governmental role, the government must seek only to advance children's welfare, acting as an agent for each child, with a duty of undivided loyalty to the child. In short, the government must always act in the child's best interest when making decisions on behalf of the child.

In *Fulton*, the lower courts, the parties, and the numerous *amici curiae* almost uniformly misunderstand the city's role and therefore wrongly frame the constitutional analysis. The dispute between the city and Catholic Social Services should turn on whether the city has violated the constitutional rights of the vulnerable *children* in its custody. Therefore, the key question is whether the city improperly put ulterior interests (such as advancing social causes — however admirable these motivations might be) over the best interests of children in need.

Here, the city's public-accommodation law does not help children in foster care, and it, therefore, has no place in the foster-care system. Public-accommodation laws ensure that persons wishing to go to museums, dine in restaurants, and otherwise patronize businesses open to the public are not turned away for discriminatory reasons. It simply does not apply when the government is, for example, appointing guardians for incompetent adults, making custody decisions in divorce proceedings, or placing children in foster homes. This is evident from the fact that the city itself routinely acts contrary to its public-accommodations law in approving foster parents by, for example, excluding applicants on the basis of physical disability and mental illness, without perceiving any need to justify doing so.

There is widespread misunderstanding regarding the role of the government in finding homes for foster children. Some think the government should simply balance the needs of foster children against other interests. This is wrong; the balancing of everyone's interests is what the state does in a "police power" role. Instead, When the state acts as the guardian of *a specific child*, it must consider only that child's individual welfare. It should not ascribe rights to other

private parties. In other words, when making decisions for that child — like where and with whom that child will live — it must consider only that child’s wellbeing.

So, for whom should an advocate for children desire victory in *Fulton*?

Both sides claim they are doing what is best for children. The city claims CSS’s policy is bad for children because it prevents or discourages same-sex couples from fostering and sends a hurtful message to LGBTQ youth. CSS responds that, as just one of 30 private foster-care agencies in Philadelphia, it does not prevent any qualified persons from fostering, and on the other hand, it has for a century been highly successful at reaching deep into Philadelphia’s huge Catholic population to recruit and train an impressive number of highly motivated and dedicated foster parents.

After a quarter-century immersed in child-welfare law and policy, I have no hesitation siding with Catholic Social Services. I am myself neither religious nor conservative. I strongly support social equality for sexual minorities and same-sex marriage. But my professional focus is on the interests and rights of children, and I call it the way I see it. I have seen public child-welfare agencies in this country routinely subordinate children’s welfare to adult causes and adults’ interests while fabricating child-welfare justifications.

The city’s claims are implausible and undocumented. There is no evidence CSS’s policy has adversely affected anyone. Yet there is ample evidence CSS has greatly helped an enormous number of children. Intuitively, one has to assume its departure will diminish the quantity of available high-quality foster homes in Philadelphia relative to what there would be if it could continue while adhering to Church doctrine; many potential foster parents will never be reached. If the city had a surplus of such homes even without CSS, then CSS’s departure is inconsequential, but the city had admitted it actually needs *more* foster homes.

The city certainly has a duty to protect LGBTQ+ youth entering foster care from discrimination and insult. But it naturally assesses the particular needs of each child when it removes them from their homes, and it has ultimate discretion regarding which agency and which foster parents care for each child. There is no evidence of any such youth being adversely affected by CSS's policy or beliefs. Again, the fabrication of child-welfare justifications for adult-serving policies is too easy and too common.

This is not the place for a comprehensive indictment of public child-welfare agencies. I will share two observations based on years of studying them. First, there is likely much anti-gay sentiment among caseworkers in the city's employ and among foster parents recruited by other private agencies. (I am not aware of any evidence of such sentiment at CSS; it does accept single applicants regardless of sexual orientation and is simply not comfortable conducting home studies with same-sex couples whom the state recognizes as married but the Church does not.) Second, the city overtly engages in race matching in foster-care placements, in violation of federal law and public-accommodation law. In my experience studying child welfare, it's also common for agencies to have unwritten policies against trans-racial adoption, which would cause many children never to be adopted. In contrast, CSS fully supports trans-racial placements.

In short, if any observers think the city of Philadelphia is a paragon of non-discrimination in connection with foster care, please contact me about buying some swampland in Florida. The city is not a trustworthy custodian and deserves no deference for its judgments about children's welfare.

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