

No. 19-123

In the Supreme Court of the United States

SHARONELL FULTON, ET AL.
Petitioners,

v.

CITY OF PHILADELPHIA, PENNSYLVANIA, ET AL.,
Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT
OF APPEALS FOR THE THIRD CIRCUIT

**BRIEF OF AMICUS CURIAE
COMMONWEALTH OF PENNSYLVANIA IN
SUPPORT OF RESPONDENTS**

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INTEREST OF *AMICUS CURIAE*

Petitioners' First Amendment claims turn in part on the role that private agencies play in approving foster parents to serve as such within the Commonwealth of Pennsylvania. That role is defined by Pennsylvania law. The Commonwealth of Pennsylvania has a compelling interest in ensuring that its law is accurately represented as the Court considers the issues involved in this case.

SUMMARY OF ARGUMENT

Pennsylvania children in foster care have certain statutorily created rights to protect their health, safety, and well-being. So that foster children may realize these fundamental rights, Pennsylvania restricts who may be a foster parent to only those capable of safeguarding a child's well-being.

While counties are responsible for providing foster care, the Pennsylvania Department of Human Services (DHS) regulates the provision of foster care in the Commonwealth. DHS's authority encompasses both establishing the qualifications to become a foster parent and supervising counties and agencies which assess whether a prospective foster parent possess those qualifications. These counties and agencies must assess whether a prospective foster parent possesses the qualities that DHS has made relevant to approval. See 55 Pa. Code §§ 3700.61, 3700.69.

Petitioners maintain that Catholic Social Services (CSS), an agency authorized through a contract with Philadelphia to approve foster parents, can approve

neither unmarried nor same-sex couples as foster parents because doing so would constitute an endorsement of those relationships, in violation of the agency's religious beliefs. And, according to petitioners, to withdraw CSS's authorization because it will not espouse views contrary to its religious beliefs violates the First Amendment.

Petitioners' argument, however, mischaracterizes Pennsylvania law. First, Pennsylvania regulations governing approval of a prospective foster parent do not, in fact, call for an approving agency to endorse a prospective foster parent's relationships. Second, Pennsylvania law does not expect, contrary to petitioners' position, that an approving agency will consider marital status during an evaluation of a prospective foster parent.

ARGUMENT

I. Pennsylvania Law Governing Foster Care

Pennsylvania guarantees children in foster care certain fundamental rights. Those include, among many others, to be treated with dignity; to be free from harassment; to receive proper nourishment, clean clothes, and contact with family members as often as possible; and to live in the "most family-like setting that is safe, healthy, and comfortable and meets the child's needs." 11 Pa. Stat. § 2633.

To ensure that foster children realize those rights, Pennsylvania also has established certain qualities that must be evaluated before an applicant becomes a

foster parent.¹ Those qualities include a prospective foster parent’s ability to provide care and nurturing to a child, as well as to accept the child’s relationship with his own family; a prospective foster parent’s mental and emotional well-being; a prospective foster parent’s community ties; a prospective foster parent’s “[e]xisting family relationships, attitudes and expectations regarding the applicant’s own children and parent/child relationships”; whether a prospective foster parent can care for a child with special needs; how many children a prospective foster parent can care for; and a prospective foster parent’s ability to work with a foster family care agency. 23 Pa. Cons. Stat. § 6344(d)(2).

Counties in Pennsylvania are responsible for providing children with necessary welfare services, including foster care. 23 Pa. Stat. § 6361 *et seq.*; 62 Pa. Stat. §§ 2301, 2305.² Provision of those services must comply with regulations promulgated by the Pennsylvania Department of Human Services (DHS). 23 Pa. Cons. Stat. §§ 2301, 6306; 62 Pa. Stat. §§ 901-902. DHS’s authority includes both the power to establish additional criteria that must be satisfied before an applicant is approved to be a foster parent, as well as the supervision of all public and private agencies that

¹ Discrimination in the provision of foster care also impedes Pennsylvania’s ability to serve the Commonwealth’s most vulnerable children. See Br. of Massachusetts, et al. as *Amici Curiae* in Support of Resp’ts, *Fulton, et al. v. City of Philadelphia, et al.*, No. 19-123 (Aug. 20, 2020) (explaining importance to States of nondiscrimination in the context of foster care).

² The City of Philadelphia is a respondent in this case; Philadelphia is a county too. See 16 Pa. Stat. § 201.

place children in foster homes. 62 Pa. Stat. §§ 902, 911.

DHS has used its delegated authority to promulgate regulations designed “to reduce risk to children in placement; to protect their health, safety and human rights; to establish minimum requirements for the operation of a foster family care agency; and to establish minimum requirements to be applied by foster family care agencies when approving and supervising foster families.” 55 Pa. Code § 3700.2.

Under those regulations, any foster parent must be at least 18 years old and must pass a medical test. 55 Pa. Code § 3700.62. Foster parents must not engage in certain forms of discipline and must participate in six hours of training per year. 55 Pa. Code §§ 3700.63, 3700.65. And their homes must meet certain health and safety standards. 55 Pa. Code §§ 3700.66-3700.67.

Finally, DHS’s regulations reiterate that the assessment of a prospective foster parent shall account for his “ability to provide care, nurturing and supervision to children,” if he has “[a] demonstrated stable mental and emotional adjustment,” and if he has “[s]upportive community ties with family, friends and neighbors.” 55 Pa. Code § 3700.64(a). Five factors inform that assessment. One of those is “[e]xisting family relationships, attitudes and expectations regarding the applicant’s own children and parent/child relationships, especially as they might affect a foster child.” 55 Pa. Code § 3700.64(b)(1); see also 23 Pa. Cons. Stat. § 6344(d)(2)(iv). The others are whether the prospective foster parent can accept the child’s relationship with the child’s own parents, can care for a

child with special needs, can work with the foster family care agency, as well as how many children would be suited to that foster family. 55 Pa. Code § 3700.64(b)(2)-(5).

Marital status is not relevant to approval: Married and unmarried individuals alike may be approved as a foster parent. According to the resource family registry—a registry DHS has been required to maintain since 2004, see 23 Pa. Cons. Stat. § 6344(d.1)³—just over 16,000 foster parents approved since 2004 identify as married, more than 8,000 identify as single, about 1,300 identify as divorced, and just under 500 do not identify with any of those categories.

The counties responsible for providing foster care identify, and contract with, the private agencies that will approve foster parents. 62 Pa. Stat. § 2301(b). Those agencies conduct visits to determine compliance with the regulatory criteria. 55 Pa. Code § 3700.69(a).⁴ The results of those visits are memori-

³ Data from the registry is not publicly available. Rather, DHS may release the data to select individuals, including the Attorney General, upon request. 23 Pa. Cons. Stat. § 6344(d.2)(2)(v). This data is available with the Office of Attorney General.

⁴ Although section 3700.69 sets procedures for annual reevaluation of a foster parent, the same regulatory criteria govern whether an applicant should be approved in the first place. See *In re Lowry*, 464 A.2d 333, 338 (Pa. Super. Ct. 1983), *rev'd on other grounds*, 484 A.2d 383 (Pa. 1984) (explaining that DHS's regulations “provide for a comprehensive evaluation process for determining the suitability of foster homes”); see also *Foster Care in Pennsylvania*, Dep't of Human Services,

alized in a written notice to the foster family that communicates whether the agency has decided “to approve, disapprove, or provisionally approve the foster family.” 55 Pa. Code § 3700.69(b)-(c).

II. Petitioners Misinterpret Pennsylvania Law

These Pennsylvania laws form the basis for petitioners’ argument that Philadelphia has conditioned its own willingness to contract with Catholic Social Services (CSS) on a demand that CSS make statements contrary to CSS’s religious principles. See Pet. Br. at 6-9, 30-33. Petitioners’ argument rests on an incorrect view of Pennsylvania law.

To begin, petitioners maintain that the written approval decisions that result from the visits performed under 55 Pa. Code § 3700.69 “signify an agency’s *approval of a family*” and are tantamount to “an *endorsement of the relationships of those living in the home.*” Pet. Br. at 8 (emphases added); see also Pet. Br. at 30. Elsewhere, petitioners have characterized approving a foster parent under section 3700.69 as a “validation of the relationships in that home.” J.A. 211. Because petitioners read section 3700.69 to require an endorsement, and because CSS will not endorse a relationship at odds with its religious beliefs, such as a same-sex marriage, petitioners argue that CSS cannot approve as a foster parent an individual in such a relationship. Pet. Br. at 9, 30-31; J.A. 171-172.

Petitioners mistake CSS's role under these regulations. Pennsylvania law does not compel CSS to approve of or endorse a prospective foster parent's relationships. Instead, CSS's role is to "to determine [a foster parent's] continued compliance with the requirements of §§ 3700.62--3700.67." See 55 Pa. Code § 3700.69(a). Depending on whether the prospective foster parent complies with Pennsylvania's regulatory requirements, the agency is "to approve, disapprove, or provisionally approve the foster family" to serve as a foster family. 55 Pa. Code § 3700.69(c). In other words, the law asks CSS to assess only whether the potential foster family meets the regulatory requirements laid out in the preceding sections. Nothing in the regulations requires CSS to endorse the prospective foster parent's relationships.

Petitioners also misrepresent the criteria that Pennsylvania regulations require CSS to assess before approving a foster parent. The regulatory criteria under which every prospective foster parent is evaluated help ensure that Pennsylvania's foster children are placed in healthy and safe settings that will promote the child's well-being—all of which Pennsylvania children in foster care are entitled to by statute. See 11 Pa. Stat. § 2633; 55 Pa. Code § 3700.2. One factor folded into that assessment is the prospective foster parent's "existing family relationships." 55 Pa. Code § 3700.64(b)(1); 23 Pa. Cons. Stat. § 6344(d)(2)(iv).

At times, petitioners suggest this criterion makes a prospective foster parent's marital status relevant to the approval process. Pet. Br. at 9, 13, 18, 30; see

also J.A. 237-238. And because of CSS's religious beliefs, petitioners assert that CSS cannot approve as a foster parent "any unmarried couples, regardless of sexual orientation," nor any "same-sex married couples." Pet. Br. at 9.

But a prospective foster parent's "existing family relationships" are distinct from that person's marital status. Rather, examining a prospective foster parent's relationships informs only whether there is reason to doubt that a parent can provide all to which foster children in Pennsylvania are entitled under 11 Pa. Stat. § 2633. DHS's regulations are explicit that a prospective foster parent's "existing family relationships" matter only "[i]n making a determination in relation to" whether the foster parent can "provide care, nurturing and supervision to children," has "demonstrated stable mental and emotional adjustment," and has "supportive community ties with family, friends, and neighbors." 55 Pa. Code § 3700.64(a)-(b); see also *Keller v. Dep't of Human Servs.*, No. 1120 C.D. 2018, 2019 WL 5078873, at *8 (Pa. Commw. Ct. Oct. 10, 2019) (explaining that evaluation of a prospective foster parent's existing family relationships matters as evidence of his ability to provide care, nurturing, and supervision for foster children).

In fact, the full regulatory criterion is actually "[e]xisting family relationships, attitudes and expectations regarding the applicant's own children and parent/child relationships, especially as they might affect a foster child." 55 Pa. Code § 3700.64(b)(1); see also 23 Pa. Cons. Stat. § 6344(d)(2)(iv). That context

reveals that Pennsylvania cares about existing relationships only as they bear on the quality of care a prospective foster parent can provide.

Indeed, Pennsylvania law does not require a foster parent to be married. See *supra* at 5. Introducing marital status into the approval process, then, is CSS's own choice rather than a obligation under Pennsylvania law—which CSS's representative conceded earlier in this litigation. See J.A. 212, 217-218.

Shorn of these mischaracterizations of Pennsylvania law, petitioners' arguments fail. While the First Amendment does not permit "[c]ompelling individuals to mouth support for views they find objectionable," *Janus v. State, County, and Municipal Employees*, 138 S. Ct. 2448, 2463 (2018), Pennsylvania law does not compel CSS to mouth views that it considers objectionable. All CSS must do is assess prospective foster parents against Pennsylvania's established criteria. That assessment communicates nothing beyond whether the agency believes the parent meets DHS's criteria. And, in any event, the view that CSS objects to expressing is outside the scope of the process that Pennsylvania has established for approving foster parents. CSS may not impose, and then object to, requirements that are not in Pennsylvania law.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted,

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