



475 Park Avenue South, Suite 2100
New York, NY 10016
tel 646.880.3005
fax 202.697.5058
info@familyequality.org

February 25, 2020

Chairwoman Carolyn B. Maloney
Ranking Member Jim Jordan
Chairman Jamie Raskin
Ranking Member Chip Roy
House Committee on Oversight and Reform
2157 Rayburn House Office Building
Washington, DC 20515

Dear Chairwoman Maloney, Ranking Member Jordan, Chairman Raskin, Ranking Member Roy, and members of the House Committee on Oversight and Reform,

Family Equality is pleased to submit this testimony for the February 27, 2020 hearing on The Administration's Religious Liberty Assault on LGBT Rights.

Family Equality advocates for LGBTQ families and those who wish to form them. We are a community of parents and children, grandparents and grandchildren that reaches across this country. For forty years we have raised our voices in support of fairness for all families. Family Equality also supports LGBTQ youth, including foster youth, seeking family formation.

Family Equality convenes and cochairs the Every Child Deserves a Family Campaign, a nationwide campaign that is composed of over 500 faith, child welfare, civil rights, LGBTQ and allied organizations and individuals who subscribe to the following beliefs and strive to improve the child welfare system by advocating for their implementation:

- (1) All child welfare decisions should be made in the best interests of the child.
- (2) All children and youth deserve a stable, loving, forever family.
- (3) Taxpayer-funded adoption and foster care service providers should not discriminate against youth, including LGBTQ youth in need of homes, or qualified LGBTQ potential parents or guardians.
- (4) Marginalized youth in the child welfare system, including LGBTQ youth and youth of color, deserve culturally competent, safe, and supportive care.
- (5) Discriminatory adoption and foster care bills must be stopped and repealed, at both the state and federal level.

The Trump Administration has taken a series of egregious actions to enable discrimination against LGBTQ people in the name of “religious liberty.” This is particularly so in the context of foster care and adoption, which has been the primary battleground for successful attacks on the rights of same-sex couples since marriage equality.¹ Same-sex couples are seven times more likely to foster and adopt than different-sex couples,² so allowing taxpayer-funded agencies to turn them away in the name of “religion” has disastrous consequences for not only the parents who are turned away and denied the family that they wish to form, but also for the 437,000 youth in care across the United States who are in need of temporary or permanent homes.³ Family Equality submits this testimony to offer further background on the Trump Administration’s attack on LGBTQ family formation through the child welfare system and the resulting impact that is most felt by the youth who depend on the government for their care, and we ask this Committee to exercise its power to oversee the Executive Branch on this issue by requiring the Department of Health and Human Services (“HHS”) to enforce existing regulations

¹ Since 2017, seven states have passed religious-based foster care and adoption license to discriminate laws, the only anti-LGBTQ legislation to pass in the United States during these years. Information available at <https://everychilddeservesafamily.com/state-resources>

² Goldberg, Shoshana, and Conron, Kerith, The Williams Institute, *How Many Same-Sex Couples in the U.S. are Raising Children* (July 2018), available at <https://williamsinstitute.law.ucla.edu/research/parenting/how-many-same-sex-parents-in-us/>.

³ U.S. Department of Health and Human Services, Admin. for Children & Families, Children’s Bureau, *Trends in Foster Care and Adoption 2009 through 2018* (THE AFCARS REPORT)(2019), available at <https://www.acf.hhs.gov/cb/resource/trends-in-foster-care-and-adoption>.

including 45 CFR § 75.300(c) and (d) and 45 CFR 1355 and to support passage of the bipartisan Every Child Deserves a Family Act, HR 3114, to end discrimination in the foster care and adoption system.

I. The Child Welfare System – the Trump Administration’s Attacks on LGBTQ People

While the Trump administration has consistently targeted LGBTQ community and religious minorities with discrimination, over the last year the administration has focused largely on allowing taxpayer-funded child welfare agencies to discriminate in the provision and administration of foster care and adoption services.

On January 23, 2019, HHS took the unprecedented move of granting the State of South Carolina’s request for a waiver of federal nondiscrimination protections, 45 CFR § 75.300(c), prohibiting foster care and adoption providers that receive Title IV-E funds through the states from discriminating in the provision of child welfare services. In effect, the waiver allows taxpayer-funded faith-based foster care agencies to turn away prospective foster and adoptive parents who do not meet the agency’s religious criteria. The impact of the waiver is best illustrated by the example that prompted the state to seek the waiver in the first place – Miracle Hill Ministries, a large, conservative Christian agency that is contracted to do approximately fifteen percent of South Carolina’s child welfare work and was refusing to work with would-be foster and adoptive parents who did not meet the agency’s particular interpretation of Protestant Christianity including Jewish, Catholic, and LGBTQ people.

Making clear his intentions beyond South Carolina, on Feb. 7, 2019 at the National Prayer Breakfast, President Trump promised continued federal funding for faith-based agencies that turn away same-sex couples applying to be foster and adoptive parents,⁴ notwithstanding HHS’ nondiscrimination rule, 45

⁴ Cha, Ariana, *Administration seeks to fund religious foster-care groups that reject LGBTQ parents*, The Washington Post (Feb 8, 2019), available at <https://www.washingtonpost.com/health/2019/02/08/trump-administration-seeks-authority-fund-religious-foster-care-groups-that-reject-lgbtq-parents/>.

CFR § 75.300(c) and (d). On March 11, 2019, the administration took its first step to make good on that promise when it released its proposed HHS budget that included an unfunded line item entitled “Protect the religious liberty of child welfare providers.”⁵ The administration also included language in its HHS Budget in Brief that the agency’s Office of Civil Rights will act on proposed rulemaking “to ensure protection of the conscience and religious freedom rights of individuals and entities working in health care and human services.” Although the budget language did not ultimately pass into law, it foretold events to come.

On April 16, 2019, HHS issued a proposed rule, 84 FR 16572,⁶ seeking to remove the collection of sexual orientation data from its Adoption and Foster Care Analysis and Reporting System (AFCARS). Under the guise of “streamlining” the AFCARS requirements, the new rule sought to eliminate requirements implemented in a 2016 Final Rule, 81 FR 90524,⁷ which required states to include data in their AFCARS reporting on the sexual orientation of youth in foster care who are over the age of 14 as well as of foster and adoptive parents and guardians. As the comments submitted as part of the 2016 rulemaking process made clear, this information is critically important so that states and tribes can improve outcomes, identify and fund needed resources, and reduce disparities experienced LGBTQ foster children. LGBTQ youth are disproportionately overrepresented in foster care and suffer worse safety, permanency, and well-being outcomes than their non-LGBTQ peers.⁸ Data on these youth at the state level is urgently needed to improve outcomes, reduce costs, and reduce disparities; data at the

⁵ Putting America’s Health First, FY 2020 President’s Budget for HHS, *available at* <https://www.hhs.gov/sites/default/files/fy-2020-budget-in-brief.pdf>.

⁶ Adoption and Foster Care Analysis and Reporting System, A Proposed Rule by the Children and Families Administration on 04/19/2019, *available at* <https://www.federalregister.gov/documents/2019/04/19/2019-07827/adoption-and-foster-care-analysis-and-reporting-system>.

⁷ Adoption and Foster Care Analysis and Reporting System, A Rule by the Children and Families Administration on 12/14/2016, *available at* <https://www.federalregister.gov/documents/2016/12/14/2016-29366/adoption-and-foster-care-analysis-and-reporting-system>.

⁸ Bianca D.M. Wilson, Khush Cooper, Angeliki Kastanis & Sheila Nezhad, *Sexual and Gender Minority Youth in Foster Care: Assessing Disproportionality and Disparities in Los Angeles*, The Williams Institute: UCLA School of Law (2014), *available at* https://williamsinstitute.law.ucla.edu/wp-content/uploads/LAFYS_ExecutiveSummary_Aug_2014.pdf.

national level is necessary to inform federal law, policy and funding determinations, to identify best practices for replication and, critically, to enhance the Administration on Children and Families' efforts to prevent removal and allow to children to remain safely at home with their families.

On November 1, 2019, HHS issued a Notice of Nonenforcement of HHS Grant Regulation, 84 FR 63809,⁹ stating that HHS would no longer enforce regulations prohibiting recipients of HHS-funded health and human service programs to discriminate on the basis of religion, sexual orientation, gender identity, or marital status. At the same time, HHS issued a proposed rule to re-promulgate 45 CFR §75.300(c) and (d) to allow taxpayer-funded foster care and adoption agencies to discriminate on the basis of religion, sexual orientation, gender identity, and marital status – specifically same-sex marriages.¹⁰ Through these actions, the Trump Administration is removing nondiscrimination protections – and replacing them with permission to discriminate with impunity – from health and human services programs that total over \$500 billion in HHS funding and serve millions of people in the United States.

On January 17, 2020, HHS issued a notice of proposed rulemaking to alter regulations governing faith-based contractors.¹¹ This proposed rule would remove the requirement of faith-based contractors to refer service recipients to alternative secular agencies upon request, and would allow for employment discrimination by faith-based agencies based not just on an employees' religion, but also on their adherence to specific religious tenets, such as marriage being between a man and a woman, or

⁹ Dep't of Health and Human Svcs., Notice of Nonenforcement, 45 CFR Part 75 (Nov. 1, 2019), *available at* <https://www.hhs.gov/sites/default/files/hhs-grants-regulation-notice-of-nonenforcement.pdf>.

¹⁰ Dep't of Health and Human Svcs, Office of the Assistant Sec. for Fin'l Resources, 45 CFR Part 75, RIN 0991-AC!^ (Nov. 1, 2019), *available at* <https://www.hhs.gov/sites/default/files/hhs-grants-regulation-nprm.pdf>.

¹¹ Dep't of Health and Human Svcs., Ensuring Equal Treatment for Faith-Based Organizations, 45 CFR 87 (Nov. 1, 2019), *available at* <https://www.federalregister.gov/documents/2020/01/17/2019-26923/ensuring-equal-treatment-of-faith-based-organizations>

the immutability of gender.¹² Such requirements put the ability of LGBTQ foster children and parents to receive affirming services in even greater doubt.

II. The Harms Caused by the Trump Administration's Discriminatory Actions

As discussed in detail below, these repeated attacks by the Trump Administration have devastating impacts not only on the LGBTQ community, but also on all children in the child welfare system.

Discrimination Reduces the Number of Homes Available for Children in Care

Allowing child welfare providers to discriminate against qualified prospective foster and adoptive parents on the basis of religion causes great harm to children in the child welfare system, which suffers from a shortage of foster homes.¹³ As illustrated through real life stories of discrimination in our *amicus curiae* brief in the U.S. Court of Appeals for the Third Circuit in *Fulton v. City of Philadelphia*,¹⁴ discrimination against prospective foster and adoptive parents or couples prevents, deters, and delays them from providing a home to a child – whether a temporary foster home or a forever family. In the words of one former foster youth:

Children need families, not facilities. At the heart of the foster care crisis in this country is the simple fact that there are not enough foster and adoptive homes. So, why would anyone think it is acceptable to turn away qualified, willing foster parents? At best, allowing child welfare agencies to discriminate based on their religious beliefs creates an atmosphere of confusion and discouragement for families who want to foster or adopt in a state that desperately needs more families to do so. At worst, it robs children of their livelihood by unduly denying LGBT, single, or non-Christian parents' opportunities to save children from the cycle of abuse and neglect they will almost certainly encounter growing up in the foster care system. No child should have the childhood that I had – especially when there are people who are willing to provide a safe and loving home.¹⁵

¹² See for example, the doctrinal statement of Miracle Hill Ministries, a federally funded foster care agency in South Carolina. Miracle Hill Ministries, *Foster Care Inquiry Form: Agreement with Doctrinal Statement*, MIRACLE HILL (2019), available at <https://miraclehill.org/foster-care-inquiry-form/>.

¹³ John Kelly, D. Heimpel, J. Loudonback, C. Renick, K. Phagen-Hansel, E. Green, . . . M. Zarate, *Foster Care Housing Crisis*, THE CHRONICLE OF SOCIAL CHANGE (2017), available at: <https://chronicleofsocialchange.org/wp-content/uploads/2017/10/The-Foster-Care-Housing-Crisis-10-31.pdf>.

¹⁴ Brief for Family Equality Council & COLAGE as Amicus Curiae, *Fulton v. City of Philadelphia*, No. 18-2572 (3rd. Cir. Oct. 4, 2018), available at: <https://www.aclu.org/legal-document/fulton-v-city-philadelphia-family-equality-council-amicus-brief>.

¹⁵ Kristopher Sharpe Statement to Family Equality (Aug. 28 & 29, 2018); *id.*

Being turned away by a state funded child welfare provider simply because of who they are or what they believe can have a chilling effect on applicants' willingness to move forward as a foster or adoptive parent. While some prospective parents abandon their efforts altogether, even those who persevere may be delayed for significant periods of time. The government's role should be to encourage families to adopt, but the Trump Administration's actions do the exact opposite.

By limiting the pool of available homes and appropriate placements for children in care, it is less likely that young people in foster care will find the temporary or permanent family they wish for and deserve. More children will grow up in group homes and "age out" of foster care, only to face adulthood with the odds stacked against them. For these children, the state has failed in fulfilling its duty of care.

The notion that allowing taxpayer funded agencies to discriminate based on their religious views somehow ensures that the greatest number of children will be served, is without merit. In fact, that argument runs counter to the experience of states who have implemented non-discrimination laws and regulations. In some states, where a few religiously affiliated agencies have chosen to stop serving children rather than to stop discriminating against qualified prospective families, there has been no negative impact on the children being served. The states, themselves, expressed it best when they said:

In the Amici States, the vast majority of foster care and adoptive services providers, including faith-based organizations, have enthusiastically complied with inclusionary policies that disallow discrimination in these services. But in some Amici States, a few organizations have discontinued offering foster care or adoptive services because recruiting, certifying, or otherwise serving same-sex couples would violate their religious beliefs. In our experience, these decisions have not harmed either children in state custody or state and local governments' ability to administer child welfare systems. Moreover, we have found other ways of productively working with these faith-based organizations to support our children and families.¹⁶

¹⁶ States' Amicus Brief, *Fulton v. City of Philadelphia*, No. 18-2572 (3rd. Cir. Oct. 4, 2018), available at: <https://www.aclu.org/legal-document/fulton-v-city-philadelphia-states-amicus-brief>.

Discrimination Increases the Likelihood of Inappropriate or Unsuitable Placements of Children Who Do Not Belong to the Agency's Approved Religion or Who Identify as LGBTQ

In addition to reducing the number of available homes, allowing child welfare providers to discriminate based on religion risks allowing the agencies to turn away the best possible placement for a child. For example, an agency could refuse to place a child with a relative simply because they are LGBTQ. Or, an agency could turn away a physician or trauma nurse simply because they are LGBTQ or belong to a minority religious faith, even where the agency has children to place who have significant medical needs. Or a teacher could be turned away, despite there being several children in care who have significant educational and developmental needs. Turning away qualified and needed families, even those with unique skill sets that could help children in care, does not serve the best interest of the child.

Allowing child welfare providers to turn prospective parents away based on their failure to subscribe to a particular agency's religious tenets means that the pool of available families will be limited to the agency's religion and faith tradition and limits opportunities for placement in homes that affirm the religious beliefs of the child or family of origin. For example, when a Christian foster care agency such as Miracle Hill Ministries in South Carolina turns away people of other faiths (including other Christians who do not subscribe to the agency's particular doctrine) who wish to be foster or adoptive parents,¹⁷ then the agency eliminates the possibility of a Jewish, Muslim, or other type of Christian or non-Christian child being placed with a family of her own faith tradition.

This is problematic for multiple reasons. First, a foster family that does not share the child's religious beliefs and faith traditions may not support the child in his religious practices and traditions. HHS guidance specifies that foster children have the right to "[p]lacement in a setting ... where their

¹⁷ Miracle Hill Ministries, *Foster Care Inquiry Form: Agreement with Doctrinal Statement*, MIRACLE HILL (2019), available at <https://miraclehill.org/foster-care-inquiry-form/>.

religious customs can be maintained;”¹⁸ and the Child Welfare League of America’s Standards of Excellence for Family Foster Care Services specify that “[p]arents of children in family foster care have the right to...[m]ake certain decisions regarding their child which include...designation of the child’s religion.”¹⁹ Secondly, three in five foster children return to their families of origin,²⁰ so support for the faith traditions (as well as other aspects of the culture of) a child’s family of origin helps ensure a smooth reintegration of a foster child with her family. Finally, turning away foster parents of a child’s faith may lead an agency to reject placement with a child's extended family member of the same faith. A summary of research on kinship care by Child Focus shows that “children experience better outcomes with kin across three major domains: improved placement stability, higher levels of permanency, and decreased behavior problems.”²¹ Thus, refusing placements with kin based on their religious beliefs goes against the requirement of an agency to act in the best interest of the child.

Similarly, when qualified prospective foster and adoptive families are turned away because they are LGBTQ or a same-sex couple, the diversity of the pool of available families is significantly diminished by decreasing the likelihood that LGBTQ children in the child welfare system will be placed with an affirming family. LGBTQ youth are overrepresented in the child welfare system by at least a factor of two²² and, unfortunately, too often enter the system because their birth or original family has abused, neglected, or abandoned them due to their LGBTQ identity.²³ Thus, a pool of

¹⁸ Child Welfare Information Gateway, *Reunification: Bringing Your Children Home From Foster Care*, U.S. D.H.H.S. CHILDREN’S BUREAU, (2016), available at <https://www.childwelfare.gov/pubPDFs/reunification.pdf>.

¹⁹ Child Welfare League of America, *Standards of Excellence for Family Foster Care Services*, CWLA (1995).

²⁰ See US Department of Health and Human Services, *Preliminary FY 2017 estimates as of June 2018*, THE AFCARS REPORT (2018).

²¹ Child Focus, *Children in Kinship Care Experience Improved Placement Stability, Higher Levels of Permanency, and Decreased Behavioral Problems: Findings from the Literature*, CHILD FOCUS, available at: http://grandfamilies.org/Portals/0/4-%20Kinship%20Outcomes%20Review%20Handout_1.pdf.

²² Bianca D.M. Wilson, Khush Cooper, Angeliki Kastanis & Sheila Nezhad, *Sexual and Gender Minority Youth in Foster Care: Assessing Disproportionality and Disparities in Los Angeles*, The Williams Institute: UCLA School of Law (2014), available at https://williamsinstitute.law.ucla.edu/wp-content/uploads/LAFYS_ExecutiveSummary_Aug_2014.pdf.

²³ Child Welfare Information Gateway, *Supporting Your LGBTQ Youth: A Guide for Foster Parents*, U.S. D.H.H.S. Children’s Bureau (2013), available at: <https://www.childwelfare.gov/pubPDFs/LGBTQyouth.pdf>.

LGBTQ-affirming placements, including families headed by LGBTQ individuals and same-sex couples, is essential to ensuring a placement that is in the best interests of many of these youth. But LGBTQ-headed families as placements do not just benefit LGBTQ foster youth. LGBTQ parents are also more likely to foster and adopt children with historically lower placement rates, including older children of color, large sibling sets, and children with special needs.²⁴

If an LGBTQ person or same-sex couple is turned away, it is highly likely that the foster and adoptive families who do meet the agency's criteria will not be affirming of an LGBTQ foster youth's sexual orientation or gender identity and may even denounce or try to change it. Sexual orientation and gender identity, like religion, are core to one's identity and being placed in a temporary or permanent home where it will be questioned or denounced risks additional traumatization of the more than one in five foster children who identify as LGBTQ.²⁵ By allowing agencies to discriminate with impunity, as this Administration has, child placing agencies would even be allowed to turn away a lesbian grandparent, bisexual uncle, or transgender cousin who are qualified and wish to provide the child with a temporary or permanent home. This refusal of "kinship" placements runs directly contrary to one of the main goals of the child welfare system: to preserve family bonds.

Discrimination Directly Harms LGBTQ Youth in Care

The actions of the Trump Administration directly discriminate against LGBTQ foster children and youth because of their religion, sexual orientation and gender identity, again contradicting the central tenet of child welfare policy, which is to act in the best interests of the child. This could result in

²⁴ D.M. Brodzinski & Evan B. Donaldson Adoption Institute, *Expanding Resources for Children III: Research-Based Best Practices in Adoption by Gays and Lesbians*, EVAN B. DONALDSON ADOPTION INSTITUTE (2011), available at: https://www.adoptioninstitute.org/wp-content/uploads/2013/12/2011_10_Expanding_Resources_BestPractices.pdf.

²⁵ See Laura Baams, Bianca D.M. Wilson & Stephen T. Russell, *LGBTQ Youth in Unstable Housing and Foster Care*, 143(3): e20174211 *Pediatrics* (2019), available at:

<https://pediatrics.aappublications.org/content/pediatrics/early/2019/02/07/peds.2017-4211.full.pdf>;

Megan Martin, Leann Down, & Rosalynd Erney, *Out of the Shadows: Supporting LGBTQ youth in Child Welfare Through Cross-System Collaboration*, Center for the Study of Social Policy (2016), available at: <https://cssp.org/resource/out-of-the-shadows/>.

LGBTQ children being denied needed support services, health care, and educational opportunities, as well as appropriate and affirming placements as outlined above. It could result in a transgender foster child being denied needed transition-related health care. Finally, it could lead to a youth being subjected to conversion therapy, a medically discredited practice attempting to change the sexual orientation or gender identity of the child.

This Discrimination Violates the Equal Protection Rights of Prospective Foster and Adoptive Parents

In addition to the harms imposed on youth in care and prospective parents, the Trump Administration’s actions in enabling child welfare providers to discriminate on the basis of religion is unconstitutional and violates the Equal Protection rights of the persons who are subjected to discrimination. The Equal Protection Clause of the Fourteenth Amendment guarantees that no State²⁶ shall deny to any person “the equal protection of the laws.”²⁷ In basic terms, neither the Federal Government, nor any State or political subdivision can discriminate in its laws – either facially or through application or enforcement²⁸ – or in providing benefits or services, against a person based on that person’s membership in a class without at least a rational basis; if the discrimination involves a “suspect” class (such as race, national origin, or religion), or “quasi-suspect” class (such as sex), the government must show a much greater governmental interest to justify its action.

Further, allowing faith-based child welfare providers receiving government funding to use a religious litmus test in delivery of their services violates the Establishment Clause. The Establishment

²⁶ This prohibition extends to the Federal Government through the Due Process Clause of the Fifth Amendment. *Bolling v. Sharpe*, 347 U.S. 497 (1954).

²⁷ While for the first 100 years of its existence, the Equal Protection clause was used as a check on state action that discriminated against persons on the basis of their race, color or national origin, its use was eventually expanded to protect against other types of class-based discrimination, including discrimination based on sex, sexual orientation, and gender identity. See footnote 43, *supra*.

²⁸ Despite the impartial wording of a statute, if it is applied and administered so as to result in class-based discrimination, the statute violates the Equal Protection Clause. *Yick Wo v. Hopkins*, 118 U.S. 356 (1886). Here, although the Proposed Rule is neutral on its face, it will clearly be applied and administered so as to result in class-based discrimination based on religion and sex, including sexual orientation and gender identity.

Clause prevents the government from favoring one religion or religious group over others and granting it special rights, privileges, or benefits. When a state or the federal government contracts with an entity to provide child welfare services, it delegates its governmental responsibility for the children in its care. Just as the government cannot use religious criteria or favor one religion over another in exercising this power, nor can an agency that receives government funding to perform a government service. Doing so violates the Establishment Clause principle that “civil power must be exercised in a manner neutral to religion.”²⁹ Further, the Establishment Clause forbids the government from granting religious exemptions that result in harms to third parties.³⁰ Here, allowing taxpayer-funded providers to use religious criteria to exclude qualified prospective families harms both the children in the system who miss out on loving homes and prospective families who are turned away.

Despite its claims to the contrary, the Trump Administration’s actions are not necessary for compliance with the Religious Freedom Restoration Act (RFRA), 42 U.S.C. §2000bb *et seq.* Such concerns are without basis in law or fact. RFRA merely provides that, if a federal action (even a neutral one of general applicability) substantially burdens the free exercise of religion,³¹ it must be justified by a compelling government interest and it must use “the least restrictive means” to further that interest. 42 U.S.C. §2000bb-1. This was the legal standard for assessing whether government action violated the Free Exercise clause prior to *Employment Div. v. Smith*, 485 U.S. 660 (1988).

²⁹ *Bd. of Educ. Of Kiryas Joyel Village Sch. Dist. v. Grumet*, 512 U.S. 687, 704 (1994).

³⁰ *E.g., Cutter v. Wilkinson*, 544 U.S. 709, 720, 722 (2005)).

³¹ It is highly debatable that requiring a religiously affiliated program grantee to adhere to the same contract conditions as non-religious grantees imposes a “substantial burden.” The essence of the *Trinity Lutheran* case was that, under the Free Exercise clause, the plaintiff church’s exercise of religion was substantially burdened because it was not considered for a playground resurfacing grant on equal terms with a secular applicant; not that it had a right to impose special terms on the grant process based on its religious beliefs. *Trinity Lutheran Church of Columbia, Inc. v. Comer*, 137 S. Ct. 2012 (2017). Similarly, in *Masterpiece Cakeshop*, the plaintiff bakery owner had a right under the Free Exercise clause to have his faith-based defense to violating the Colorado civil rights law (refusing service to a gay couple) heard by a neutral adjudicatory body, i.e., one that would treat him equally with other alleged violators; he did not have a right to an exemption from the law based on his religious beliefs. *Masterpiece Cakeshop, Ltd. v. Colo. Civil Rights Comm’n*, 138 S. Ct. 1719 (2018).

RFRA does not create any substantive right of religiously affiliated entities to an exemption from neutral laws of general applicability if those laws meet the legal standard.

No court has held that prohibiting taxpayer funded child welfare agencies from discriminating violates RFRA or is an unconstitutional burden on Free Exercise rights.³²

III. Recommendations for the Committee

We respectfully urge this Committee to exercise its oversight authority to end these egregious attacks on the minority faith and LGBTQ communities. First, we urge this Committee to direct the U.S. Department of Health and Human Services (“HHS”) to immediately resume enforcement of 45 CFR §75.300(c) and (d), which prohibit discrimination by recipients of federal funds on the basis of religion, sexual orientation, and gender identity, among other protected classes. The Trump Administration circumvented the rulemaking procedures of the Administrative Procedures Act by issuing a Notice of Nonenforcement stating it would no longer abide by 45 CFR §75.300(c) and (d), allowing child welfare providers across the nation to discriminate with impunity and exacerbating the harms outlined in section II, *infra*.

Second, we respectfully ask that this Committee direct the collection of sexual orientation and gender identity data on youth in care and foster and adoptive parents and guardians, including the voluntary sexual orientation data collection on foster youth ages fourteen and older and foster and adoptive parents and guardians, under 45 CFR 1355. Collection of this data is essential to supporting the safety, well-being, and permanency of LGBTQ youth in care. Research shows that more than 1 in 5

³² Although the case involved the prohibition against racial discrimination in places of public accommodation under Title II, rather than in programs receiving federal assistance under Title VI of the 1964 Civil Rights Act, it is worth noting that the Supreme Court approved the award of plaintiffs’ attorney fees because the defendant’s contentions – including that “the Act was unconstitutional because it ‘contravenes the will of God’ and constitutes an interference with the ‘free exercise of Defendant’s religion’” -- were “patently frivolous.” *Newman v. Piggie Park Enterprises*, 390 U.S. 400, 403, n. 5 (1968).

youth in care are LGBTQ³³ and that those youth report twice the rate of poor treatment in foster care as non-LGBTQ youth and suffer worse outcomes, such as multiple placements, longer stays in group homes and greater rates of hospitalization, homelessness and involvement with the criminal justice system.³⁴ States, tribes, and agencies cannot improve care and outcomes for LGBTQ youth if there is no data by which to measure the impact of their efforts.

Finally, this invidious discrimination underscores the necessity of passing the bipartisan Every Child Deserves a Family Act, HR 3114, and we respectfully ask the members of this Committee to support passage of that important legislation in the House of Representatives in 2020.³⁵ HR 3114 would prohibit federally-funded child welfare service providers from discriminating against children, families, and individuals because of their religion, sex, sexual orientation, gender identity, and marital status. It also ensures that services to youth in care are delivered in an identity-affirming and culturally responsive manner. Further, the Act codifies the collection of AFCARS data regarding sexual orientation and gender identity of children in care as well as foster and adoptive parents and guardians and whether family conflict related to a youth's sexual orientation or gender identity was a factor in the youth's removal from their family of origin. Moreover, ECDF creates a National Resource Center to promote the safety, well-being, permanency, stability, and family placement for LGBTQ children and youth in care and directs technical assistance to bring child welfare service providers into compliance with this law. HR 3114 is a comprehensive, proactive measure to protect all children, families, and

³³ Laura Baams, Bianca D.M. Wilson & Stephen T. Russell, *LGBTQ Youth in Unstable Housing and Foster Care*, 143(3): e20174211 *Pediatrics* (2019), available at:

<https://pediatrics.aappublications.org/content/pediatrics/early/2019/02/07/peds.2017-4211.full.pdf>;

Megan Martin, Leann Down, & Rosalynd Erney, *Out of the Shadows: Supporting LGBTQ youth in Child Welfare Through Cross-System Collaboration*, Center for the Study of Social Policy (2016), available at: <https://cssp.org/resource/out-of-the-shadows/>.

³⁴ Bianca D.M. Wilson, Khush Cooper, Angeliki Kastanis & Sheila Nezhad, *Sexual and Gender Minority Youth in Foster Care: Assessing Disproportionality and Disparities in Los Angeles*, The Williams Institute: UCLA School of Law (2014), available at https://williamsinstitute.law.ucla.edu/wp-content/uploads/LAFYS_ExecutiveSummary_Aug_2014.pdf.

³⁵ House Bill H.3114 (introduced June 5, 2019), available at https://johnlewis.house.gov/sites/johnlewis.house.gov/files/LEWIGA_020_xml.pdf.

individuals impacted by the child welfare system, and passing this bill would put an end to the Trump Administration's relentless attacks on LGBTQ families and youth in the name of "religious liberty."

CONCLUSION

"It is beyond dispute that any public entity, state or federal, has a compelling interest in assuring that public dollars, drawn from the tax contributions of all citizens, do not serve to finance the evil of private prejudice." *Richmond v. J.A. Croson Co.*, 488 U.S. 469, 492 (1989). The evil that the Trump Administration is facilitating by allowing discrimination on the basis of religion by taxpayer funded child welfare agencies is particularly egregious as the impact is felt most directly on the very children whose care is entrusted to the government. Providing child welfare services are among a state's most crucial duties. Caring for and supporting vulnerable children who have been removed from their homes – all too often because of abuse and trauma – necessitates prioritizing the health and safety of the children and limiting further trauma, above all other considerations. Children suffer when agencies are allowed to discriminate, and we respectfully urge this Committee to exercise its authority and act in the best interests of these children who have been abandoned by the Trump Administration.

Respectfully,



The Rev. Stan J. Sloan
Chief Executive Officer