RELIGIOUS LIBERTY FOR RELIGIOUS CHILD-WELFARE ORGANIZATIONS: PROMISES AND PERILS

*Asma T. Uddin**

INTRODUCTION

In the 2015 case *Obergefell v. Hodges*, the U.S. Supreme Court held that states cannot deny same-sex couples access to marriage and its accompanying benefits.[1] Some religious communities with traditional beliefs about marriage and sexuality responded to the ruling with strong concerns about its potential impact on their religious exercise.[2]

One area of concern involved religious child-welfare organizations that work with the state to provide these services. In all states, there are two options for prospective parents seeking to adopt children. In the private system, birth parents voluntarily place their child up for adoption through a private organization.[3] In contrast, the public system includes children that have been removed from their families by the state or orphaned without any relative to take care of them.[4] Private organizations—including private religious organizations—can

* Visiting Assistant Professor of Law at Catholic University of America Columbus School of Law. I would like to thank my research assistant, Ross Fodera, for his assistance throughout this project.

1 576 U.S. 644 (2015).

2 *See, e.g.*, Michael O'Loughlin, *Catholics React to Supreme Court's Marriage Decision*, CRUX (June 26, 2015), https://cruxnow.com/life/2015/06/catholics-react-to-supreme-courts-marriage-decision [https://perma.cc/2HU4-N93B] (expressing a variety of reactions of Catholics to the *Obergefell* decision); *Religious Groups React to Supreme Court Ruling on Same-Sex Marriage*, TAMPA BAY TIMES (June 26, 2015), https://www.tampabay.com/news/courts/religious-groups-react-to-supreme-court-ruling-on-same-sex-marriage/2235233/ [https://perma.cc/KXR8-CYP4] (including responses from numerous religious leaders and groups).

3 Adrianne M. Spoto, Note, *Fostering Discrimination: Religious Exemption Laws in Child Welfare and the LGBTQ Community*, 96 N.Y.U. L. REV. 296, 304 (2021).

4 *Id.*

work in the public system and in many cases have partaken in this work, so much so that in some states, Christian child-welfare organizations are the primary provider of state child-welfare services.[5]

Participating in the public system means these private organizations must work hand-in-hand with the state. Many of these private organizations rely on contracts to govern that relationship, essentially making them state contractors.[6] Some states require compliance with their nondiscrimination policy as a condition of receiving those contracts, even if the nondiscrimination policy runs counter to the religious organization's sincerely held religious beliefs.[7] The question then arises as to how to balance (1) the organization's right to engage in religious exercise with (2) the state's interest in nondiscrimination.

The Court recently considered this question in *Fulton v. City of Philadelphia*.[8] *Fulton* involved Philadelphia's refusal to contract with Catholic Social Services (CSS) for the provision of foster care services unless CSS agreed to certify same-sex couples as foster parents.[9] CSS did not comply with the city's requirements and instead challenged Philadelphia's public accommodations law under the First Amendment.[10] More specifically, CSS argued that its practices are not subject to the Court's rule in *Employment Division v. Smith*[11] that would deny exemptions from neutral laws of general applicability.[12] *Smith* is inapplicable in cases where—like *Fulton*—the government grants individualized exceptions to its laws; in those cases, CSS argued, courts are required to apply the strict-scrutiny standard.[13]

Writing for the Court, Chief Justice John Roberts agreed with CSS. The opinion focused on a contract provision allowing the commissioner of the city's Department of Human Services to grant exemptions in her "sole discretion."[14] The provision afforded sufficient discretion to the government to render the nondiscrimination policy not "generally applicable."[15] As such, the Court said, the policy was not subject to *Smith*; instead, the city's denial of a religious exemption to CSS had

5 *Id.* at 305.
6 *Id.*
7 *See id.* at 301.
8 141 S. Ct. 1868, 1874 (2021).
9 *Id.* at 1875–76.
10 *Id.* at 1876.
11 494 U.S. 872 (1990).
12 *Fulton*, 141 S. Ct. at 1876.
13 *See id.* at 1880.
14 *Id.* at 1878 (quoting Supplemental Appendix to City Respondents' Brief on the Merits at 17, Fulton v. City of Philadelphia, 141 S. Ct. 1868 (2021) (No. 19-123)).
15 *See id.*

to be assessed using the strict scrutiny standard.[16] The city failed to meet that exacting standard, and CSS won.[17]

By focusing on the narrow question about general applicability, the Court sidestepped the bigger issue of balancing religious liberty and LGBTQ rights in the context of religious child-welfare organizations. The issue thus remains open and subject to legal uncertainty.

A few states have taken steps to create certainty for religious actors in this space. To date, eleven states have enacted religious exemptions to protect religious actors in the child-welfare space.[18] The exemptions are not identical. Some prohibit the government from punishing religious entities that decline to serve LGBTQ prospective parents and/or LGBTQ youth.[19] Others go further and prohibit the government from denying these entities licenses, grants, contracts, or participation in state programs based on their religious beliefs.[20]

Same-sex couples and others have opposed these exemptions in at least two states. This Essay considers those challenges and the constitutional arguments raised there under the Establishment Clause, along with responses by religious entities under the Free Exercise and Establishment Clauses and the Religious Freedom Restoration Act (RFRA). Before considering those cases in Part II, this Essay in Part I looks at legal conflicts that have arisen in states that do not have such exemptions.

I. LEGAL CHALLENGES IN THE ABSENCE OF RELIGIOUS EXEMPTIONS

A. Early Controversies

In several states, the conflict between LGBTQ rights and religious liberty has had Catholic groups at its center. For example, a Massachusetts controversy involved Catholic Charities of Boston, a private network of Catholic organizations committed to a range of social services, including adoption and foster care services. The saga began in October 2005 when the Boston Globe published a piece titled,

16 *Id.* at 1881.

17 *Id.* at 1881–82.

18 *See* ALA. CODE § 26-10D-5 (2023); KAN. STAT. ANN. § 60-5322 (2023); MICH. COMP. LAWS § 722.124e (2023); MISS. CODE ANN. § 11-62-5 (2023); N.D. CENT. CODE § 50-12-07.1 (2023); OKLA. STAT. tit. 10A, § 1-8-112 (2023); S.D. CODIFIED LAWS § 26-6-39 (2023); TENN. CODE ANN. § 36-1-147 (2023); TEX. HUM. RES. CODE ANN. § 45.004 (West 2023); VA. CODE ANN. § 63.2-1709.3 (2023); Exec. Order No. 2018-12, 42 S.C. Reg. 5 (Apr. 27, 2018).

19 *See, e.g.*, S.D. CODIFIED LAWS § 26-6-39 (2023).

20 *See, e.g.*, MISS. CODE. ANN. § 11-62-5(2) (2023) (prohibiting the state from engaging in discriminatory action against child-welfare organizations who decline to provide service due to sincerely held religious beliefs).

"Archdiocesan Agency Aids in Adoptions for Gays."[21] The article revealed that, over the course of the preceding two decades, Catholic Charities had placed thirteen children with same-sex couples—in compliance with the Department of Social Services regulations prohibiting discrimination based on sexual orientation, but in clear violation of the church doctrine.[22]

The Boston Globe's exposure prompted the Boston Archdioceses to open an investigation into the matter and, later, to retain the services of a prominent law firm to help it find a compromise solution.[23] The firm was unable to find this solution. Then-Governor Mitt Romney proposed a bill exempting religious organizations from the state's antidiscrimination requirements when providing adoption and foster placement services.[24] The bill made it to the House Judiciary Committee, where it died.[25] In the absence of an exemption, Catholic Charities of Boston found itself without options and in March 2006, it closed its doors to those seeking its adoption services.[26]

A Catholic group in San Francisco used a different tactic. The San Francisco Board of Supervisors passed a resolution opposing a Vatican directive, issued by Cardinal William Levada, that the Catholic Archdiocese stop placing children in need of adoption in same-sex households.[27] "The resolution urge[d] the Cardinal to withdraw his instructions; denounce[d] the Cardinal's directive as 'meddl[ing]' by a 'foreign country'; call[ed] it 'hateful,' 'insulting,' and 'callous'; and urge[d] the local archbishop and Catholic Charities to 'defy' the Cardinal's instructions."[28] The Catholic League for Religious and Civil Rights sued the city, alleging that the resolution violated the Establishment Clause because it directly condemned their religion.[29] The case was ultimately dismissed; despite the court's finding that the city's description of Catholic beliefs as "discriminatory" and "hateful" could be

21 *See* Colleen Theresa Rutledge, *Caught in the Crossfire: How Catholic Charities of Boston Was Victim to the Clash Between Gay Rights and Religious Freedom*, 15 DUKE J. GENDER L. & POL'Y 297, 299 (2008) (citing Patricia Wen, *Archdiocesan Agency Aids in Adoptions by Gays*, BOSTON GLOBE, Oct. 22, 2005).

22 *Id.*

23 *Id.* at 299–300.

24 *Id.* at 300.

25 *Id.*

26 *Id.* at 297, 300.

27 Cath. League for Religious & C.R. v. City & Cnty. of San Francisco, 624 F.3d 1043, 1047 (9th Cir. 2010) (en banc).

28 *Id.* (quoting S.F. Res. No. 168-06 (Mar. 21, 2006), https://sfbos.org/ftp/uploadedfiles/bdsupvrs/resolutions06/r0168-06.pdf [https://perma.cc/J9TW-B9DD]).

29 *Id.* at 1047–48.

seen as disparaging,[30] five judges on the Ninth Circuit Court of Appeals found that the plaintiffs lacked standing and three judges found that the plaintiffs had standing but that the resolution had a primarily secular purpose (to promote equal rights for same-sex couples in adoption).[31]

B. New Hope Family Services, Inc. v. Poole

In more recent years, the tide seems to have turned and religious actors—in the few lawsuits challenging state nondiscrimination provisions—have prevailed. For example, in New York, New Hope Family Services, a Christian adoption agency, recently secured a victory. Its saga began in September 2010, when New York codified same-sex couples' right to adopt.[32] In January 2011, the state family-services division, Office of Children and Family Services (OCFS), informed state-authorized adoption agencies about the new regulation and prohibited those agencies from discriminating against same-sex couples.[33] In 2013, the state promulgated a new rule that required authorized agencies to "take reasonable steps to prevent such discrimination . . . promptly investigate incidents of discrimination . . . and take reasonable and appropriate corrective or disciplinary action when such incidents occur."[34]

Under this rule, authorized agencies were required to "receive and respond to inquiries from, conduct orientation sessions for, and offer OCFS-approved applications to prospective parents."[35] After the agency received an adoption application, it had to complete an adoption study; the agency could reject an application only if the applicants were noncooperative, were physically or emotionally incapable of caring for an adoptive child, or where approval was not in the best interests of the child (as defined by a list of specifications).[36] If the agencies refused to comply with these rules, they would be forced to close.[37]

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30 *Id.* at 1053.

31 *See id.* at 1060 (Silverman, J., concurring).

32 *See* Children and Minors—Adoption—Unmarried Adult Intimate Partners, 2010 N.Y. LAWS 1364 (codified as amended at N.Y. DOM. REL. LAW § 110 (McKinney 2022)).

33 *See* New Hope Fam. Servs., Inc. v. Poole, 387 F. Supp. 3d 194, 202 (N.D.N.Y. 2019), *rev'd in part, vacated in part*, 966 F.3d 145 (2d Cir. 2020).

34 *Id.* (quoting N.Y. COMP. CODES. R. & REGS. tit. 18, § 421.3(d) (2013)).

35 *See id.* (citing N.Y. COMP. CODES R. & REGS. tit. 18, § 421.15 (2019)).

36 *See id.* at 202–03 (citing N.Y. COMP. CODES R. & REGS. tit. 18, §§ 421.13, 421.15(g) (2019)).

37 *See id.* at 206 (citing Verified Complaint for Injunctive and Declaratory Relief ¶ 198, New Hope Fam. Servs., Inc. v. Poole, 387 F. Supp. 3d 194 (N.D.N.Y. 2019) (No. 5:18-cv-01419)).

In 2018, New Hope sought a preliminary injunction against OCFS, claiming (among other things) that the Office's invalidation of New Hope's policy of not placing children with same-sex couples violated its free exercise right.[38] The agency also included a separate claim alleging unconstitutional conditions.[39] The district court rejected these claims. Under free exercise, it held that the New York law was neutral and generally applicable and that the state therefore need only satisfy rational basis review.[40] To that end, the court found the law was rationally related to the state's goals in ensuring (1) that all qualified citizens had access to important government services; and (2) "that the pool of foster parents and resource caregivers is as diverse and broad as the children in need of foster parents and resource caregivers."[41]

On unconstitutional conditions, the court viewed the claim as "a mere repackaging" of New Hope's First Amendment claims.[42] Therefore, the court said, it too would "repackage[] its resolution of those claims," that is, that "New Hope has failed to plausibly allege any violation of its constitutional rights."[43]

In July 2020, the Second Circuit reversed the lower court's decision, finding that New Hope had stated a plausible free exercise claim.[44] Specifically, regarding neutrality, the court noted that "government hostility to religion can be 'masked, as well as overt,'" and found that the pleadings suggested a "sufficient 'suspicion' of religious animosity to warrant 'pause.'"[45] Among the facts the court found concerning were (1) during the rulemaking process for the 2013 regulation, OCFS stated that it aimed to "eliminate *archaic* regulatory language, which implies that the sexual orientation of gay, lesbian and bisexual prospective parents . . . is relevant to evaluating their appropriateness as adoptive parents"[46]; (2) when New Hope informed OCFS that its "comply-or-close order" violated its free exercise rights, OCFS responded by noting that "some Christian ministries have decided to compromise and stay open."[47] After OCFS's rule took effect, a number

38 New Hope Fam. Servs., Inc. v. Poole, 966 F.3d 145, 149 (2d Cir. 2020).

39 *New Hope*, 387 F. Supp. 3d at 207.

40 *Id.* at 213.

41 *Id.* at 216.

42 *Id.* at 224.

43 *Id.*

44 New Hope Fam. Servs., Inc. v. Poole, 966 F.3d 145, 149 (2d Cir. 2020).

45 *Id.* at 163 (first quoting Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520, 534 (1993); and then quoting Masterpiece Cakeshop v. Colo. C.R. Comm'n, 138 S. Ct. 1719, 1731 (2018)).

46 *Id.* at 163–64 (quoting Verified Complaint, *supra* note 37, ¶ 166).

47 *Id.* (quoting Verified Complaint, *supra* note 37, ¶ 192).

of agencies were removed from its previous list of authorized agencies; among the removed agencies were several religious ones.[48] In the case of one Christian adoption agency that was forced to close—despite having served the local community for ninety-five years—an OCFS spokeswoman remarked simply that "[d]iscrimination of any kind is illegal . . . . There is no place for providers that choose not to follow the law."[49]

After the Second Circuit's decision, the district court issued an order enjoining the state from enforcing its antidiscrimination law against New Hope "insofar as it would compel New Hope to process applications from, or place children for adoption with, same-sex couples or unmarried cohabitating couples, and insofar as it would prevent New Hope from referring such couples to other agencies."[50]

C. Blais v. Hunter

Religious liberty conflicts in the child welfare context also impact *individuals* who seek to adopt or become foster parents. In *Blais v. Hunter*, the state of Washington developed questionnaires to determine how prospective parents would treat their children if they were to come out as LGBTQ.[51] The plaintiffs were great-grandparents of an infant that they intended to foster and later adopt.[52] They indicated on the questionnaire that, because of their religious beliefs, they could not administer hormone treatment if the infant later developed gender dysphoria.[53] The state determined that this response violated its policy and denied the Blaises' foster care license application.[54]

The Blaises sued, alleging violations of their rights under the Free Exercise Clause.[55] The court ruled in favor of the Blaises, holding that the state's policy was not subject to *Smith* because it was neither neutral nor generally applicable, and thus required strict scrutiny.[56] The policy was not neutral because it served as a religious gerrymander; applications by parents with religious beliefs like the Blaises' were disproportionately denied.[57] The policy thus functioned to "infringe upon

48 *Id.* (citing Verified Complaint, *supra* note 37, ¶ 202–03).

49 *Id.* (citing Verified Complaint, *supra* note 37, ¶ 204) (alteration in original).

50 New Hope Fam. Servs., Inc. v. Poole, No. 5:18-cv-01419, 2022 WL 4094540, at *7 (N.D.N.Y. Sept. 6, 2022).

51 *See* 493 F. Supp. 3d 984, 990 (E.D. Wash. 2020).

52 *Id.* at 989.

53 *Id.* at 991.

54 *Id.* at 989.

55 *Id.*

56 *See id.* at 1000–02.

57 *Id.* at 998.

or restrict practices *because* of their religious motivation."[58] Separately, the policy was not generally applicable as it targeted individuals with religious beliefs under a system of "individualized assessments."[59] The Department of Health and Human Services required prospective parents to fill out questionnaires and then had discretion on the basis of those answers to deny applications if the religious beliefs prohibited certain medical decisions for LGBTQ children.

* * *

While both the Blaises and New Hope prevailed, it continues to be less than certain that courts will be able to move state antidiscrimination provisions out from under *Smith*. Even in states with explicit exemptions in place, clear (sometimes overwhelming) evidence of government hostility has been critical to securing a win for the religious agencies. Part II considers cases that have arisen in those states.

II. LEGAL CHALLENGES IN RESPONSE TO RELIGIOUS EXEMPTIONS

A. Religious Exemptions

Eleven states have enacted laws or other policies that protect a religious organization from participating in child placement that conflicts with its sincerely held religious beliefs.[60] Many of these laws use language like Mississippi's, which prohibits "discriminatory" government action against religious organizations;[61] South Dakota's law says that "[t]he state may not discriminate or take any adverse action against" such agencies;[62] Texas and Alabama use nearly identical language.[63] The idea, made explicit in the South Carolina executive order, is that religious organizations are required to be protected as such under the First Amendment of the United States, state constitutional provisions, and where applicable, state Religious Freedom Restoration Acts (RFRAs).[64] In contrast, Alabama prohibits the government from denying licenses, but is silent on the denial of grants, contracts, and program participation.[65]

58 *Id.* at 993 (quoting Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520, 546 (1993)).

59 *Id.* at 1000.

60 *See supra* note 18 and accompanying sources.

61 MISS. CODE ANN. § 11-62-5(1) (2023).

62 S.D. CODIFIED LAWS § 26-6-39 (2023).

63 TEX. HUM. RES. CODE ANN. § 45.004 (West 2023); ALA. CODE § 26-10D-5 (2023).

64 *See, e.g.*, Exec. Order No. 2018-12, 42 S.C. Reg. 5 (Apr. 27, 2018).

65 *See* ALA. CODE § 26-10D-5 (2023).

Of the eleven laws protecting religious child welfare organizations, seven states require that the sincerely held religious belief be explicitly outlined in the organizations' policies.[66] For example, Michigan's law requires "sincerely held religious beliefs" to be "contained in a written policy, statement of faith, or other document adhered to by the child placing agency."[67] South Dakota also refers specifically to an "agency's written sincerely-held religious belief or moral conviction of the child-placement agency."[68] South Carolina and Texas are silent on written requirements.[69]

Most states with religious exemptions refer generally to "sincerely held religious beliefs." Two states, however, are explicit about which beliefs they seek to protect. Mississippi makes clear that:

> The sincerely held religious beliefs or moral convictions protected by this chapter are the belief or conviction that:
>
> (a) Marriage is or should be recognized as the union of one man and one woman;
>
> (b) Sexual relations are properly reserved to such a marriage; and
>
> (c) Male (man) or female (woman) refer to an individual's immutable biological sex as objectively determined by anatomy and genetics at time of birth.[70]

Texas also specifies a particular set of religious beliefs, noting that the government cannot take adverse action against child-welfare providers that (1) "plac[e] . . . children in a private or parochial school or otherwise provid[e] a religious education," or (2) "decline to provide, facilitate, or refer a person for abortions, contraceptives, or drugs, devices, or services that are potentially abortion-inducing."[71]

Michigan is the only state that expressly requires exempt agencies to refer denied applicants to another agency that is willing and able to provide the declined services or to the Michigan Department of Health and Human Services website that identifies licensed child-placement agencies.[72] In contrast, seven states include referrals among the range

66 MICH. COMP. LAWS § 722.124e(2) (2023); KAN. STAT. ANN. § 60-5322(f) (2023); OKLA. STAT. tit. 10A, § 1-8-112 (2023); S.D. CODIFIED LAWS § 26-6-39 (2023); TENN. CODE ANN. § 36-1-147(a) (2023); VA. CODE ANN. § 63.2-1709.3 (2023); N.D. CENT. CODE § 50-12-07.1 (2023).

67 MICH. COMP. LAWS § 722.124e(2) (2023).

68 S.D. CODIFIED LAWS § 26-6-39 (2023).

69 Exec. Order No. 2018-12, 42 S.C. Reg. 5 (Apr. 27, 2018); TEX. HUM. RES. CODE ANN. § 45.004 (West 2023).

70 MISS. CODE ANN. § 11-62-3 (2023).

71 TEX. HUM. RES. CODE ANN. § 45.004 (West 2023).

72 *See* MICH. COMP. LAWS § 722.124e(4) (2023).

of protected actions;[73] for example, Texas prohibits the government from "discriminat[ing]" against an agency that "has declined or will decline to provide, facilitate, or *refer* a person for child welfare services that conflict with, or under circumstances that conflict with, the provider's sincerely held religious beliefs."[74] Three states (Mississippi, South Carolina, South Dakota) are silent about referrals.[75]

The U.S. Department of Health and Human Services (HHS) has also weighed in on the issue. In 2016, it issued a final rule prohibiting any child-welfare agencies that received federal funding from refusing service to LGBTQ individuals.[76] The Trump Administration in a 2021 regulation amended the 2016 rule and removed the requirement that recipients of federal funds comply with antidiscrimination policy when administering services.[77] The Trump rule focused solely on the government's role and stated that HHS shall not exclude any person from a program if doing so would violate federal law.[78] To that end, the 2021 rule amended a section of the 2016 rule that explicitly invoked *Obergefell* to instead read that "HHS will follow all applicable Supreme Court decisions in administering its award programs."[79]

HHS determined it had a number of options to address the burdens imposed on religious exercise by the 2016 rule, but to "mirror the balance struck by Congress with respect to nondiscrimination requirements and to reduce confusion for grant applicants and recipients," the Department decided that "instead of requiring individual objectors to assert claims under RFRA or other applicable laws," it was

73 ALA. CODE § 26-10D-5 (2023); TENN. CODE ANN. § 36-1-147 (2023); TEX. HUM. RES. CODE ANN. § 45.004 (West 2023); OKLA. STAT. tit. 10A, § 1-8-112 (2023); KAN. STAT. ANN. § 60-5322 (2023); VA. CODE ANN. § 63.2-1709.3 (2023); N.D. CENT. CODE § 50-12-07.1 (2023).

74 TEX. HUM. RES. CODE ANN. § 45.004 (West 2023) (emphasis added). Tennessee law states that no private agency shall be required "to perform, assist, counsel, *recommend*, consent to, *refer*, or participate in any placement of a child for foster care or adoption when the proposed placement would violate the agency's *written* religious or moral convictions or policies." TENN. CODE ANN. § 36-1-147(a) (2023) (emphasis added). Oklahoma, Virginia, North Dakota, and Kansas use very similar language in their statutes to protect an agency from referring or recommending an applicant to another agency but requiring the agency to have a written policy in order to invoke the exemption. *See* OKLA. STAT. tit. 10A, § 1-8-112 (2023); VA. CODE ANN. § 63.2-1709.3 (2023); N.D. CENT. CODE ANN. § 50-12-07.1 (2023); KAN. STAT. ANN. § 60-5322(f) (2023).

75 MISS. CODE. ANN. § 11-62-5 (2023); S.D. CODIFIED LAWS § 26-6-39 (2023); Exec. Order No. 2018-12, 42 S.C. Reg. 5 (Apr. 27, 2018).

76 Health and Human Services Grants Regulation, 81 Fed. Reg. 89393, 89395 (Dec. 12, 2016) (to be codified at 45 C.F.R. pt. 75).

77 *See* Health and Human Services Grants Regulation, 86 Fed. Reg. 2257, 2278 (Jan. 12, 2021) (to be codified at 45 C.F.R. pt. 75).

78 *Id.*

79 *See id.*

preferable to eliminate the antidiscriminatory requirements on these entities.[80]

Later that same year, however, the Biden Administration reinstated what it describes as a "long-standing Department practice of evaluation of religious exemptions and modifications . . . on a case-by-case basis."[81]

B. Cases and Controversies

Two of these religious exemptions have been challenged in *Barber v. Bryant*[82] and *Dumont v. Lyon*.[83] Plaintiffs in both cases brought claims under the Establishment and Equal Protection Clauses. The Essay will assess challengers' arguments relevant to the former claim.

Next, the Essay will consider Free Exercise, Establishment, and RFRA claims available to religious entities when a state has a religious exemption, and later decides to eliminate it. This was the chain of events in *Dumont*.

1. *Barber v. Bryant*

Barber involved a challenge to the Mississippi exemption before that law took effect.[84] Plaintiffs included thirteen state citizens, consisting of (1) members of groups targeted by the exemption (LGBTQ and unmarried persons); (2) religious clergy with religious beliefs at odds with those outlined in the exemption; and (3) "other citizens who, based on their religious or moral convictions," did not "hold the beliefs" outlined in the exemption.[85]

As noted above, the Mississippi exemption is explicit in the beliefs it protects:

> (a) Marriage is or should be recognized as the union of one man and one woman;
>
> (b) Sexual relations are properly reserved to such a marriage; and

80 *Id.* at 2266.

81 *HHS Takes Action to Prevent Discrimination and Strengthen Civil Rights*, U.S. DEP'T OF HEALTH & HUM. SERVS. (Nov. 18, 2021), https://www.hhs.gov/about/news/2021/11/18/hhs-takes-action-to-prevent-discrimination-and-strengthen-civil-rights.html [https://perma.cc/K785-9SM5].

82 193 F. Supp. 3d 677 (S.D. Miss. 2016), *rev'd*, 860 F.3d 345 (5th Cir. 2017).

83 341 F. Supp. 3d 706 (E.D. Mich. 2018).

84 *Barber*, 193 F. Supp. 3d at 687.

85 *Id.* at 688.

> (c) Male (man) or female (woman) refer to an individual's immutable biological sex as objectively determined by anatomy and genetics at time of birth.[86]

The plaintiffs argued—and the district court accepted—that the proposed exemption violated the Establishment Clause because it favored some religious beliefs over others, communicating to those individuals that they were "insiders, favored members of the political community" while excluding individuals with different beliefs.[87] The district court rejected Mississippi's argument that the religious exemption was neutral because all religions oppose same-sex marriage, noting instead that different religions have taken different positions on the issue: "HB 1523 favors Southern Baptist over Unitarian doctrine, Catholic over Episcopalian doctrine, and Orthodox Judaism over Reform Judaism doctrine."[88] Based on this, the court held that plaintiffs were likely to succeed on their Establishment Clause claim and issued a preliminary injunction enjoining the law from taking effect.[89]

On appeal, the Fifth Circuit Court of Appeals dismissed the case for lack of standing.[90] It held that the plaintiffs lacked Establishment Clause standing because they failed to demonstrate "personal confrontation."[91] An individual "cannot confront statutory text," the court said.[92] Allowing standing on that basis would be akin to "allowing standing based on a 'generalized interest of all citizens in' the government's complying with the Establishment Clause without an injury-in-fact . . . That, we know, 'cannot alone satisfy the requirements of Art. III without draining those requirements of meaning.'"[93] The Mississippi law today is in effect and has not been challenged since *Barber*.[94]

2. *Dumont v. Lyon*

In *Dumont v. Lyon*, Dana and Kristy Dumont, along with other LGBTQ prospective parents, challenged Michigan's religious exemption for religious child-welfare agencies.[95] Specifically, they challenged

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86 MISS. CODE ANN. § 11-62-3 (2023).

87 *Barber*, 193 F. Supp. 3d at 688 (quoting Santa Fe Indep. Sch. Dist. v. Doe, 530 U.S. 290, 309–10 (2000)).

88 *Id.* at 717.

89 *Id.* at 688.

90 Barber v. Bryant, 860 F.3d 345, 350 (5th Cir. 2017).

91 *Id.* at 354.

92 *Id.*

93 *Id.* (quoting Valley Forge Christian Coll. v. Ams. United for Separation of Church & State, Inc., 454 U.S. 464, 483 (1982)).

94 *See* MISS. CODE ANN. § 11-62-3 (2023).

95 341 F. Supp. 3d 706, 713 (E.D. Mich. 2018).

the state Department of Health and Human Services' (DHHS) practice of allowing state-contracted and taxpayer-funded religious child welfare agencies to screen prospective foster and adoptive parents based on religious criteria.[96] This, the plaintiffs argued, was a violation of their rights under the Establishment Clause because it inflicted "both stigmatic and individual injuries."[97] Unlike the *Barber* plaintiffs, the *Dumont* plaintiffs successfully established standing; they had each been turned away by religious child welfare organizations based on the plaintiffs' sexual orientation.[98]

Michigan filed a motion to dismiss; in response, the court assessed the plausibility of the claims, ultimately denying the motion.[99] In determining whether plaintiffs had a plausible Establishment Clause claim, the court used the Sixth Circuit's "three thread" test.[100] The first thread incorporates the *Lemon v. Kurtzman* test, which asks whether the government action has a "secular legislative purpose," a primary effect that "neither advances nor inhibits religion," and whether it fosters excessive government entanglement with religion.[101] The second thread is the endorsement analysis, which asks whether the government action "conveys a message of endorsement or disapproval."[102] The third thread considers the historical approach, which asks whether the government practice at issue "was accepted by the Framers and has withstood the critical scrutiny of time and political change."[103]

Intervenor Defendants, St. Vincent Catholic Charities, urged the court to use the third thread, that is, the historical approach.[104] St. Vincent pointed to the long history of religious organizations in Michigan working with the state child welfare system.[105] The court, however, declined to use the historical approach, interpreting that test narrowly to include only those practices that were "accepted by the Framers" and have "withstood the critical scrutiny of time and political change."[106]

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96 *Id.*

97 Spoto, *supra* note 3, at 319.

98 *Id.*

99 *Dumont*, 341 F. Supp 3d at 713–14.

100 *Id.* at 731.

101 *Id.* (quoting Smith v. Jefferson Cnty. Bd. of Sch. Comm'rs, 788 F.3d 580, 586–87 (6th Cir. 2015)).

102 *Id.* (quoting *Smith*, 788 F.3d at 587).

103 *Id.* at 732 (quoting *Smith*, 788 F.3d at 587).

104 *See id.*

105 *See id.*

106 *Id.* (quoting Town of Greece v. Galloway, 572 U.S. 565, 577 (2014)).

Applying the first and second jurisprudential threads, the court held that the plaintiffs had alleged a plausible Establishment Clause claim.[107] The Establishment Clause prohibits the government from favoring not just one religion over another, but also religion over nonreligion.[108] According to the court, if the plaintiff's alleged facts are taken as true, the state's practice of contracting with and allowing religious child-welfare agencies to turn away same-sex couples has the "subjective purpose of discriminating against those who oppose the view of the faith-based agencies," and thus favoring religion over nonreligion.[109] The state's practice also "objectively endorses the religious view of those agencies that same-sex marriage is wrong."[110]

On excessive entanglement, the plaintiffs argued that the state's practice fosters such an entanglement because it "delegat[es] a governmental function to a religious institution."[111] Provision of child welfare services is a government function, the plaintiffs contended; it involves care for children who are in the state's foster care system.[112] By allowing religious organizations to perform that function, the state had impermissibly delegated to them a government function in violation of the Establishment Clause.[113] The court accepted this argument as plausible.[114]

Following the court's denial of the motion to dismiss, in March 2019, Michigan settled the case and agreed to enforce its nondiscrimination requirements on child-welfare organizations that the state contracts with.[115] Key to this process was the installment of Michigan Attorney General Dana Nessel, who was elected during the case proceedings and had signaled during her campaign that she disagreed with the state's position on religious exemptions.[116]

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107 *Id.* at 734.

108 *Id.* (citing Epperson v. Arkansas, 393 U.S. 97, 103–04 (1968).

109 *Id.*

110 *Id.*

111 *Id.* at 736 (alteration in original) (quoting Doe v. Porter, 370 F.3d 558, 563 (6th Cir. 2004)).

112 *See id.* at 714–15.

113 *See id.* at 739.

114 *See id.* at 740.

115 Derek Robertson, *Nessel Settles Michigan Same-Sex Adoption Lawsuit*, MICH. ADVANCE (Mar. 22, 2019, 12:24 PM), https://www.michiganadvance.com/2019/03/22/nessel-settles-michigan-same-sex-adoption-lawsuit [https://perma.cc/FE44-AEJF].

116 *See id.*

3. *Buck v. Gordon*

Under Nessel, Michigan interpreted its policy as no longer protecting religious child-welfare organizations with religious objections to same-sex marriage, and it moved to take adverse actions against such organizations.[117] In response to this change in policy, in April 2019, St. Vincent Catholic Charities and others sought "preliminary injunctive relief to preserve the status quo while the validity of the State's new position [wa]s tested in plenary litigation."[118] In its suit, the plaintiffs alleged, among other things, that the state's new policy violated their rights under the Free Exercise and Establishment Clauses as well as RFRA.[119]

St. Vincent noted that Nessel's public statements made clear she believes that the exemption reflects "discriminatory animus" and that St. Vincent and other like religious actors were discriminatory actors.[120] She called the law "a victory for the hate mongers" and stated, "[i]f you are a proponent of this type of bill, you honestly have to concede that you just dislike gay people more than you care about the needs of foster care kids."[121] St. Vincent argued that these statements demonstrated antireligious hostility in violation of the Free Exercise Clause's requirement of neutrality.[122]

Nessel further justified her position based on the fact that Michigan received significant federal funding that was conditioned on nondiscrimination on the basis of sexual orientation.[123] St. Vincent pointed out, however, that other federal regulations and caselaw require Michigan "to respect the religious character of social service providers who receive federal funds."[124] Relying on *Agency for International Development v. Alliance for an Open Society International, Inc.*, St. Vincent

117 *See* Buck v. Gordon, 429 F. Supp. 3d 447, 451 (W.D. Mich. 2019).

118 *See id.*

119 *Id.* at 460–61.

120 *See id.* at 457 (quoting Ed White, *Dem AG Candidate: Adoption Law Discriminates Against Gays*, AP NEWS (Sept. 27, 2018), https://apnews.com/article/a1fc021e8e2e4b3b829586ba56ad9c07 [https://perma.cc/2VWJ-87EJ]).

121 *Id.* at 458 n.9 (first quoting *Opponents Say Adoption Bill Discriminates Against Gays and Lesbians*, FOX 2 DETROIT (Mar. 4, 2015), https://www.fox2detroit.com/news/opponents-say-adoption-bill-discriminates-against-gays-and-lesbians [https://perma.cc/Q4BN-HEYL]; and then quoting Rick Pluta, *Faith-Based Adoption Bills Headed to House Floor*, MICH. RADIO (Mar. 4, 2015, 5:56 PM), https://www.michiganradio.org/families-community/2015-03-04/faith-based-adoption-bills-headed-to-house-floor [https://perma.cc/52F4-RVBK]).

122 *See* Memorandum of Law in Support of Plaintiffs' Motion for a Preliminary Injunction at 36–37, Buck v. Gordon, 429 F. Supp. 3d 447 (W.D. Mich. 2019) (No. 19-cv-00286).

123 *See Buck*, 429 F. Supp. 3d at 458–59.

124 Complaint ¶ 98, Buck v. Gordon, 429 F. Supp. 3d 477 (W.D. Mich. 2019) (No. 19-cv-00286).

argued that the government cannot place conditions on government funding "that infringes upon the recipient's constitutionally protected rights, even if the government has no obligation to offer the benefit in the first instance."[125] The government cannot "seek to leverage funding to regulate speech outside the contours of the program itself."[126] Its predicament was even direr than the one in *Agency for International Development*, St. Vincent asserted, because "without its contract with the government," St. Vincent was completely locked out of the foster care or public-adoption system.[127] Excluding St. Vincent based on its religious beliefs about marriage and sexuality constituted unlawful, "invidious discrimination of disfavored subjects."[128]

Nessel also prohibited religious child-welfare organizations from (1) referring otherwise eligible LGBTQ couples to other agencies; and (2) refusing to conduct home studies or process adoption or foster care licensing applications by otherwise qualified LGBTQ couples.[129] Any religious organization that failed to comply with these orders would have its state contracts terminated.[130] Michigan conceded that it permits child-welfare organizations to refer prospective parents to another agency under certain circumstances (for example, "for geographic reasons, if they have a long wait list, if they are unable to accommodate the families' preferences," or if they have Native American ancestry).[131] Organizations can also "recruit foster parents that can serve specific needs of children, including children with disabilities or mental health issues."[132] The state had also permitted other agencies to make referrals for religious reasons other than religious objections to same-sex marriage: "Under the State's new policy . . . the *only* justification for a referral that is now impermissible is a religious objection to same-sex marriage," St. Vincent noted.[133] It argued that the uneven treatment of referral requests made the policy not generally applicable and thus subject to strict scrutiny.[134]

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125 Memorandum of Law in Support of Plaintiffs' Motion for a Preliminary Injunction, *supra* note 122, at 46 (quoting Agency for Int'l Dev. v. All. for Open Soc'y Int'l, Inc., 570 U.S. 205, 212 (2013)).

126 *Id.* (quoting *Agency for Int'l Dev.*, 570 U.S. at 214–15).

127 *See id.* at 48.

128 *See id.* (quoting Nat'l Inst. of Fam. & Life Advocs. v. Becerra, 138 S. Ct. 2361, 2375 (2018)).

129 *See Buck*, 429 F. Supp. 3d at 458.

130 *See id.*

131 Complaint, *supra* note 124, ¶ 107.

132 *Id.* ¶ 108.

133 *Id.* ¶ 109.

134 *See id.* ¶¶ 129–36.

The policy also failed general applicability because it incorporated a system of individualized exemptions: "Michigan engages in the individualized assessment of alleged contract violations . . . and exercised a great deal of discretion in creating corrective action plans and permitting exceptions. Defendants are therefore engaging in individualized, discretionary assessments of St. Vincent's conduct."[135] The state also permitted individualized exceptions to both child placement requirements and its policy of prohibiting contractors from transferring cases back to DHHS.[136] Altogether, the state's actions deterred the plaintiffs, as religious actors, from exercising their constitutional rights to free religious exercise.

For their Establishment Clause claim, the plaintiffs argued that the state preferred one denomination over another; its policy was specifically "designed to end government partnerships with religious groups based upon a disfavored religious belief."[137] By "applying their laws in a manner which penalizes St. Vincent for its religious beliefs," plaintiffs contended that defendants "alienate, communicate disapproval to, and impose concrete harms on foster families . . . who share St. Vincent's Christian religious beliefs."[138] Finally, plaintiffs alleged that the state's termination of St. Vincent's contracts or other adverse government actions would impose a substantial burden on plaintiffs' sincere religious exercise without a compelling reason, in violation of RFRA.[139]

In its September 2019 opinion, the district court held that the plaintiffs had established a likelihood of success on the merits, and that the status quo should be preserved while the parties litigated Michigan's new policy.[140] Strict scrutiny applied, the court held, because the historical background and Nessel's statements evidenced religious targeting.[141] And the state's policy was unlikely to survive strict scrutiny.[142] The court acknowledged two possible compelling government interests (1) "preventing discriminatory conduct in services for which the State pays"; and (2) "making available as many properly certified homes for the placement of foster and adopted children as

135 *Id.* ¶ 139.

136 *See* Memorandum of Law in Support of Plaintiffs' Motion for a Preliminary Injunction, *supra* note 122, at 32–34.

137 *Id.* at 38.

138 Complaint, *supra* note 124, ¶ 158.

139 Memorandum of Law in Support of Plaintiffs' Motion for a Preliminary Injunction, *supra* note 122, at 48–51.

140 *See* Buck v. Gordon, 429 F. Supp. 3d 447, 466 (W.D. Mich. 2019).

141 *Id.* at 461–62.

142 *Id.* at 463.

possible."[143] But the court also noted that St. Vincent was not impeding those interests. "St. Vincent places its children with any certified parent—unmarried couples, same-sex couples, or otherwise. This is precisely the non-discriminatory conduct the State desires."[144] That the state still wanted to cancel St. Vincent's contract belied the true purpose of its actions was "to stamp out St. Vincent's religious belief and replace it with the State's own."[145] Unlike the "carefully balanced and established practice" of the religious exemption as it was interpreted and applied prior to Nessel, the state's new approach enforced "a State-orthodoxy test that prevent[ed] Catholic believers from participating."[146]

As for the state's interest in "making available as many properly certified homes for the placement of foster and adopted children as possible," by excluding religious entities, the state undermined its own goal.[147] St. Vincent had a history of "affirmatively" referring same-sex couples seeking assistance to other agencies.[148] The state's insistence on excluding St. Vincent despite this practice of referral "strongly suggest[ed] that something else—namely, religious targeting—[was] the State's real purpose."[149]

At the time of the court's holding, *Fulton* had not yet been decided by the Supreme Court. The court distinguished the Third Circuit of Appeals decision in favor of Philadelphia, noting that in *Fulton*, the issue involved a religious refusal to certify same-sex couples rather than an agency, like St. Vincent, that actively referred same-sex couples "to some other agency for an impartial evaluation."[150] There was also no sudden change in the city's position nor was there evidence that the city "was motivated by ill will toward a specific religious group or otherwise impermissibly targeted religious conduct."[151]

In contrast, St. Vincent's case required strict scrutiny.[152] The court's injunction prohibited Michigan "from terminating or suspending performance of their contracts with St. Vincent, or declining to renew the contracts or taking other adverse action against St. Vincent

143 *Id.*
144 *Id.*
145 *Id.*
146 *Id.*
147 *Id.*
148 *Id.*
149 *Id.*
150 *Id.*
151 *Id.* at 464 (quoting City of Philadelphia v. Fulton, 922 F.3d 140, 153–54 (3d Cir. 2019), *rev'd*, 141 S. Ct. 1868 (2021)).
152 *Id.*

'for engaging in protected speech and religious exercise.'"[153] After the Supreme Court decided *Fulton* in June 2021, Michigan entered a settlement agreement with St. Vincent, permitting St. Vincent to continue its services in line with its religious beliefs.[154]

CONCLUSION

Religious child-welfare organizations with religious objections to same-sex couples as foster or adoptive parents have come into conflict with state antidiscrimination regulations. This has occurred in states with explicit religious exemptions in place, and in states without such exemptions. The lawsuits are, to date, few in number, and though victory has taken longer in some cases than in others, the religious actors have prevailed in all of these lawsuits.

Evidence of clear government hostility toward the religious beliefs at issue has been key to a number of these victories; in several cases, government officials have explicitly equated the traditional religious beliefs about family and marriage with a form of "discrimination" or animus that the state sought to eliminate. These explicit statements of animus in several cases where religious agencies prevailed raise the question of whether their victory will be possible in the absence of such statements. The religious agencies' loss in *Dumont v. Lyon*, prior to Nessel's entrance onto the scene, suggests that even in states with explicit religious exemptions, victory might be elusive.

153 *Id.* at 461 (quoting Plaintiffs' Motion for Preliminary Injunction ¶ 5, Buck v. Gordon, 429 F. Supp. 3d 447 (W.D. Mich. 2019) (No. 1:19-cv-00286)).

154 Carol Thompson, *Michigan Settles Lawsuit with St. Vincent Catholic Charities over Same-Sex Adoptions*, DETROIT NEWS (Jan. 25, 2022, 6:03 PM), https://www.detroitnews.com/story/news/local/michigan/2022/01/25/same-sex-couples-adoption-michigan-st-vincent-catholic-charities-lawsuit-settlement/9215191002/ [https://perma.cc/CTX7-S586].