

# FOSTERING DISCRIMINATION: RELIGIOUS EXEMPTION LAWS IN CHILD WELFARE AND THE LGBTQ COMMUNITY

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*In response to increasing rights for LGBTQ individuals in the United States, particularly the Supreme Court’s affirmation of the right to same-sex marriage in Obergefell v. Hodges, eleven states have imposed laws or policies permitting child welfare organizations to deny services in accordance with their religious beliefs. These measures generally prohibit the state from “discriminating against” religious child welfare organizations by denying them funding or program participation when they refuse to provide services based on their religious beliefs. This Note provides an overview of these religious exemption laws and ultimately argues that, by requiring government funding of discriminatory child welfare organizations, the laws are unconstitutional under the Establishment Clause. The Note begins by considering relevant details about adoption and foster care systems in the United States. It then turns to the laws and policies in question, discussing their provisions, motivations, and impact. Then, taking two specific laws as examples, it analyzes these laws’ constitutionality, arguing for their invalidity under several approaches to understanding the Establishment Clause. By favoring certain religious viewpoints over others, permitting religion to dictate who receives government benefits and services, and imposing burdens on third parties (particularly LGBTQ prospective parents and youth), religious exemption laws ignore the line between church and state in violation of the Establishment Clause.*

INTRODUCTION .....	297
I. OVERVIEW OF ADOPTION AND FOSTER CARE SYSTEMS IN THE UNITED STATES .....	302
A. <i>History of Publicly Funded Adoption and Foster             Care in the United States</i> .....	303
B. <i>Modern Structure of State Adoption and Foster Care             Systems</i> .....	304
II. CURRENT RELIGIOUS EXEMPTION LAWS FOR CHILD WELFARE ORGANIZATIONS .....	306
A. <i>Religious Exemptions for Child Welfare             Organizations</i> .....	306
B. <i>Motivations Behind Religious Exemption Laws for             Child Welfare Organizations</i> .....	310

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C. *Harms Imposed by Religious Exemption Laws in the Child Welfare Sphere* ..... 313

D. *Court Challenges to Religious Exemption Laws and Policies in Child Welfare* ..... 317

III. RELIGIOUS EXEMPTION LAWS AND THE ESTABLISHMENT CLAUSE ..... 320

A. *Religious Favoritism* ..... 322

B. *Delegation of Decisionmaking Authority to Religions* ..... 324

C. *Third-Party Harm Principle* ..... 328

CONCLUSION ..... 332

INTRODUCTION

In 2016, after eleven years together, Kristy and Dana Dumont were ready to expand their family.<sup>1</sup> Having received numerous emails from the Michigan Department of Health and Human Services seeking homes for children in foster care, the two women decided to adopt a foster child.<sup>2</sup> They worked hard to prepare themselves to welcome a child into their family: They moved into a larger home, researched the school district, and grew excited for this new step in their lives.<sup>3</sup> However, when they reached out to a state-contracted child-placing agency, they were turned away.<sup>4</sup> The reason? The agency refused to place children with same-sex couples.<sup>5</sup>

Several years later and hundreds of miles away in South Carolina, Eden Rogers and Brandy Welch faced a similar barrier.<sup>6</sup> Eden and Brandy, who already had two well-loved children, had always planned to serve as foster parents.<sup>7</sup> But when they applied to the best-known child-placing agency in their part of the state, they were rejected

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<sup>1</sup> Kristy Dumont & Dana Dumont, *We Were Rejected from Adopting Foster Children Because We Are Gay*, VICE (June 26, 2018, 12:57 PM), [https://www.vice.com/en\\_us/article/a3amze/we-were-rejected-from-adopting-foster-children-because-we-are-gay](https://www.vice.com/en_us/article/a3amze/we-were-rejected-from-adopting-foster-children-because-we-are-gay); see also *Kristy and Dana Dumont*, ACLU, <https://www.aclu.org/bio/kristy-and-dana-dumont> (last visited Nov. 21, 2020) (recounting Kristy and Dana’s experiences with foster care in Michigan).

<sup>2</sup> Dumont & Dumont, *supra* note 1.

<sup>3</sup> *Id.*

<sup>4</sup> *Id.*

<sup>5</sup> *Id.*

<sup>6</sup> See Nico Lang, “*Family Is Not Just About Biology*”: *Lesbian Couple Fights Trump to Foster a Child*, LOGO: NEWNOWNEXT (June 28, 2019), <http://www.newnownext.com/lesbian-couple-family-foster-trump/06/2019>.

<sup>7</sup> Nathaniel Cary, *Greenville Couple Sues Trump Administration and SC Governor over Foster-Care Practice*, GREENVILLE NEWS (May 30, 2019, 4:36 PM), <https://www.greenvilleonline.com/story/news/2019/05/30/greenville-sc-couple-sue-trump-administration-governor-over-miracle-hill-foster-care/1284405001>.

because of their sexual orientations and religion.<sup>8</sup> Like Kristy and Dana, Eden and Brandy were deeply hurt by the experience.<sup>9</sup>

Unfortunately, these couples' stories are not unique, and some state laws currently permit this form of discrimination. Although the Supreme Court held in 2015 in *Obergefell v. Hodges* that states cannot deny same-sex couples access to marriage and its accompanying benefits,<sup>10</sup> the ruling triggered a strong backlash among some religious communities, with many expressing concerns about its potential reach and impact.<sup>11</sup> Conservative lawmakers introduced and passed laws intended to limit LGBTQ rights and/or insulate religious individuals and organizations from any obligation to acknowledge and respect same-sex marriages.<sup>12</sup> One branch of these religious exemption laws ensures that state actors cannot require child welfare organizations to provide services contradicting their religious or moral beliefs.<sup>13</sup> Prior to *Obergefell* reaching the Supreme Court, only two states had these kinds of laws.<sup>14</sup> Since 2015, nine more states have enacted them.<sup>15</sup>

These laws enable child welfare organizations to deny foster care applications from LGBTQ individuals and/or couples, raising concerns about harms inflicted on those who are denied the organiza-

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<sup>8</sup> *Id.* (explaining that the organization to which Eden and Brandy applied—Miracle Hill—does not permit fostering by same-sex couples or non-Evangelicals).

<sup>9</sup> *Id.* (noting that the rejection e-mail made Brandy feel ill and that the experience was “hurtful and insulting”).

<sup>10</sup> 576 U.S. 644, 670, 681 (2015).

<sup>11</sup> 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> (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> (including responses from numerous religious leaders and groups).

<sup>12</sup> See Richard Wolf, *Gay Marriage Victory at Supreme Court Triggering Backlash*, USA TODAY (May 29, 2016, 4:32 PM), <https://www.usatoday.com/story/news/politics/2016/05/29/gay-lesbian-transgender-religious-exemption-supreme-court-north-carolina/84908172>. For example, North Carolina passed a law prohibiting its local governments from enacting antidiscrimination measures based on sexual orientation or gender identity. *Id.* Similarly, Mississippi passed a law permitting the denial of services to same-sex couples or transgender individuals based on religious beliefs. *Id.* This Note analyzes the provisions of Mississippi’s law addressing adoption and foster care providers.

<sup>13</sup> See *infra* Section II.A. Within the child welfare sphere, both private organizations and governmental entities play a role. Because of the phrasing of the laws analyzed in this Note, references to “child welfare organizations” or “child welfare agencies” in this Note both generally refer to private organizations. References to governmental child welfare agencies are specifically indicated as such to avoid confusion.

<sup>14</sup> As for the pre-*Obergefell* states, North Dakota passed its law in 2003, and Virginia passed its law in 2012. 2003 N.D. Laws 418 (codified as N.D. CENT. CODE ANN. § 50-12-07.1 (2019)); 2012 Va. Acts 715 (codified as VA. CODE ANN. § 63.2-1709.3 (2020)).

<sup>15</sup> See *infra* note 49 (identifying all eleven statutes).

tions' services, as well as the broader LGBTQ community.<sup>16</sup> For example, in 2016, Mississippi passed a broad law that, among other provisions, prohibited the government from taking action against or defunding religious child welfare organizations that deny services in accordance with religious beliefs against same-sex marriage, gender non-conformity, or nonmarital sex.<sup>17</sup> Expansive religious exemption laws<sup>18</sup> like Mississippi's could allow religious child welfare organizations to turn away LGBTQ prospective parents, refuse to serve LGBTQ youth, or refuse to respect LGBTQ children's identities and needs.<sup>19</sup> For LGBTQ families whose children have been temporarily removed through the abuse and neglect system, religious organizations could even potentially deny them critical reunification services designed to enable their children to return home.<sup>20</sup>

Additionally, religious exemption laws like Mississippi's do not merely protect organizations' abilities to act—or refusals to act—based on their religious beliefs. They also prohibit the state from taking adverse action against child welfare organizations that do so.<sup>21</sup> This means, for example, that the state could not deny funding, licenses, or state program participation to an organization based on its refusal to serve LGBTQ prospective parents or youth. In other words, state and local government actors are *required* by these laws to fund and support these organizations, and thereby facilitate these religious refusals. Even if a government agency learned of discrimination—for example, through a complaint like that of the Dumont couple—its hands would be tied.

This Note argues that laws permitting government-funded organizations to deny adoption and foster care services based on religious beliefs are unconstitutional under the First Amendment's Establishment Clause. By favoring certain religious viewpoints over

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<sup>16</sup> These harms go beyond the LGBTQ community as well—for example, a Protestant organization could refuse to work with Jewish or Catholic prospective parents due to their differing religious beliefs. *See infra* note 85.

<sup>17</sup> MISS. CODE ANN. § 11-62-3, -5 (2020).

<sup>18</sup> For a more detailed discussion of relevant laws and their provisions, see *infra* Section II.A.

<sup>19</sup> *See supra* notes 1–9 and accompanying text (detailing the experiences of two same-sex couples who were turned away by religious adoption and foster care agencies in their states); *see also infra* Section II.C (discussing the wide variety of harms that religious exemption laws can and do pose).

<sup>20</sup> *See* MISS. CODE ANN. § 11-62-17(5) (2020) (including reunification services in its list of covered activities); TEX. HUM. RES. CODE ANN. § 45.002(3)(N) (West 2019) (including reunification services); *see also infra* notes 95–98 and accompanying text (discussing problems with foster care and family reunification, as well as the added burden these laws could impose on families seeking reunification).

<sup>21</sup> *See* MISS. CODE ANN. § 11-62-5(2) (2020) (prohibiting the state from taking “discriminatory action” against child welfare organizations acting on protected beliefs).

others and permitting religion to dictate who receives government benefits and services, religious exemption laws ignore the line between church and state in violation of the Establishment Clause.<sup>22</sup> This constitutional flaw may arguably exist regardless of whether the government funds a child welfare organization. Still, the presence of government funding compounds the indignities imposed by a denial of service by adding a sense of state approval or legitimacy to the organization's denial of services. As such, this Note focuses specifically on government-funded child welfare organizations.

Since these laws are mostly recent, few of them have been challenged in courts, and as of the publication of this Note only one such challenge has been completed successfully.<sup>23</sup> Moreover, the literature on this topic is limited given the recency of the laws involved, many of which did not exist until after *Obergefell* made same-sex marriage legal.<sup>24</sup> Thus, this Note seeks to contribute to the current body of literature through engagement with the specific provisions and constitutionality of two state laws: one, a belief-specific law from Mississippi, and the other a more general law from South Dakota. By looking to these examples, the Note is better able to evaluate the vulnerability of different variations of religious exemption laws in the child welfare context and can provide a more thorough assessment of their constitutionality (or lack thereof).

Part I of this Note provides background information on U.S. adoption and foster care systems, focusing on the aspects most relevant to religious exemption laws and a potential Establishment Clause challenge. Part II provides a more detailed analysis of the existing religious exemptions for child welfare organizations. It discusses the laws themselves, comparing their provisions and reach. It then considers their context, their impacts on various populations, and past challenges to these laws. Part III turns to the Establishment Clause, considering lines of cases addressing: (1) laws that favor certain beliefs over others, (2) laws that delegate state decisionmaking powers to religious actors, and (3) laws that impose harms on third parties. Part III concludes that both belief-specific religious exemptions like Mississippi's and general religious exemptions like South Dakota's violate the Establishment Clause when they permit government-

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<sup>22</sup> See *infra* Part III (analyzing how Establishment Clause precedent and policy cast doubt on religious exemption laws in the child welfare context).

<sup>23</sup> See *infra* Section II.D.

<sup>24</sup> See *supra* text accompanying note 15; see also Mark Strasser, *Conscience Clauses and the Placement of Children*, 15 J.L. & FAM. STUD. 1, 14–17 (2013) (discussing Equal Protection concepts as they relate to religious exemption laws).

funded child welfare organizations to deny services based on religious criteria.

It is also important to briefly mention a related constitutional provision that goes beyond the scope of this Note: the Free Exercise Clause. Some state and local governments have affirmatively required government-funded and/or licensed child welfare organizations to accept same-sex couples as prospective parents—essentially the inverse of the laws discussed in the Note. Religious child welfare organizations have challenged the nondiscrimination requirements, arguing that they are prohibited by the Free Exercise Clause, and the U.S. Supreme Court has recently heard oral arguments in one such challenge, *Fulton v. City of Philadelphia*.<sup>25</sup> *Fulton* arose out of Philadelphia’s 2018 decision not to renew its foster care contract with Catholic Social Services (CSS) due to CSS’s refusal to work with same-sex couples.<sup>26</sup> In response, CSS sued under the Free Exercise Clause, making two major arguments: (1) broadly, that the city could not condition participation in its foster care program on conduct that violates CSS’s religious beliefs; and (2) more specifically, that the city had targeted CSS for enforcement due to their religious beliefs rather than enforcing its antidiscrimination preference neutrally.<sup>27</sup> Both the trial court and the Third Circuit rejected CSS’s claims.<sup>28</sup>

The *Fulton* challenge does not itself raise the question of the role of the Establishment Clause with respect to religious exemption laws for child welfare organizations. Still, the Supreme Court’s decision could impact the arguments in this Note depending on the decision’s breadth. If the Supreme Court issues a narrow ruling focused on, for example, the city’s approach to enforcing the antidiscrimination requirement, then the arguments in this Note likely would not be impacted at all.<sup>29</sup> If, however, the Supreme Court issues an extremely

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<sup>25</sup> 922 F.3d 140 (3d Cir. 2019), *argued*, No. 19-123 (U.S. Nov. 4, 2020). Other similar challenges are also making their way through other appellate courts. *See, e.g.*, *New Hope Fam. Servs., Inc. v. Poole*, 966 F.3d 145, 160 (2d Cir. 2020) (permitting the Free Exercise claim to proceed past a motion to dismiss).

<sup>26</sup> *See Fulton*, 922 F.3d at 146–47; James Esseks, Opinion, *The Next Big Case on LGBTQ Rights Is Already Before the Supreme Court*, WASH. POST (Oct. 9, 2020, 1:53 PM), <https://www.washingtonpost.com/opinions/2020/10/09/next-big-case-lgbtq-rights-is-already-before-supreme-court> (discussing the background of the lawsuit).

<sup>27</sup> *See Fulton v. City of Philadelphia*, 320 F. Supp. 3d 661, 683 (E.D. Pa. 2018) (refuting CSS’s “conditioning” claim by explaining that the law is generally applicable); *id.* at 686 (discussing CSS’s argument that the city targeted them due to religious beliefs). CSS also raised free speech concerns. *Id.* at 668.

<sup>28</sup> *See Fulton*, 922 F.3d at 165; *Fulton*, 320 F. Supp. 3d at 686, 690.

<sup>29</sup> This sort of narrow decision would be consistent with the Court’s approach in *Masterpiece Cakeshop*. *See Masterpiece Cakeshop, Ltd. v. Colo. C.R. Comm’n*, 138 S. Ct. 1719 (2018) (focusing heavily on statements made by government officials suggesting a lack of religious neutrality in their application of a nondiscrimination law).

broad ruling providing that the Free Exercise Clause forces the state to tolerate anti-LGBTQ discrimination when it funds religious adoption organizations, then that could directly foreclose some of this Note's suggested avenues for challenging the constitutionality of religious exemption laws under the Establishment Clause. However, even with an expansive decision in *Fulton*, this Note's arguments regarding statutes that cover only specific religious beliefs, for instance, could still be viable.<sup>30</sup>

Given that the Supreme Court will soon be addressing this Free Exercise Clause issue, the constitutional requirements of the Free Exercise Clause will likely receive considerable scholarly attention in the coming months, and some authors had already begun to address that issue.<sup>31</sup> This Note focuses instead on the Establishment Clause side of the problem in hopes of casting light on an otherwise potentially overlooked issue. The Establishment Clause plays an important role in protecting individual rights in relation to the government. For families like the Dumonts, the Establishment Clause is a potential source of protection against state-funded religious discrimination. It would be dangerous to consider the Free Exercise implications of facts like those in *Fulton* without also considering the Establishment Clause implications of the laws discussed in this Note.

## I

### OVERVIEW OF ADOPTION AND FOSTER CARE SYSTEMS IN THE UNITED STATES

This Part briefly outlines relevant background information on the adoption and foster care systems in the United States, with an eye towards the aspects most relevant to religious exemption laws. Section I.A examines the history of adoption and foster care in the United States, considering their origins and their relatively recent development into a structured system. Section I.B, meanwhile, outlines the

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<sup>30</sup> Additionally, perhaps the Establishment Clause would require states to ensure that publicly-funded child welfare organizations provide referrals when they deny someone services on religious grounds—something that the current religious exemption laws often do not require organizations to do. *See, e.g.*, OKLA. STAT. ANN. tit. 10a, § 1-8-112(D) (West 2020) (including objections to making referrals in its protections).

<sup>31</sup> *See, e.g.*, Matthew A. Issa, Note, *Guaranteeing Marriage Rights: Examining the Clash Between Same-Sex Adoption and Religious Freedom*, 18 GEO. J. GENDER & L. 207, 209, 215–19 (2017) (arguing that “the special interests in the adoption context require . . . that religious organizations cannot be allowed to refuse” placement with same-sex couples); Tracy Smith, Comment, *Stretching the First Amendment: Religious Freedom and Its Constitutional Limits Within the Adoption Sector*, 46 PEPP. L. REV. 113, 116 (2018) (arguing that post-*Obergefell* religious exemption laws stretch the protection of the Free Exercise Clause “beyond its intended scope”); *see also* Strasser, *supra* note 24, at 14 (briefly discussing the Free Exercise Clause before proceeding to an Equal Protection analysis).

modern structure of adoption and foster care systems, discussing some commonalities among the varied state adoption systems and the roles of various actors—both private (including religious) and public—within these systems.

A. *History of Publicly Funded Adoption and Foster Care in the United States*

Foster care and the public adoption system—as we know them today—are relatively recent developments in the United States. The modern-day public foster care system emerged only in the early 1900s, and adoption was a “relatively new practice” in the late 1800s.<sup>32</sup>

Before this, the needs of dependent children were met primarily through private arrangements and organizations. During the pre-Revolutionary period, for example, children whose parents could not support them would be apprenticed out to others in the community; these children would work in exchange for care (and skills training).<sup>33</sup> Private orphanages also developed, many of them religious in character.<sup>34</sup> But state governments did not yet play much of a role in child welfare, let alone the significant role they play modernly.

Instead, this state involvement in child welfare started to take shape around the late nineteenth century. At this point, states began to take on direct responsibility for dependent children by opening government-run orphanages and/or subsidizing the private orphanages already in place.<sup>35</sup> In the 1920s, the child welfare infrastructure was still quite diffuse and predominantly private rather than governmental.<sup>36</sup> But with the New Deal in the 1930s, the modern foster care system began to emerge, as parents in need approached government agencies to request foster placement or other services for their children.<sup>37</sup> By 1944, care for dependent children had shifted from a private service to an organized, government-based, professionalized one:

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<sup>32</sup> CATHERINE E. RYMPH, *RAISING GOVERNMENT CHILDREN: A HISTORY OF FOSTER CARE AND THE AMERICAN WELFARE STATE* 3, 42 (2017). Adoptions were first recognized in the United States in 1851, when Massachusetts passed its Adoption of Children Act. *See Brief History of Adoption in the United States*, ADOPTION NETWORK, <https://adoptionnetwork.com/adoption/history-of-adoption> (last visited Nov. 21, 2020).

<sup>33</sup> RYMPH, *supra* note 32, at 18. Unlike the foster care system, this process of indenturing out could be private in nature. *Id.* at 18–19 (noting, however, that a child could also be apprenticed out by request of community leaders in some circumstances, like if the child’s parents were “idle” or the child was “badly behaved”).

<sup>34</sup> *Id.* at 19.

<sup>35</sup> *Id.* at 20 (discussing this shift from the private sphere to the public sphere and the different paths states took).

<sup>36</sup> *Id.* at 33.

<sup>37</sup> *Id.* at 63–64. Interestingly, prior to the availability of federal funding, eleven states lacked a statewide governmental child welfare agency and only one-fourth of states had a



Government agencies now had “primary responsibility” for child welfare and foster home care, and private organizations played a supporting role for certain services.<sup>38</sup>

This history reflects a gradual development of government-provided and government-funded child welfare services. Rather than being a staple of the American system, it is a relatively recent development. In a similar vein, religious organizations were not always providing child welfare-related services as part of a government-funded system (which is relevant to aspects of the Establishment Clause analysis later in this Note).<sup>39</sup>

### *B. Modern Structure of State Adoption and Foster Care Systems*

Although much of family law, including adoption and foster care, is largely left to the states, states share some common patterns in their adoption and foster care systems. There are generally two primary systems through which prospective parents can adopt children. The first is the private system, where birth parents place their child up for adoption voluntarily through a private organization or on their own.<sup>40</sup> The second is the public adoption system, designed to meet the needs of foster children and other children in the state’s care.<sup>41</sup> This public system is the focus of this Note. Unlike the private system, children usually do not enter the public system by parental choice. Instead, these children have often been removed from their families by the state or been orphaned without a relative to care for them.<sup>42</sup> The public adoption and foster care system is massive: More than 672,000

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system of county-based public child welfare services. But by the end of 1939, with funding available, every state had a statewide governmental child welfare agency. *Id.* at 64.

<sup>38</sup> See *id.* at 64 (explaining how the functions of private and governmental agencies diverged).

<sup>39</sup> See *infra* Section III.B.

<sup>40</sup> See *Public vs. Private Adoption*, ADOPTHHELP, <https://www.adopthelp.com/public-vs-private-adoption> (last visited Nov. 21, 2020) (discussing the private, independent adoption system and contrasting it with the public system). Some parties will rely on private organizations to facilitate an adoption in the private system. See, e.g., *What Are the Best Adoption Agencies or Professionals for You?*, ADOPTION NETWORK, <https://adoptionnetwork.com/adoption-agencies> (last visited Nov. 21, 2020) (discussing various kinds of adoption agencies and services). Others choose to pursue a truly independent private adoption process, by working directly with the birth parents and bypassing any agency involvement. *Id.*

<sup>41</sup> See *Public vs. Private Adoption*, *supra* note 40 (discussing the process of adopting through the public foster-to-adopt system).

<sup>42</sup> *Id.*; see also Tish Gallegos, *Why Is Foster Care Needed?*, CONTRA COSTA CNTY. EMP. & HUM. SERVS. (Dec. 8, 2017), <https://ehsd.org/2017/12/08/why-is-foster-care-needed> (detailing circumstances in which a child may enter foster care).

children spent at least some time in foster care in the United States in 2019, with about 424,000 children in foster care on any given day.<sup>43</sup>

Private organizations (religious and non-religious alike) can provide services within either or both of these two systems. But private organizations operating within the public system must necessarily work hand-in-hand with the state.<sup>44</sup> When that happens, the state pays private adoption and foster care organizations for these services and relies on contracts to govern their relationships with the organizations,<sup>45</sup> with these private organizations essentially acting as state contractors. Of note is that religious organizations—including Christian ones—are the dominant service providers in the child welfare system in certain parts of the country.<sup>46</sup> For example, Catholic Charities offers adoption and foster care services in many states across the country, viewing their work as part of their religious mission.<sup>47</sup> Their contracts with state or local governments have involved recruiting and certifying foster parents and congregate care for youth in state custody, among other services.<sup>48</sup>

This Note focuses on foster care and the public adoption system because, within this system, private organizations are providing government-funded services. Therefore, their services should be even-handed and non-discriminatory. Because of the focus on government-funded services, this Note does not address whether an organization providing private, non-government-funded services can be permitted to rely on religious criteria, or whether an organization that does both

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<sup>43</sup> *Foster Care*, CHILDREN'S RTS., <https://www.childrensrights.org/newsroom/factsheets/foster-care> (last visited Mar. 2, 2021).

<sup>44</sup> Some organizations focus solely on recruiting and assessing potential foster parents, and others directly provide group homes or other forms of group care to children in the state's custody. *See, e.g.*, City Respondents' Brief in Opposition at 4–5, *Fulton v. City of Philadelphia*, No. 19-123 (U.S. argued Nov. 4, 2020).

<sup>45</sup> *See, e.g., id.*

<sup>46</sup> *See* Ariana Eunjung Cha, *Administration Seeks to Fund Religious Foster-Care Groups That Reject LGBTQ Parents*, WASH. POST (Feb. 8, 2019, 10:30 AM), <https://www.washingtonpost.com/health/2019/02/08/trump-administration-seeks-authority-fund-religious-foster-care-groups-that-reject-lgbtq-parents> (describing President Trump's promise to provide funding to faith-based adoption agencies that do not place children with same-sex couples). One example is the Evangelical Protestant group Miracle Hill Ministries, which plays a major role in South Carolina foster care. *See infra* note 85. Similarly, a listing of foster care agency offices in Mississippi revealed seven offices, with six of those seven offices being Christian affiliated. *National Foster Care & Adoption Directory Search*, CHILD WELFARE INFO. GATEWAY, <https://www.childwelfare.gov/nfcad/?CWIGFunctionsaction=nfcad:main.getResults&LANG=en&STATE=MS&ATYPEID=4,5,41&orderBy=orgname1> (last visited Nov. 21, 2020).

<sup>47</sup> *Foundational Services*, CATH. CHARITIES USA, <https://www.catholiccharitiesusa.org/our-vision-and-ministry/foundational-services> (last visited Nov. 22, 2020).

<sup>48</sup> *See, e.g.*, City Respondents' Brief in Opposition, *supra* note 44, at 4–5 (discussing one such contract).

private and public adoption work should be able to use religious criteria in its private work alone.

## II

### CURRENT RELIGIOUS EXEMPTION LAWS FOR CHILD WELFARE ORGANIZATIONS

This Part provides background information important to understanding the issues surrounding religious exemptions for child welfare organizations. Section II.A provides a primer on the laws' contents and relevant federal activity. Section II.B discusses the laws' histories and goals. Section II.C then analyzes the harms that religious exemption laws in the adoption and foster care context pose for LGBTQ prospective parents, LGBTQ youth, and others. Finally, Section II.D considers several recent challenges to these laws.

#### A. *Religious Exemptions for Child Welfare Organizations*

As of the publication of this Note, eleven states have enacted laws or other measures that enable religious child welfare organizations to deny services based on their religious beliefs.<sup>49</sup> The provisions of the religious exemption laws vary by state but follow a common pattern of using antidiscrimination language that paints the organizations as victims of unfair state action. Alabama's law, for instance, says the state cannot "refuse to license or otherwise *discriminate* or take an adverse action against any child placing agency" due to the agency's "sincerely held religious beliefs."<sup>50</sup> However, this antidis-

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<sup>49</sup> ALA. CODE § 26-10D-5 (2020); KAN. STAT. ANN. § 60-5322 (2020); MICH. COMP. LAWS ANN. § 722.124e (West 2020); MISS. CODE ANN. § 11-62-5 (2020); N.D. CENT. CODE ANN. § 50-12-07.1 (2019); OKLA. STAT. ANN. tit. 10a, § 1-8-112 (West 2020); S.C. Exec. Order No. 2018-12 (Mar. 13, 2018), <https://governor.sc.gov/sites/default/files/Documents/Executive-Orders/2018-03-13-FILED-Executive-Order-No-2018-12.pdf>; 2018-2019 S.C. Acts 4950 § 38.29, [https://www.scstatehouse.gov/query.php?search=DOC&searchtext=child%20placing&category=BUDGET&year=2018&version\\_id=7&return\\_page=&version\\_title=Appropriation%20Act&conid=36539630&result\\_pos=0&keyval=39447&numrows=10](https://www.scstatehouse.gov/query.php?search=DOC&searchtext=child%20placing&category=BUDGET&year=2018&version_id=7&return_page=&version_title=Appropriation%20Act&conid=36539630&result_pos=0&keyval=39447&numrows=10) (last visited Mar. 2, 2021); S.D. CODIFIED LAWS § 26-6-39 (2020); TENN. CODE ANN. § 36-1-147 (2020); TEX. HUM. RES. CODE ANN. § 45.004 (West 2019); VA. CODE ANN. § 63.2-1709.3 (2020).

<sup>50</sup> ALA. CODE § 26-10D-5(a); *see also* MICH. COMP. LAWS ANN. § 722.124e(3), (7)(a) (defining "[a]dverse action" to include "discriminating against the child placing agency" and prohibiting such action "on the basis that the child placing agency has declined or will decline to provide any services" due to the agency's "sincerely held religious beliefs"); MISS. CODE ANN. § 11-62-5(2) (forbidding the government from "tak[ing] any discriminatory action against a religious organization . . . on the basis that such organization has provided or declined to provide any adoption or foster care service, or related service" based on religious or moral belief); S.D. CODIFIED LAWS § 26-6-39 (barring the state from "discriminat[ing] or tak[ing] any adverse action against a child-placement agency" because of a refusal to provide a service "that conflicts with, or provide

crimination framing is deceptive. These laws actually permit discrimination on the part of child-placing organizations against those whose lives or beliefs are different from those of the organization.<sup>51</sup>

One distinction between the states' religious exemption laws is whether or not they apply to government-funded organizations. Alabama does not require the state to fund child-placing organizations that deny services on religious grounds. Instead, its law merely ensures that child-placing organizations can maintain the state licenses permitting them to offer private, non-government-funded adoption services.<sup>52</sup> By contrast, the other ten states prohibit a broader range of government actions in response to child-placing organizations' religiously based denial of services, including denying the organization government funding, denying the organization participation in state programs or contracts, and suing the organization for discrimination based on its religious beliefs.<sup>53</sup> Essentially, these ten states require government actors to fund child-placing organizations' discriminatory activities.

Religious exemption statutes for child welfare organizations also vary in the kinds of beliefs they protect. Most of these laws do not

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any service under circumstances that conflict with the agency's written sincerely-held religious belief or moral conviction"); TEX. HUM. RES. CODE ANN. § 45.004(1) (providing that government entities "may not discriminate or take any adverse action against a child welfare services provider" based on refusals to provide services "that conflict with, or under circumstances that conflict with, the provider's sincerely held religious beliefs").

<sup>51</sup> For a more detailed discussion of the ways in which these religious exemption laws promote discrimination, see *infra* Section II.C.

<sup>52</sup> See ALA. CODE § 26-10D-5; see also *id.* § 26-10D-3(1) (defining "adverse action" to include only enforcement or licensing actions); *id.* § 26-10D-3(2) (defining "child placing agency" to exclude agencies that receive federal or state funds from the law's coverage).

<sup>53</sup> See KAN. STAT. ANN. § 60-5322(d), (e), (h) (prohibiting denial of participation in government programs, denial of reimbursements through case management contractors, and civil fines or other civil action, unless the entity is a case management contractor); MICH. COMP. LAWS ANN. § 722.124e(7)(a) (prohibiting "any action that materially alters the terms or conditions of the child placing agency's funding, contract, or license"); MISS. CODE ANN. § 11-62-7(1)(c) (2020) (including withholding or denying state grants, contracts, and similar agreements as a form of discriminatory action to which the religious exemption law applies); N.D. CENT. CODE ANN. § 50-12-07.1 (prohibiting denial of grants or contracts); OKLA. STAT. ANN. tit. 10a, § 1-8-112(C), (D) (prohibiting denial of "any grant, contract, or participation in a government program" as well as any civil action based on religious refusals); 2018 S.C. Acts 361; H. 4950, 2018 Gen. Assemb., 122nd Sess., § 38.29 (S.C. 2018); S.D. CODIFIED LAWS § 26-6-37 (2020) (defining adverse action to include denial of funding and contracts or taking enforcement action); TENN. CODE ANN. § 36-1-147(c), (d) (prohibiting denial of "any grant, contract, or participation in a government program" as well as any civil action); TEX. HUM. RES. CODE ANN. § 45.002(4) (West 2019) (including in its definition of covered child welfare service providers one who "applies for or receives a contract, subcontract, grant, subgrant, or cooperative agreement to provide child welfare services"); VA. CODE ANN. § 63.2-1709.3(C), (D) (prohibiting denial of "any grant, contract, or participation in a government program" as well as any claim for damages).

identify specific religious beliefs to which they apply (although some explicitly provide that they do not protect race discrimination justified by religious beliefs<sup>54</sup>). Instead, they apply to any religious belief of an organization.<sup>55</sup> But two states—Mississippi and to a lesser extent Texas—protect child welfare organizations that act or refuse to act based on a *specific*, limited set of religious beliefs listed in the statute.<sup>56</sup> These states’ prioritization of some beliefs over others will become relevant in the Establishment Clause analysis, since, rather than approaching religion with an even hand, they tip the scales in favor of a particular set of beliefs.<sup>57</sup>

Religious exemption laws for child welfare organizations also vary in the kinds of child welfare-related activities to which they explicitly apply. Many state religious exemption laws for child welfare organizations focus on child placement, protecting refusals to serve certain prospective parents for religious reasons.<sup>58</sup> Under these laws, there is at least a plausible argument that organizations do not have a legal basis to deny services (or at least non-placement services) to LGBTQ youth, since they only mention child *placement* and not care-related tasks.<sup>59</sup> However, some states—most notably Mississippi and

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<sup>54</sup> See, e.g., S.D. CODIFIED LAWS § 26-6-42 (2020) (specifying that South Dakota’s religious exemption law may not be “construed to allow a child-placement agency to decline to provide a service on the basis of a person’s race, ethnicity, or national origin”).

<sup>55</sup> See, e.g., ALA. CODE 26-10D-5(a) (protecting objections based on “sincerely held religious beliefs of the child placing agency”); MICH. COMP. LAWS ANN. § 722.124e(3) (extending protection based on “sincerely held religious beliefs contained in a written policy, statement of faith, or other document adhered to by the child placing agency”); N.D. CENT. CODE ANN. § 50-12-07.1 (covering conduct based on “written religious or moral convictions or policies”); OKLA. STAT. ANN. tit. 10a, § 1-8-112 (covering placement refusals that “would violate the agency’s written religious or moral convictions or policies”); S.D. CODIFIED LAWS § 26-6-39 (protecting service refusals based on a “conflict with the agency’s written sincerely-held religious belief or moral conviction”); VA. CODE ANN. § 63.2-1709.3 (covering “written religious or moral convictions or policies”).

<sup>56</sup> See MISS. CODE ANN. § 11-62-3 (2020) (listing three specific “religious beliefs or moral convictions” to which the statute’s protections apply); TEX. HUM. RES. CODE ANN. § 45.004 (West 2019) (covering religious beliefs in general but also specifically protecting religious refusals to “provide, facilitate, or refer a person for” abortion or contraceptives). For a more detailed discussion of the Mississippi law’s protected beliefs, see *infra* notes 136–40 and accompanying text.

<sup>57</sup> See *infra* Section III.A.

<sup>58</sup> See, e.g., KAN. STAT. ANN. § 60-5322(b) (providing that “no child placement agency shall be required to perform, assist, counsel, recommend, consent to, refer or otherwise participate in any *placement* of a child for foster care or adoption” (emphasis added)); N.D. CENT. CODE ANN. § 50-12-07.1 (covering an agency’s “performing, assisting, counseling, recommending, facilitating, referring, or participating in a *placement*” that violates the agency’s beliefs (emphasis added)); OKLA. STAT. ANN. tit. 10a, § 1-8-112(A) (protecting a child-placing agency’s refusal to “perform, assist, counsel, recommend, consent to, refer, or participate in any *placement*” (emphasis added)).

<sup>59</sup> See FAM. EQUAL. COUNCIL, SNAPSHOT: LGBTQ ADOPTION AND FOSTER CARE PARENTING IN NORTH DAKOTA 1 (2019), <https://www.familyequality.org/wp-content/>

Texas—explicitly cover a much broader array of services, including services for foster children themselves and reunification services for families who have been separated due to accusations of abuse or neglect.<sup>60</sup> This breadth leaves organizations in Mississippi and Texas greater flexibility to deny services to LGBTQ individuals or others who do not comport with the organizations’ religious beliefs.

Congress has not yet taken any action to support or prevent these state laws. Federal lawmakers have introduced bills on both sides of this issue, but none have passed.<sup>61</sup> The federal administrative state, by contrast, has played a more active role on this issue recently. In 2016, the Department of Health and Human Services (HHS) issued a final rule prohibiting discrimination based on sexual orientation and gender identity by adoption and foster care organizations that receive federal funding.<sup>62</sup> However, at least one state was able to obtain a waiver from this rule, exempting religious organizations in the state from compliance as long as they refer prospective parents to other entities within the state.<sup>63</sup> Meanwhile, the Trump Administration

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uploads/2019/03/35-North-Dakota-Snapshot.pdf (taking a limited, prospective-parent focused interpretation of North Dakota’s law); HUM. RTS. CAMPAIGN, DISREGARDING THE BEST INTEREST OF THE CHILD: LICENSES TO DISCRIMINATE IN CHILD WELFARE SERVICES 5 (2017), <https://assets2.hrc.org/files/assets/resources/licenses-to-discriminate-child-welfare-2017.pdf> (“However, it is important to note that while these laws allow the agencies to discriminate against prospective parents, they do not extend to allowing the agency to refuse to provide services that a child in care needs.”).

<sup>60</sup> MISS. CODE ANN. § 11-62-17(5) (2020) (including, additionally, services such as “[a]ssisting abused or neglected children” and “[a]ssisting kinship guardianships or kinship caregivers”); TEX. HUM. RES. CODE ANN. § 45.002(3) (West 2019) (including a more expansive list of covered activities, including “counseling children or parents” and even “serving as a foster parent”).

<sup>61</sup> See, e.g., Every Child Deserves a Family Act, S. 1791, 116th Cong. § 3(a) (2019) (prohibiting discrimination based on religion, marital status, and sex—including sexual orientation and gender identity—in child welfare services supported by federal funds); Child Welfare Provider Inclusion Act of 2019, S. 274, 116th Cong. § 3 (2019) (prohibiting the federal government and states receiving child welfare funding from taking “adverse action” against a child welfare organization because it “has declined or will decline to provide, facilitate, or refer for a child welfare service that conflicts with, or under circumstances that conflict with, the provider’s sincerely held religious beliefs or moral convictions”).

<sup>62</sup> 45 C.F.R. § 75.300(c)–(d) (2019) (“It is a public policy requirement of HHS that no person otherwise eligible will be excluded from participation in, denied the benefits of, or subjected to discrimination in the administration of HHS programs and services based on non-merit factors such as . . . gender identity[ ] or sexual orientation.”).

<sup>63</sup> See, e.g., Emanuella Grinberg, *South Carolina Foster Care Providers Can Reject People Who Don’t Share Their Religious Beliefs*, CNN (Jan. 23, 2019, 10:48 PM), <https://www.cnn.com/2019/01/23/politics/south-carolina-religious-freedom-nondiscrimination-waiver-hhs/index.html> (discussing South Carolina’s successful request for a waiver from HHS to allow religious organizations—specifically including Miracle Hill Ministries, see *supra* note 8 and accompanying text—to turn away prospective parents for religious reasons). This was the first federal waiver of its kind. *Id.* The Governor cited to the

promulgated a rule to roll back those protections altogether.<sup>64</sup> If it goes into effect,<sup>65</sup> this new rule would not *require* states to permit adoption and foster care organizations to use religious grounds to discriminate,<sup>66</sup> but it would leave LGBTQ individuals without clear, explicit federal regulatory protection against discrimination by publicly-funded religious child welfare organizations. This regulatory back-and-forth at HHS, along with the potential that Congress might repeal any legislation it passed (if it ever passes legislation in this area at all), illustrates the importance of recognizing the unconstitutionality of this form of government-funded religious discrimination. A constitutional holding clarifying that governments cannot and should not fund child welfare organizations that discriminate based on religion would ensure stronger, more lasting protections for the LGBTQ community—and for religious and non-religious individuals alike.<sup>67</sup>

### *B. Motivations Behind Religious Exemption Laws for Child Welfare Organizations*

In analyzing state religious exemption laws for child welfare organizations, it is particularly helpful to consider their motivations. These details help to contextualize more thoroughly the extent to which the laws have a secular purpose or are instead driven by a desire to promote religion or religious beliefs, which is relevant to the Establishment Clause analysis.

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Religious Freedom Restoration Act and Supreme Court precedent to justify the request. Letter from Henry McMaster, Governor, to Hon. Steven Wagner, Acting Assistant Secretary, Admin. for Child. & Fams. (Feb. 27, 2018), <https://governor.sc.gov/sites/default/files/Documents/newsroom/Scanned%20from%20ECOS-XR-SH119.pdf>.

<sup>64</sup> See 86 Fed. Reg. 2257, 2278 (Jan. 12, 2021) (to be codified at 45 C.F.R. pt. 75) (changing the language of § 75.300(c) to prohibit discrimination “to the extent doing so is prohibited by federal statute” rather than explicitly listing a series of protected characteristics including sexual orientation and gender identity); see also Caitlin Oprysko, *Proposed HHS Rule Would Roll Back LGBTQ Protections in Adoption, Foster Care*, POLITICO (Nov. 1, 2019, 7:44 PM), <https://www.politico.com/news/2019/11/01/trump-hhs-lgbtq-children-064135> (discussing the proposed rule and reactions to it).

<sup>65</sup> Due to ongoing litigation, the date on which the Trump rule becomes effective was postponed from February 11, 2021, to August 11, 2021. See *Order, Facing Foster Care in Alaska v. U.S. Dep’t of Health & Hum. Servs.*, No. 21-cv-308 (D.D.C. Feb. 9, 2021), ECF No. 18 (order postponing effective date). The Biden Administration stipulated to this order, *id.*, and it could take further action to undo the rule. MaryBeth Musumeci, *How Can Trump Administration Regulations Be Reversed?*, KAISER FAM. FOUND. (Jan. 29, 2021), <https://www.kff.org/medicaid/issue-brief/how-can-trump-administration-regulations-be-reversed>.

<sup>66</sup> 84 Fed. Reg. at 63,835 (using the language of “prohibiting” exclusion rather than requiring it).

<sup>67</sup> For more information on how religious exemption laws in the child welfare context can harm *religious* individuals, see *infra* note 85.

Government officials often try to avoid directly expressing any blatant homophobia or transphobia in the text of religious exemption laws for child welfare organizations.<sup>68</sup> In discussing these laws, they often focus their attention on the expressed desires of religious child welfare organizations, which claim that, without these protections, they will be forced to shut down their adoption services and leave large numbers of foster children unsupported.<sup>69</sup> But lawmakers sometimes *have* signaled hostility to LGBTQ rights, same-sex marriage, and *Obergefell* in discussing these exemption laws. For example, Mississippi legislators focused a lot of attention on *Obergefell*, noting that the decision was what prompted them to propose the law in the first place.<sup>70</sup> Mississippi's governor characterized *Obergefell* as having “usurped [states’] right to self-governance and ha[ving] mandated that states must comply with federal marriage standards—standards that are out of step with the wishes of many in the United States and that are certainly out of step with the majority of Mississippians.”<sup>71</sup> One legislator described the decision as “in direct conflict with God’s design for marriage as set forth in the Bible,” and another had committed to assessing whether the state should stop issuing marriage licenses in response to the decision.<sup>72</sup> Similarly, during the debate on Kansas’s bill, a state legislator used the phrase “homosexual agenda” and characterized the LGBTQ rights movement as “dominant” and “totally intolerant.”<sup>73</sup>

Child welfare religious exemption laws can also be contextualized as part of a broader strategy of Project Blitz, also known as “Freedom

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<sup>68</sup> See, e.g., MICH. COMP. LAWS ANN. § 722.124e(1) (West 2020) (not specifically calling out LGBTQ-rights developments in the list of legislative findings).

<sup>69</sup> See, e.g., Hannah Weikel, *South Dakota Governor Signs Religious Adoption Protections*, ASSOCIATED PRESS (March 10, 2017), <https://apnews.com/article/87f07bd2cc0c4607bf00238d8160b119> (describing the bill sponsor’s concern that “the same thing [would] happen in South Dakota” as when “[r]eligious agencies in Massachusetts, Illinois, California and Washington D.C. ended adoption services after states passed non-discrimination laws that include sexual orientation”). But there is reason to believe that these concerns are overstated and pretextual. See *infra* notes 174–80 and accompanying text (discussing prior experiences in areas where child welfare agencies were prohibited from discriminating based on sexual orientation and explaining that, while some religious organizations may shut their doors, others will continue to provide services).

<sup>70</sup> See *Barber v. Bryant*, 193 F. Supp. 3d 677, 693 (S.D. Miss. 2016) (“Mississippi’s legislators formally responded to *Obergefell* in the next legislative session.”), *rev’d on other grounds*, 860 F.3d 345 (5th Cir. 2017).

<sup>71</sup> *Id.* at 691–92.

<sup>72</sup> *Id.* at 692.

<sup>73</sup> Jon Parton, *Kansas Protects Anti-Gay Adoption Agencies*, COURTHOUSE NEWS SERV. (May 4, 2018), <https://www.courthousenews.com/kansas-protects-anti-gay-adoption-agencies>.



for All.”<sup>74</sup> Project Blitz is a coalition of Christian groups whose mission is “[t]o protect the free exercise of traditional Judeo-Christian religious values and beliefs in the public square” and “[t]o properly frame the narrative and the language of religious liberty issues.”<sup>75</sup> To further this mission, it has proposed a series of model bills to state legislators across the country; this series of bills includes the child welfare religious exemption laws that we see today.<sup>76</sup> Project Blitz has been criticized for its vision of the United States as a Christian nation and its Christian-centric take on what constitutes religious freedom.<sup>77</sup> Nonetheless, it has been very active, getting numerous bills introduced and passed in state legislatures and amassing at least some legislator support in most states.<sup>78</sup> Project Blitz’s leaders have been particularly enthusiastic about Mississippi’s religious exemption law, referring to it as the “Mississippi missile.”<sup>79</sup> Other religious exemption bills for adoption and foster care organizations have been tied to Project Blitz,

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<sup>74</sup> See Nancy LeTourneau, *Project Blitz Is Producing Model Legislation for Christian Nationalists*, WASH. MONTHLY (Jan. 24, 2020), <https://washingtonmonthly.com/2020/01/24/project-blitz-is-producing-model-legislation-for-christian-nationalists>. In October 2019, Project Blitz announced that it would be changing its name to “Freedom for All.” Frederick Clarkson, *Project Blitz by Any Other Name*, POL. RSCH. ASSOCS. (Nov. 7, 2019), <https://www.politicalresearch.org/2019/11/07/project-blitz-any-other-name>. To avoid confusion, this Note will use the name “Project Blitz” to refer to the group’s actions from both before and after this rebranding.

<sup>75</sup> *Toolkit*, CONG. PRAYER CAUCUS FOUND., <https://cpcfoundation.com/first-freedom-coalition-project-blitz> (last visited Dec. 2, 2020).

<sup>76</sup> See CONG. PRAYER CAUCUS FOUND., NAT’L LEGAL FOUND. & WALLBUILDERS PROFAMILY LEGIS. NETWORK, REPORT AND ANALYSIS ON RELIGIOUS FREEDOM MEASURES IMPACTING PRAYER AND FAITH IN AMERICA 78–82 (2017), <https://www.au.org/sites/default/files/2018-10/Project%20Blitz%20Playbook%202017.pdf> (detailing a sample religious exemption bill for child-placing agencies). This set of model bills helps to explain why most of the religious exemption laws for child welfare organizations share such similar provisions, structures, and language. Other model bill topics include school prayer and religious displays on government property. *Id.* at 10–11, 103–04.

<sup>77</sup> See, e.g., *Project Blitz*, AM. UNITED FOR SEPARATION CHURCH & STATE, <https://www.au.org/tags/project-blitz> (last visited Jan. 30, 2020) (“Project Blitz is part of a full-frontal assault by Christian nationalists to force a narrow set of religious beliefs into our shared secular laws.”).

<sup>78</sup> See Clarkson, *supra* note 74 (“Carawan claims that their state legislative network now comprises some 950 legislators, organized into Prayer Caucuses in 38 states. They expect to have 42 state Prayer Caucuses by the end of 2019.”); Kristian Hernandez, Pratheek Rebal, Nathaniel Carey & Mike Reicher, *Bills Supporting Religion-Based Rejection Turning Parents Away from Adoption Agencies*, USA TODAY (June 10, 2019, 6:00 AM), <https://www.usatoday.com/story/news/investigations/2019/06/10/adoption-agencies-latest-front-religious-freedom-fight/1359072001> (describing findings that more than five hundred bills had been introduced in the past decade based on Project Blitz’s model legislation, of which more than sixty were passed); Katherine Stewart, Opinion, *A Christian Nationalist Blitz*, N.Y. TIMES (May 26, 2018), <https://www.nytimes.com/2018/05/26/opinion/project-blitz-christian-nationalists.html> (“[M]ore than 70 bills before state legislatures appear to be based on Project Blitz templates or have similar objectives.”).

<sup>79</sup> Stewart, *supra* note 78.

too,<sup>80</sup> and justifications for the states' religious exemption laws have tended to mirror those in the Project Blitz "playbook."<sup>81</sup>

The link between Project Blitz and state religious exemption laws in the child welfare context is troubling. While it is certainly true that interest groups with varied goals and affiliations often advocate for certain policies and even help legislators draft bills,<sup>82</sup> this group's goal is to erode the boundaries between church and state, a goal that is antithetical to the Establishment Clause.<sup>83</sup> That underlying goal should shape an understanding of Project Blitz's proposed bills, including the bills providing religious exemptions for adoption and foster care organizations. And even if a state adopts a Project Blitz bill by looking to another state's law (rather than relying on Project Blitz's own resources), the fact that Project Blitz views religious exemption bills as a step toward blending religion and government should give one pause.

### C. Harms Imposed by Religious Exemption Laws in the Child Welfare Sphere

The actual and potential harms of religious exemption laws in child welfare are manifold. This Section identifies some of those harms to several specific parts of the LGBTQ community: prospective parents, children, and families caught up in the child welfare system.<sup>84</sup>

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<sup>80</sup> See, e.g., Mike Reicher, *A 'Copycat' Bill Would Allow Adoption Agencies to Deny Tennessee Gay Couples. Here's Who's Behind It.*, TENNESSEAN (Apr. 4, 2019, 11:32 AM), <https://www.tennessean.com/story/news/2019/04/04/tennessee-copycat-bills-target-same-sex-adoption/3357287002> (discussing the 2019 legislative session version of Tennessee's religious exemption law); Samantha Sokol, *Uncovering Project Blitz: Fighting a Secret, Coordinated Legislative Strategy to Undermine Religious Freedom in the States*, AM. UNITED FOR SEPARATION CHURCH & STATE (June 5, 2018), <https://www.au.org/blogs/wall-of-separation/uncovering-project-blitz-fighting-a-secret-coordinated-legislative> (cataloging four state bills considered in 2018 based on Project Blitz's model bill on adoption and foster care agencies).

<sup>81</sup> Compare CONG. PRAYER CAUCUS FOUND. ET AL., *supra* note 76, at 84–85 (raising concerns about religious child welfare agencies closing down if required to provide services that go against their beliefs with Illinois, Massachusetts, California, and Washington, D.C. as examples, and arguing that these laws benefit children in the foster system), with Weikel, *supra* note 69 (citing the same four places as a reason to allow refusals).

<sup>82</sup> See Rob O'Dell & Nick Penzenstadler, *You Elected Them to Write New Laws. They're Letting Corporations Do It Instead.*, USA TODAY (June 19, 2019, 6:56 PM), <https://www.usatoday.com/in-depth/news/investigations/2019/04/03/abortion-gun-laws-stand-your-ground-model-bills-conservatives-liberal-corporate-influence-lobbyists/3162173002> (detailing findings from an investigation into "copycat bills").

<sup>83</sup> For more detail on the requirements and motivations of the Establishment Clause, see *infra* Part III.

<sup>84</sup> This Section relies predominantly on the language and breadth of the statutes to predict the harms, since these laws are still relatively recent and individuals do not always come forward publicly when they have faced discrimination.

Recognizing the unconstitutionality of religious exemptions for government-funded child welfare organizations is essential to preventing these harms.<sup>85</sup>

Religious exemption laws in the child welfare sphere pose a threat most obviously to LGBTQ prospective parents. These laws can make it more difficult for LGBTQ adults to find a child-placing agency that will work with them. Some states (including some that have passed religious exemption laws) have very few adoption and foster care providers.<sup>86</sup> This could mean that the only provider in the area is a religious provider, free to reject LGBTQ prospective parents based on religious criteria. For same-sex couples (and for some, though not all, transgender individuals<sup>87</sup>) adoption is one of the predominant and limited ways of becoming parents together.<sup>88</sup> Religious

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<sup>85</sup> Although this Note has focused particularly on the impact of these religious exemption laws on LGBTQ people, it is also important to consider that these laws have the potential for a much broader impact. In states that permit religious child-placing agencies to deny services based on any sincerely held religious belief, a child-placing agency could turn people away or deny children and families services based on any number of other religious criteria. For example, Miracle Hill Ministries, the “largest taxpayer-funded foster care agency in South Carolina,” has turned away Jewish and Catholic foster parents or volunteers, claiming that they only work with evangelical Protestants. *Maddonna v. Dept. of Health and Human Services*, AM. UNITED FOR SEPARATION CHURCH & STATE, <https://www.au.org/tags/maddonna-v-dept-of-health-and-human-services> (last visited Dec. 30, 2020); see also Hernandez, Rebala, Carey & Reicher, *supra* note 78 (describing those turned away). Ironically, these prospective foster parents’ stories demonstrate how a set of laws justified as protecting religious freedom is actually used to *permit* religious discrimination.

<sup>86</sup> See, e.g., *National Foster Care & Adoption Directory Search*, *supra* note 46 (listing seven foster care agencies in Mississippi, six of which are Christian affiliated).

<sup>87</sup> It is important to acknowledge and respect the wide variety of experiences of transgender and nonbinary individuals with respect to reproduction. Transgender individuals who have received certain gender affirmation surgeries will no longer be able to have biological children, and hormone therapy can also at least temporarily inhibit fertility in some individuals. See, e.g., Paula Amato, *Fertility Options for Transgender Persons*, U.C.S.F. TRANSGENDER CARE (June 17, 2016), <https://transcare.ucsf.edu/guidelines/fertility>. Some transgender or nonbinary individuals may experience dysphoria related to reproduction and thus choose not to have biological children even if they are physically able to do so. See, e.g., Chris Bodenner, *When Getting Pregnant Threatens Your Gender Identity*, ATL.: REPORTER’S NOTEBOOK (June 27, 2016, 5:51 PM), <https://www.theatlantic.com/notes/2016/06/when-getting-pregnant-threatens-your-gender-identity/489065> (quoting a reader’s decision to use contraception because pregnancy would exacerbate their dysphoria). Some transgender men or nonbinary individuals decide to become pregnant and bear children. See Julie Compton, *Trans Dads Tell Doctors: ‘You Can Be a Man and Have a Baby,’* NBC NEWS, <https://www.nbcnews.com/feature/nbc-out/trans-dads-tell-doctors-you-can-be-man-have-baby-n1006906> (May 20, 2019, 6:39 AM) (discussing the experiences of several trans men and nonbinary individuals with pregnancy and childbirth).

<sup>88</sup> See Danielle Taylor, *Same-Sex Couples Are More Likely to Adopt or Foster Children*, U.S. CENSUS BUREAU (Sept. 17, 2020), <https://www.census.gov/library/stories/2020/09/fifteen-percent-of-same-sex-couples-have-children-in-their-household.html>; see also Gary

exemption laws thus have the potential to impede or even prevent LGBTQ individuals from becoming parents at all. Even if they can find another organization to work with, religious exemption laws nonetheless expose LGBTQ prospective parents to the indignity of being turned away, often with the insinuation that they are subpar or unfit parents.<sup>89</sup>

The damaging reach of religious exemption laws extends beyond prospective parents—they are also harmful for youth in general, and LGBTQ youth in particular. By restricting the pool of potential parents, these laws potentially make it more difficult for all children in the foster care system to find homes, regardless of those children’s own sexual orientations or gender identities.<sup>90</sup> But LGBTQ youth—along with children of color—are disproportionately involved in the foster care system,<sup>91</sup> and they will likely experience the consequences of limited prospective parent availability more deeply. Within the foster system in the United States as a whole, LGBTQ youth already face more difficulties in obtaining foster or adoptive placements, face greater risks of abuse, and become homeless at high rates.<sup>92</sup> Laws that limit the number of prospective parents available to foster or adopt children—such as religious exemption laws—make it even more challenging for already-disadvantaged LGBTQ foster children to find safe and loving homes.

Even more troubling, some of the exclusion laws explicitly go beyond child placement to other child welfare services,<sup>93</sup> meaning they would enable religious child welfare organizations to discrimi-

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J. Gates, *Marriage and Family: LGBT Individuals and Same-Sex Couples*, 25 *FUTURE CHILD.* 67, 69–70 (2015) (explaining that same-sex couples are increasingly turning to adoption and surrogacy now and are less likely to have children from previous, different-sex relationships than they were in the past).

<sup>89</sup> See Louise Mellinger, *Religious Refusals to Public Accommodations Laws: Four Reasons to Say No*, 38 *HARV. J.L. & GENDER* 177, 189–91 (2015) (discussing dignitary harms in the context of religious exemptions from more general antidiscrimination laws).

<sup>90</sup> See, e.g., Megan Martin, *Administration-Sanctioned Discrimination Is Keeping Foster Kids Out of Loving Homes*, *TALK POVERTY* (May 3, 2019), <https://talkpoverty.org/2019/05/03/administration-sanctioned-discrimination-keeping-foster-kids-loving-homes> (discussing the impact that these laws and policies can have considering the roughly 20,000 children who age out of the foster care system without being adopted each year).

<sup>91</sup> *Id.* (“[C]hildren of color and children who identify as LGBTQ+ are disproportionality [sic] involved in child welfare systems and experience disparities while there.”).

<sup>92</sup> Jordan Blair Woods, *Religious Exemptions and LGBTQ Child Welfare*, 103 *MINN. L. REV.* 2343, 2405–06 (2019).

<sup>93</sup> See, e.g., *MICH. COMP. LAWS ANN.* § 722.124e(2) (West 2020) (providing that a child-placing agency “shall not be required to provide *any* services” that conflict with its sincerely held religious beliefs (emphasis added)); *MISS. CODE ANN.* § 11-62-17(5) (2020) (defining “adoption or foster care services” to include “social services provided to or on behalf of children,” including “[a]ssisting abused or neglected children”); *TEX. HUM. RES.*

nate against LGBTQ youth directly. Under such a law, an organization could refuse to provide any services to LGBTQ children at all. Alternatively, the organization could decline to provide affirming and respectful care for LGBTQ children, perhaps refusing to respect a transgender child's pronouns or knowingly placing LGBTQ children in homophobic or transphobic households where they will face pressure and rejection.<sup>94</sup>

Some states' religious exemption laws also pose a potential danger to LGBTQ families separated by the child abuse and neglect system. Mississippi and Texas both specifically extend their religious exemption laws to family reunification services.<sup>95</sup> This extension is particularly troubling given current child welfare practices. Governmental child protective agencies and courts often penalize parents for failing to follow their service plans even if outside forces prevented them from doing so; for example, parents in jail or prison are still expected to attend parenting classes, even when classes are not available to them.<sup>96</sup> If parents are prevented from following their service plans due to a reunification service provider's religious beliefs (for example, a refusal to provide reunification services to a same-sex couple or a transgender parent), this could prevent, or at the very least delay, the parents from regaining custody of their children, thus disrupting their family and exposing all members of the family to continuing trauma.<sup>97</sup> Many have criticized the child welfare system for

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CODE ANN. § 45.002(3) (West 2019) (using a similar definition of child welfare services to that of Mississippi).

<sup>94</sup> Mississippi's law prohibits state action against a person to whom "the state grants custody of a foster or adoptive child, or who seeks from the state custody of a foster or adoptive child, wholly or partially on the basis that the person guides, instructs or raises a child, or intends to guide, instruct, or raise a child" in accordance with the statute's protected religious beliefs about sex, sexual orientation, and gender identity. MISS. CODE ANN. § 11-62-5(3) (2020). This suggests that the state would be *required* to place an LGBTQ child with homophobic or transphobic prospective parents if those parents' homophobia and transphobia were grounded in religious beliefs and the parents otherwise met foster parent criteria. Likewise, Texas includes "serving as a foster parent" as a form of covered child welfare activity. TEX. HUM. RES. CODE ANN. § 45.002(3)(P).

<sup>95</sup> MISS. CODE ANN. § 11-62-17(5)(1)-(n); TEX. HUM. RES. CODE ANN. § 45.002(3)(L)-(N).

<sup>96</sup> See, e.g., *Thompson v. Tex. Dep't of Fam. & Protective Servs.*, 176 S.W.3d 121, 127 (Tex. Ct. App. 2004) (affirming the termination of an incarcerated father's parental rights and rejecting his argument that the Department failed to assess whether the required parenting classes were available to him because the burden was on the father to comply with the order "whether or not he was incarcerated"), *overruled on other grounds*, *Cervantes-Peterson v. Tex. Dep't of Fam. & Protective Servs.*, 221 S.W.3d 244 (Tex. Ct. App. 2006).

<sup>97</sup> See generally Nova PBS Official, *Inside the Brains of Children Separated from Parents*, YOUTUBE (June 25, 2018), <https://www.youtube.com/watch?v=bwpcn8sRtqg> (discussing the serious consequences of brief separations of children from their parents).

penalizing poverty and systematically targeting families of color for family separation.<sup>98</sup> By creating additional barriers for families that have been separated—or that are in danger of separation—by the state, these particular religious exemption laws compound the harms experienced by these families and risk unnecessarily trapping children in the overburdened foster care system.

Thus, the individual harms imposed by religious exemption laws on LGBTQ prospective (or current) parents and youth are serious. And even beyond those harms, religious exemption laws hurt the LGBTQ community as a whole by permitting (and even more significantly, requiring the funding of) anti-LGBTQ discrimination. They send a message that discrimination by child welfare organizations against LGBTQ individuals is acceptable to, or even encouraged by, the state. Along similar lines, they could be perceived as affirming religious organizations' views that LGBTQ individuals are inadequate parents or that having LGBTQ parents is harmful to children. The dignitary harms this could pose to LGBTQ people are severe.<sup>99</sup>

#### *D. Court Challenges to Religious Exemption Laws and Policies in Child Welfare*

Despite the myriad potential harms imposed by these state religious exemption laws for child welfare organizations, they generally had not been challenged in the courts until recently.<sup>100</sup> Advocacy groups have now begun to focus on these laws more carefully, and several challenges are currently working their way through the court system.<sup>101</sup> Additionally, two lawsuits have already concluded. This

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<sup>98</sup> See, e.g., DOROTHY ROBERTS, *SHATTERED BONDS: THE COLOR OF CHILD WELFARE* (2002) (discussing and critiquing racial injustice in the child welfare system and its impacts on Black communities); Erin Cloud, Rebecca Oyama & Lauren Teichner, *Family Defense in the Age of Black Lives Matter*, 20 CUNY L. REV. F. 68 (2017) (discussing racism in the child welfare system and connecting family defense work to racial justice movements like Black Lives Matter).

<sup>99</sup> “Dignitary harms” here refers to the psychological impact that religious exemptions can pose to LGBTQ communities. See Melling, *supra* note 89, at 190–91 (explaining that exemptions to antidiscrimination laws harm marginalized groups by validating discrimination and “undermin[ing] the traditionally stigmatized group’s belief that the community will ever give them a fair shake”).

<sup>100</sup> For example, North Dakota passed its exemption law in 2003, 2003 N.D. Laws 418 (codified as N.D. CENT. CODE ANN. § 50-12-07.1 (2019)), and that law has not been challenged in court to the author’s knowledge since its passage. See *Citing References - § 50-12-07.1*, WESTLAW, <https://1.next.westlaw.com> (last visited Mar. 2, 2021) (displaying no cases or orders citing the North Dakota law).

<sup>101</sup> See, e.g., *Rogers v. U.S. Dep’t of Health & Hum. Servs.*, 466 F. Supp. 3d 625 (D.S.C. 2020) (surviving a motion to dismiss in challenging HHS’s waiver of antidiscrimination requirements for South Carolina); *Maddonna v. U.S. Dep’t of Health & Hum. Servs.*, No. 19-CV-3551 (D.S.C. Aug. 10, 2020), ECF No. 43 (same).

Section elaborates on those completed challenges and how the courts have handled them.

The first of these examples was a challenge under the Establishment Clause and Equal Protection Clause to Mississippi's religious exemption law, before it went into effect.<sup>102</sup> The challenge, *Barber v. Bryant*, targeted the law as a whole rather than the child welfare section specifically.<sup>103</sup> But both the district and appellate decisions addressed the child welfare section, and their overall reasoning is applicable to it as well. The district court issued a preliminary injunction, reasoning that the plaintiffs were likely to succeed in establishing unconstitutionality on both grounds.<sup>104</sup> For the Establishment Clause claim, the court focused on how the Mississippi law favors certain religious beliefs and burdens third parties who do not receive the law's protections.<sup>105</sup> For the Equal Protection claim, the court found that the law lacked a rational basis because its stated purpose of protecting religious freedom was already served by the state's Religious Freedom Restoration Act and that the law instead singles out LGBTQ individuals for disfavored treatment.<sup>106</sup>

However, the Fifth Circuit ordered that the case be dismissed for want of standing.<sup>107</sup> None of the plaintiffs had been denied services under the law since the lawsuit was a pre-enforcement challenge, nor had any of them alleged concrete plans to seek a service that would be covered by the law.<sup>108</sup> Because the standing requirement was not met, the Fifth Circuit did not give any indications of how it would have decided the Establishment Clause or Equal Protection claims on their merits.<sup>109</sup> After the Fifth Circuit's ruling, the Mississippi law went into effect, and there has not been a subsequent challenge.

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<sup>102</sup> *Barber v. Bryant*, 193 F. Supp. 3d 677, 698–702 (S.D. Miss. 2016), *rev'd*, 860 F.3d 345 (5th Cir. 2017).

<sup>103</sup> *See id.* at 696.

<sup>104</sup> *Id.* at 722–24.

<sup>105</sup> *Id.* at 716 (“[The Mississippi law] constitutes an official preference for certain religious tenets. . . . Christian Mississippians with religious beliefs contrary to § 2 become second-class Christians. Their exclusion . . . sends a message ‘that they are outsiders, not full members of the political community, and an accompanying message to adherents that they are insiders . . . .’” (quoting *McCreary Cnty. v. ACLU of Ky.*, 545 U.S. 844, 860 (2005))); *see also id.* at 721 (holding that the exemption “comes at the expense of other citizens”).

<sup>106</sup> *Id.* at 710 (“Under the guise of providing additional protection for religious exercise, it creates a vehicle for state-sanctioned discrimination on the basis of sexual orientation and gender identity. It is not rationally related to a legitimate end.”).

<sup>107</sup> *Barber*, 860 F.3d at 353, 358.

<sup>108</sup> *Id.* at 357.

<sup>109</sup> *Id.* at 352.

The second lawsuit considered in this Note is *Dumont v. Lyon*,<sup>110</sup> the case brought by Kristy and Dana Dumont, along with other prospective parents in Michigan who were turned away from an adoption agency due to their sexual orientation.<sup>111</sup> As in Mississippi, the suit relied on both the Establishment Clause and Equal Protection Clause, claiming both stigmatic and individual injuries.<sup>112</sup> Unlike the Fifth Circuit in *Barber v. Bryant*, the district court here found standing to sue, emphasizing that the plaintiffs had in fact been turned away by a child-placing agency.<sup>113</sup> The *Dumont* court also denied the defendants' motion to dismiss for failure to state a claim.<sup>114</sup> With respect to the Establishment Clause, the court credited the plaintiffs' arguments that Michigan's enforcement of its religious exemption law arguably: (1) signals state endorsement of religious views about same-sex marriage, and (2) impermissibly delegates a government function to organizations that employ religious criteria in carrying out that function.<sup>115</sup> As for the Equal Protection claim, even though the court determined rational basis to be the appropriate standard of review, the court refused to dismiss the claims based on the plaintiffs' arguments that the law was irrational and motivated by anti-gay animus.<sup>116</sup> After the court denied the motion to dismiss, the case settled, with Michigan agreeing to change its policy and enforce nondiscrimination requirements (but the state has not repealed the exemption law itself).<sup>117</sup>

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<sup>110</sup> *Dumont v. Lyon*, 341 F. Supp. 3d 706 (E.D. Mich. 2018).

<sup>111</sup> For more background on Kristy and Dana's story, see *supra* notes 1–5 and accompanying text.

<sup>112</sup> *Dumont*, 341 F. Supp. 3d at 720.

<sup>113</sup> *Id.* at 721. The court did not find grounds for taxpayer standing, however. *Id.* at 730.

<sup>114</sup> *Id.* at 753.

<sup>115</sup> *Id.* at 736, 740.

<sup>116</sup> *Id.* at 741–43 (discussing both claims of animus and arguments that Michigan's stated reason for the law—potential for closure of faith-based adoption agencies—was unfounded).

<sup>117</sup> Stipulation of Voluntary Dismissal with Prejudice at 8–14, *Dumont v. Gordon*, No. 17-cv-13080 (E.D. Mich. Mar. 22, 2019), <https://www.aclu.org/legal-document/dumont-v-gordon-settlement-stipulation> (detailing the parties' settlement agreement requiring Michigan DHHS to enforce nondiscrimination requirements on child-placing agencies with whom DHHS has contracts). The settlement was made possible by Michigan Attorney General Dana Nessel, who was elected while the case was in progress and had signaled that she did not agree with how the state was handling the lawsuit. Derek Robertson, *Nessel Settles Michigan Same-Sex Adoption Lawsuit*, MICH. ADVANCE (Mar. 22, 2019, 4:54 PM), <https://www.michiganadvance.com/2019/03/22/nessel-settles-michigan-same-sex-adoption-lawsuit>. The arrangement reached by this settlement agreement is being challenged in another Michigan district court as violating the free exercise, equal protection, and free speech rights of the child-placing agencies. See *Buck v. Gordon*, 429 F. Supp. 3d 447, 451 (W.D. Mich. 2019) (issuing a preliminary injunction against the state preventing it from enforcing its new policy against a Catholic child welfare agency).



These cases show that constitutional challenges to religious exemption laws for child welfare organizations can hold up in court once the standing bar is met—even for a law like Michigan’s that appears religiously neutral on its face.

### III

#### RELIGIOUS EXEMPTION LAWS AND THE ESTABLISHMENT CLAUSE

Having considered the requirements and context of these religious exemption laws for child welfare organizations, the varied and serious harms they impose, and recent challenges to them, this Note now turns to the Establishment Clause to argue for their unconstitutionality. These religious exemption laws violate the Establishment Clause in several ways: (1) at least some of them demonstrate impermissible religious favoritism; (2) they all delegate governmental functions and decisionmaking to religious entities; and (3) they all impose harms and burdens on third parties. These Establishment Clause violations can best be seen by examining two specific examples of religious exemption laws in the child welfare sphere: South Dakota’s and Mississippi’s. These two laws serve as a relatively representative example of the various forms that these religious exemption laws take. Specifically, South Dakota’s law applies to refusals based on religious beliefs at large, whereas Mississippi’s law only applies to religious refusals based on three statutorily defined religious beliefs. Although some of the bases for unconstitutionality apply to these laws to different extents, both laws—and the other laws they represent—should be understood to violate the Establishment Clause.

The Establishment Clause plays an important limiting role in U.S. government. The First Amendment provides that “Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof.”<sup>118</sup> This statement sets two limitations on the government’s relationship with religion: (1) the Establishment Clause, which prevents the government from sponsoring or promoting religion; and (2) the Free Exercise Clause, which limits the extent to which the government can interfere with individuals’ religious beliefs or practices. At its most basic level, the Establishment Clause prevents government from adopting an official religion, but it also goes further, to prohibit laws that could be understood as “a step that could

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<sup>118</sup> U.S. CONST. amend. I. Although the text refers to “Congress,” the Establishment Clause was incorporated against the states through the Fourteenth Amendment. *See* *Everson v. Bd. of Educ.*, 330 U.S. 1, 8 (1947) (citing *Murdock v. Pennsylvania*, 319 U.S. 105, 108 (1943)).

lead to such establishment” of religion.<sup>119</sup> To that end, it prohibits the government from favoring certain religions or religious beliefs over others<sup>120</sup> or otherwise entangling itself too closely with religion.<sup>121</sup>

A long line of Supreme Court decisions has expanded on the Establishment Clause’s restrictions on government involvement with religion. *Lemon v. Kurtzman* generated the standard test for an Establishment Clause violation.<sup>122</sup> The *Lemon* test considers three main factors: (1) whether the law lacks a secular purpose; (2) whether the law’s “principal or primary effect” is to advance or inhibit religion; and (3) whether the law “foster[s] ‘an excessive governmental entanglement with religion.’”<sup>123</sup> If any of these three factors is met, the law violates the Establishment Clause.<sup>124</sup> Some subsequent Supreme Court decisions have gradually adjusted or chipped away at the test, and some have even questioned the *Lemon* test as a whole.<sup>125</sup> Because of this, although *Lemon* still remains the governing test, this Note focuses on more circumstance-specific lines of Establishment Clause precedent to assess religious exemption laws in the child welfare context.<sup>126</sup> Although they vary from one another, the three approaches discussed in this Note reflect the common theme that the government should not involve itself too deeply in matters of religion

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<sup>119</sup> *Lemon v. Kurtzman*, 403 U.S. 602, 612 (1971).

<sup>120</sup> See *Larson v. Valente*, 456 U.S. 228, 244 (1982) (“The clearest command of the Establishment Clause is that one religious denomination cannot be officially preferred over another.”).

<sup>121</sup> See *Lemon*, 403 U.S. at 612 (observing that the main three activities meant to be prohibited by the Establishment Clause are “sponsorship, financial support, and active involvement of the sovereign in religious activity” (quoting *Walz v. Tax Comm’n*, 397 U.S. 664, 668 (1970))).

<sup>122</sup> 403 U.S. 602.

<sup>123</sup> *Id.* at 612–13 (quoting *Walz*, 397 U.S. at 674).

<sup>124</sup> See *id.* at 613–14 (explaining that the court did not need to investigate the “principal or primary effect” because there was “excessive entanglement”).

<sup>125</sup> See, e.g., *Am. Legion v. Am. Humanist Ass’n*, 139 S. Ct. 2067, 2080 (2019) (plurality opinion) (“If the *Lemon* Court thought that its test would provide a framework for all future Establishment Clause decisions, its expectation has not been met. In many cases, this Court has either expressly declined to apply the test or has simply ignored it.”).

<sup>126</sup> All three of the more targeted approaches this Note lays out could also be contextualized as reflecting part or all of the *Lemon* test. The line of cases prohibiting the government from favoring one religion or religious belief over others aligns with the first two factors of the *Lemon* test: A law creating this sort of favoritism might lack a secular purpose, and even if it has such a purpose, it would, by its very nature, advance or inhibit religion. See *infra* Section III.A. Meanwhile, the line of cases prohibiting the government from delegating its decisionmaking authority to religious entities reflects concerns about advancement of religion as well as excessive government entanglement with religion. See *infra* Section III.B. The prohibition on third-party harms can be linked to concerns about laws advancing or inhibiting religion, too, as it focuses on laws that support religion or religious beliefs at others’ expense. See *infra* Section III.C.

and that religious entities should not involve themselves too deeply in government.

### A. *Religious Favoritism*

The first of these lines of cases addresses the unconstitutionality of state laws that clearly favor certain religions or religious beliefs over others (or over non-religion). This prohibition is most clearly reflected in the prongs of the *Lemon* test prohibiting the government from passing laws with religious purposes or which aid or inhibit religion.<sup>127</sup>

Of all the potential Establishment Clause violations, religious favoritism is the most obvious example, and the Supreme Court has responded accordingly.<sup>128</sup> For example, in *Epperson v. Arkansas*, the Supreme Court struck down a state law forbidding teachers in public schools and universities from teaching about evolution.<sup>129</sup> It reasoned that the law was not neutral and instead sought to exclude teaching on evolution due to the conflict between evolution and certain religious beliefs.<sup>130</sup> In a later case, the Court also invalidated a Louisiana law requiring creationism to be taught alongside evolution, rejecting the state's argument that it had a secular purpose.<sup>131</sup> According to the Court, the law did not foster comprehensive education or academic freedom since it did not require any instruction on the origins of humanity in general. Instead, the law merely required that "creation science" be taught *if* evolution was included in the curriculum.<sup>132</sup> Based on this reasoning, the law demonstrated an impermissible government preference for religious beliefs (creationism) over evolution,<sup>133</sup> which the Act's sponsor further exacerbated through statements indicating that he was motivated by his own religious

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<sup>127</sup> See *Lemon*, 403 U.S. at 612 (describing the purpose and effect prongs).

<sup>128</sup> See *Larson v. Valente*, 456 U.S. 228, 244 (1982) ("The clearest command of the Establishment Clause is that one religious denomination cannot be officially preferred over another.").

<sup>129</sup> 393 U.S. 97, 107–09 (1968) ("Arkansas did not seek to excise from the curricula of its schools and universities all discussion of the origin of man. The law's effort was confined to an attempt to blot out a particular theory because of its supposed conflict with the Biblical account, literally read."). The Court emphasized that the First Amendment "forbids alike the preference of a religious doctrine or the prohibition of theory which is deemed antagonistic to a particular dogma." *Id.* at 106–07.

<sup>130</sup> *Id.* at 107–09.

<sup>131</sup> *Edwards v. Aguillard*, 482 U.S. 578, 585 (1987) (noting that a law can have a purpose of endorsing or promoting religion either by promoting religion in general or by promoting specific religious beliefs).

<sup>132</sup> *Id.* at 588–89.

<sup>133</sup> See *id.* at 588 (summarizing the ways in which the law favored creationism over religion).

beliefs.<sup>134</sup> The Court has also extended this doctrine to less obvious forms of favoritism, such as state registration and fundraising reporting requirements for charitable organizations that provided an exemption for only some religious organizations.<sup>135</sup> Overall, these cases reflect a concern about the government using its powers to provide certain religions or religious viewpoints with special protections or privileges under the law.

Of the two laws considered here, the Mississippi law represents the clearest example of religious favoritism. Rather than protecting religious beliefs in an even-handed manner, it blatantly favors particular religious beliefs. Unlike other religious exemption laws, including Mississippi's own Religious Freedom Restoration Act (RFRA),<sup>136</sup> this law extends protection to child welfare organizations (and others) that act according to three religious beliefs: (1) "Marriage is or should be recognized as the union of one man and one woman"; (2) "Sexual relations are properly reserved to such a marriage"; and (3) "Male (man) or female (woman) refer to an individual's immutable biological sex as objectively determined by anatomy and genetics at time of birth."<sup>137</sup> The statute does not extend protection to those with other beliefs.

Like the laws addressing the teaching of evolution and creationism in schools, this sort of selective protection of religious beliefs is constitutionally impermissible. Just as the unconstitutional Louisiana statute prioritized creationism over other beliefs in the education sphere,<sup>138</sup> the Mississippi religious exemption law prioritizes its three listed beliefs in child welfare services. To the Supreme Court, this selective protection demonstrated that the Louisiana law lacked a secular purpose—it did not promote fairness with a blanket protection for all believers and nonbelievers, but instead sought to favor creationism and discredit evolution.<sup>139</sup> Mississippi's religious exemption

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<sup>134</sup> See *id.* at 592–93 (recounting that the Act's sponsor "explained during the legislative hearings that his disdain for the theory of evolution resulted from the support that evolution supplied to views contrary to his own religious beliefs").

<sup>135</sup> *Larson v. Valente*, 456 U.S. 228, 231–32, 255 (1982). To the Court, this law essentially favored certain religious organizations (those that seek most of their contributions from members) over others (those that rely more heavily on contributions from non-members). See *id.* at 254–55 (discussing legislative history showing that legislators had specific religious organizations they did or did not want covered).

<sup>136</sup> MISS. CODE ANN. § 11-61-1(5)(a)–(b) (2020) ("Government shall not substantially burden a person's exercise of religion even if the burden results from a rule of general applicability, except . . . [if it is] the least restrictive means of furthering [a] compelling governmental interest.").

<sup>137</sup> *Id.* § 11-62-3.

<sup>138</sup> *Edwards*, 482 U.S. at 588.

<sup>139</sup> *Id.* at 588–89.

law should fall on similar grounds: Rather than serving a secular purpose like promoting a diversity of viewpoints, this law only promotes a limited list of religious beliefs.

Interestingly, Mississippi explicitly excluded its religious exemption law from the application of its more general RFRA, which prohibits the government from substantially burdening the exercise of religion without a compelling justification.<sup>140</sup> This exclusion arguably acknowledges that the religious exemption law could indeed burden others' religious exercise if they do not adhere to the three protected beliefs. Mississippi nonetheless chose to protect a select list of religious beliefs at the expense of those with contrary ones. On balance, the Mississippi religious exemption law for child welfare organizations represents a clear example of the unconstitutional favoring of certain religious beliefs over others.

Unlike Mississippi, the South Dakota exemption law appears more evenhanded on the surface. Rather than selecting specific beliefs to protect, South Dakota extends protection to child welfare agencies that act in accordance “with *any* sincerely-held religious belief or moral conviction of the child-placement agency that shall be contained in a written policy, statement of faith, or other document adhered to” by the agency.<sup>141</sup> Likewise, it prohibits the state from taking “adverse action” against such an agency, including denying funding, contracts, or licenses.<sup>142</sup> Because of this level of generality, South Dakota's religious exemption for child welfare organizations more closely resembles frequently-applied religious accommodation laws.<sup>143</sup> On the surface, at least, it does not appear to favor some religions or religious beliefs over others.

### B. *Delegation of Decisionmaking Authority to Religions*

Although the Establishment Clause's religious favoritism prohibition likely would not be sufficient on its own to invalidate South Dakota's ostensibly neutral statute, that does not mean that South Dakota's law is constitutional. Even if a law does not pick favorites or single out specific religious beliefs for special treatment, it may still violate the Establishment Clause as an impermissible delegation of government power to religions or religious organizations. In *Larkin v.*

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<sup>140</sup> MISS. CODE ANN. § 11-62-19 (2020); see also *id.* § 11-61-1(5) (setting the standard for Mississippi's general RFRA).

<sup>141</sup> S.D. CODIFIED LAWS § 26-6-38 (2020) (emphasis added).

<sup>142</sup> *Id.* § 26-6-37 (defining “adverse action”); *id.* § 26-6-39 (prohibiting adverse action).

<sup>143</sup> See, e.g., Religious Freedom Restoration Act of 1993, 42 U.S.C. § 2000bb-1 (prohibiting the government from “substantially burden[ing]” a person's religious exercise, without limiting the specific beliefs protected).

*Grendel's Den, Inc.*, the Court addressed a state law giving churches a veto over the issuance of liquor licenses to nearby businesses.<sup>144</sup> The Court concluded that this law violated the Establishment Clause. Specifically, it explained that the law “substitutes the unilateral and absolute power of a church for the reasoned decisionmaking of a public legislative body acting on evidence and guided by standards, on issues with significant economic and political implications,” thus excessively and unconstitutionally entangling the government and religion.<sup>145</sup> Similarly, the Court later invalidated New York’s creation of a special public school district for a Satmar Hasidic Jewish community,<sup>146</sup> in part because the government had delegated its authority over public schools to a religious group.<sup>147</sup>

The principles from *Grendel's Den* and similar cases critiquing the delegation of government decisions to religious authorities apply to Mississippi and South Dakota’s religious exemption laws for child welfare organizations. When an organization receives government funding to provide public adoption and foster care services, it is acting as a contractor for the government, providing a service that the government would otherwise handle itself.<sup>148</sup> Through their religious exemption laws, Mississippi and South Dakota permit religious child welfare organizations to perform those responsibilities and provide services according to religious criteria. These religious exemption laws thus “enmesh[] churches in the exercise of substantial governmental powers contrary to [the Court’s] consistent interpretation of the Establishment Clause.”<sup>149</sup> Even more troubling, the states are permitting these religious organizations to carry out their adoption and foster care-related services in a way that a state most likely could not do itself.<sup>150</sup>

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<sup>144</sup> 459 U.S. 116 (1982).

<sup>145</sup> *Id.* at 127.

<sup>146</sup> *Bd. of Educ. v. Grumet*, 512 U.S. 687, 706 (1994) (plurality opinion) (“[W]e have never hinted that an otherwise unconstitutional delegation of political power to a religious group could be saved as a religious accommodation . . .”).

<sup>147</sup> *Id.* at 696 (“[T]he statute . . . departs from [the Establishment Clause] by delegating the State’s discretionary authority over public schools to a group defined by its character as a religious community, in a legal and historical context that gives no assurance that governmental power has been or will be exercised neutrally.”).

<sup>148</sup> See *supra* Section I.B.

<sup>149</sup> *Grendel's Den*, 459 U.S. at 126.

<sup>150</sup> The government in *Grendel's Den* had the power to prohibit the issuance of liquor licenses within a certain distance of a church rather than making the licenses conditional on church approval. *Id.* at 123–24. By contrast, lower courts have struck down state laws prohibiting same-sex couples from adoption, relying on both federal and state constitutions. See, e.g., *Campaign for S. Equal. v. Miss. Dep’t of Hum. Servs.*, 175 F. Supp. 3d 691, 710 (S.D. Miss. 2016) (issuing a preliminary injunction based on the federal Equal Protection Clause); *Fla. Dep’t of Child. & Fams. v. Adoption of X.X.G.*, 45 So. 3d 79,

Along similar lines, one author has argued that the religious nondelegation theory should be applied to general religious exemptions from antidiscrimination laws.<sup>151</sup> Hersh argues that nondiscrimination laws themselves are a government benefit, and allocation of that government benefit should not be controlled by religious actors.<sup>152</sup> Applying this argument to the laws at issue in this Note, both South Dakota and Mississippi's laws prevent the enforcement of currently existing nondiscrimination laws against religious child welfare organizations when those organizations discriminate based on sexual orientation or gender identity. Jackson, Mississippi, has local ordinances prohibiting discrimination based on sexual orientation.<sup>153</sup> Similarly, Brookings, South Dakota, amended its human rights ordinance to prohibit discrimination based on sexual orientation and gender identity in the provision of public accommodations and services.<sup>154</sup> Assuming that these local ordinances would reach adoption and foster care services, under a nondelegation theory of the Establishment Clause, Mississippi and South Dakota should not be able to permit a religious child welfare organization to determine

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91–92 (Fla. Dist. Ct. App. 2010) (ruling based on the Florida state constitution). Meanwhile, rulings by the United States Supreme Court on LGB rights have at least strongly implied that states could not deny same-sex couples the ability to adopt children. See *Obergefell v. Hodges*, 576 U.S. 644, 670 (2015) (“There is no difference between same- and opposite-sex couples with respect to this principle. Yet by virtue of their exclusion from that institution, same-sex couples are denied the constellation of benefits that the States have linked to marriage.”); see also *Pavan v. Smith*, 137 S. Ct. 2075, 2078 (2017) (per curiam) (alteration in original) (ruling that Arkansas “denied married same-sex couples access to the ‘constellation of benefits that the Stat[e] ha[s] linked to marriage’” by permitting a mother’s husband—but not her wife—to be listed on her child’s birth certificate (quoting *Obergefell*, 576 U.S. at 670)); *Campaign for S. Equal.*, 175 F. Supp. 3d at 710 (explaining that the Supreme Court in *Obergefell* extended its Equal Protection holding to “marriage-related benefits,” including “the right to adopt” and thus finding that Mississippi’s ban on same-sex couple adoption would violate the Equal Protection Clause).

<sup>151</sup> See, e.g., Adam K. Hersh, Note, *Daniel in the Lion’s Den: A Structural Reconsideration of Religious Exemptions from Nondiscrimination Laws Since Obergefell*, 70 STAN. L. REV. 265 (2018).

<sup>152</sup> See *id.* at 305–06 (explaining how the Mississippi law creates a religious non-delegation problem).

<sup>153</sup> See Anna Wolfe & Sarah Fowler, *Jackson Council Adds LGBT Protections to Law*, CLARION-LEDGER (June 15, 2016, 7:03 PM), <https://www.clarionledger.com/story/news/local/2016/06/14/jackson-council-passes-anti-discrimination-provision/85903510> (discussing the unanimous passage of an amendment to Jackson’s antidiscrimination ordinances to protect against sexual orientation and gender identity discrimination).

<sup>154</sup> BROOKINGS, S.D., CODE OF ORDINANCES § 2-143(5)–(6) (2020), [https://library.municode.com/sd/brookings/codes/code\\_of\\_ordinances?nodeId=CH2AD\\_ARTVBOCOCO\\_DIV2HURICO](https://library.municode.com/sd/brookings/codes/code_of_ordinances?nodeId=CH2AD_ARTVBOCOCO_DIV2HURICO); see also Collen Kutney, *Brookings Becomes First City in South Dakota to Enact Comprehensive LGBTQ-Inclusive Ordinance*, HUM. RTS. CAMPAIGN (Mar. 13, 2018), <https://www.hrc.org/blog/brookings-becomes-first-city-in-south-dakota-to-enact-comprehensive-lgbtq-i> (discussing the amendment to cover sexual orientation and gender identity).

whether someone does or does not get to receive the benefits of those nondiscrimination ordinances.<sup>155</sup> But that is precisely what Mississippi and South Dakota's religious exemption laws do: They preempt the application of these local nondiscrimination ordinances to religious child welfare organizations, leaving it up to those organizations to determine whether or not they will subject LGBTQ individuals in places like Jackson or Brookings to otherwise prohibited discrimination. Admittedly, this is a novel theory that has not been thoroughly tested in the courts. But even if general religious exemptions from antidiscrimination laws do not run afoul of *Grendel's Den* and its progeny, religious control over government services and government-funded benefits—as permitted by Mississippi and South Dakota's laws here—clearly does.

Some might object to this focus on nondelegation, arguing that religious organizations have traditionally provided adoption services in accordance with their beliefs. Under this view, ostensibly neutral religious exemption laws like that of South Dakota simply permit religious organizations to continue in that tradition. This argument builds on a recent—but not yet widely adopted—theory of the Establishment Clause, under which longstanding practices, particularly those adopted by the Framers close to the enactment of the Constitution, will not violate the Clause.<sup>156</sup> Proponents of this theory reason that if the Framers of the Constitution accepted a practice shortly after the First Amendment was ratified, the practice must, in fact, not violate the Establishment Clause.<sup>157</sup>

The historical approach to the Establishment Clause, however, does not provide much guidance on laws that require the government to fund child welfare organizations that discriminate based on religious beliefs. Unlike prayers before legislative sessions (the only area

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<sup>155</sup> See Hersh, *supra* note 151, at 307 (explaining how the use of religious exemptions to nondiscrimination requirements like this “nullifies a governmental benefit” on religious grounds).

<sup>156</sup> See *Town of Greece v. Galloway*, 572 U.S. 565, 577 (2014) (“Any test the Court adopts must acknowledge a practice that was accepted by the Framers and has withstood the critical scrutiny of time and political change.”); *Marsh v. Chambers*, 463 U.S. 783, 790–92 (1983) (discussing the “unique history” of legislative prayer stretching “unbroken” from the First Congress for more than two hundred years in evaluating Nebraska’s legislative prayer practices under the Establishment Clause); see also *Am. Legion v. Am. Humanist Ass’n*, 139 S. Ct. 2067, 2087–89 (2019) (plurality opinion) (applying the historical approach in a challenge to the Bladensburg Cross).

<sup>157</sup> See, e.g., *Town of Greece*, 572 U.S. at 576 (“That the First Congress provided for the appointment of chaplains only days after approving language for the First Amendment demonstrates that the Framers considered legislative prayer a benign acknowledgment of religion’s role in society.”).



in which a majority of the Court has applied this theory),<sup>158</sup> there is no evidence of an established, Founding-era tradition of government sponsorship of discriminatory adoption and foster care services.<sup>159</sup> At that point, the federal government was not involved in these issues at all,<sup>160</sup> and the closest analogues to foster care involved private agreements.<sup>161</sup> Thus, even putting aside criticisms of the historical approach to the Establishment Clause as providing inadequate protection in general,<sup>162</sup> the historical approach simply cannot be applied with any accuracy to the context of state-funded adoption and foster care. The absence of a clear, Founding-era history or tradition increases the danger that a court could pick an inappropriate comparison point from sometime in history when a government paid a religious institution to take care of children, whether or not connected to the Founding, and use that history to insulate an unconstitutional practice. Meanwhile, the history of privately funded religious adoption entities should not weigh in favor of Mississippi's and South Dakota's laws, just as the history of independent religious schools does not mean that a state government could explicitly and directly fund religious instruction.<sup>163</sup> Rather, the analysis should focus on government-funded services only.

### C. *Third-Party Harm Principle*

The final Establishment Clause theory addressed in this Note focuses on the *impact* of religious exemption laws. The Supreme Court has upheld certain religious accommodations laws, observing that states have some leeway to exempt or accommodate religious practitioners from otherwise applicable laws, even where the Free

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<sup>158</sup> See *id.*; *Marsh*, 463 U.S. at 790–92.

<sup>159</sup> See *supra* Section I.A (discussing the gradual emergence of the modern-day adoption and foster care system beginning only in the mid-nineteenth century and carrying on until the mid-1900s).

<sup>160</sup> See *supra* Section I.A. In discussing the historical approach, some critics have emphasized that the logic of the historical approach requires the practices to be federal rather than state-based, since at the time of the founding the First Amendment had not been incorporated against the states. See, e.g., Alex J. Luchenitser & Sarah R. Goetz, *A Hollow History Test: Why Establishment Clause Cases Should Not Be Decided Through Comparisons with Historical Practices*, 68 *CATH. U. L. REV.* 653, 665–67 (2019) (pointing to eighteenth and nineteenth century state practices—such as the establishment of state churches—that would blatantly violate the Establishment Clause if attempted today).

<sup>161</sup> See *supra* Section I.A.

<sup>162</sup> See Luchenitser & Goetz, *supra* note 160, at 655–57 (criticizing the focus on historical practices as indicators of Establishment Clause applicability and instead arguing that the focus should be on the history that led to the Establishment Clause's development).

<sup>163</sup> Cf. *Lemon v. Kurtzman*, 403 U.S. 602 (1971) (striking down state reimbursement for religious schools).

Exercise Clause would not require such an accommodation; however, religious accommodations may still go too far and violate the Establishment Clause.<sup>164</sup> So which accommodations go too far, and which do not?

To answer this question, some scholars and advocates have argued that the Establishment Clause (and Supreme Court precedent interpreting the Clause) should be understood to prohibit religious accommodations where those accommodations would burden third parties.<sup>165</sup> This approach seeks to balance individuals' interests in their religious practice against others' interests in not being harmed or burdened by religious practices. For example, an accommodation permitting someone to wear a religious head covering does not harm anyone else; it impacts only the person wearing the head covering. Thus, such an accommodation should be permissible.

One of the most commonly cited examples of the third-party harm doctrine in action is *Estate of Thornton v. Caldor, Inc.*<sup>166</sup> In this case, the Supreme Court struck down a state law prohibiting employers from requiring an employee to work on the employee's Sabbath day.<sup>167</sup> The law had been passed as part of the state's decision to permit certain businesses to remain open on Sundays.<sup>168</sup> But the Supreme Court found that this Sabbath day law violated the Establishment Clause, largely because of the law's burden on third parties—employers and other employees.<sup>169</sup> Based on this third-party burden, the Court concluded that the law had a "primary effect that impermissibly advances a particular religious practice" and was thus

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<sup>164</sup> See, e.g., *Gillette v. United States*, 401 U.S. 437, 453–54 (1971) (taking the stance that, "[q]uite apart from the question whether the Free Exercise Clause might require some sort of exemption," the government may choose to "accommodate free exercise values" where that accommodation "reflects valid secular purposes").

<sup>165</sup> See, e.g., Micah Schwartzman, Nelson Tebbe & Richard Schragger, *The Costs of Conscience*, 106 KY. L.J. 781, 788 (2017–2018) ("[T]he Supreme Court has explicitly and repeatedly recognized that the Establishment Clause limits statutory religious accommodations that impose burdens on third parties."); see also Frederick Mark Gedicks & Rebecca G. Van Tassel, *RFRA Exemptions from the Contraception Mandate: An Unconstitutional Accommodation of Religion*, 49 HARV. C.R.-C.L. L. REV. 343, 363 (2014) ("Like the prototypical established church, cost-shifting accommodations grant a privilege to those who engage in the accommodated practice at the expense of unbelievers and other nonadherents who do not.").

<sup>166</sup> 472 U.S. 703 (1985).

<sup>167</sup> *Id.* at 706.

<sup>168</sup> *Id.* at 705–06, 706 n.3.

<sup>169</sup> See *id.* at 709 ("In essence, the Connecticut statute imposes on employers and employees an absolute duty to conform their business practices to the particular religious practices of the employee by enforcing observance of the Sabbath the employee unilaterally designates.").

invalid.<sup>170</sup> In other cases, by contrast, the Court has emphasized the absence of harms to third parties as a reason for rejecting an Establishment Clause claim.<sup>171</sup>

An accommodation like the religious exemption laws discussed in this Note imposes both practical and dignitary harms on third parties.<sup>172</sup> Therefore, under the third-party harm approach, such accommodations should be deemed unconstitutional. These laws make it more difficult or even impossible for LGBTQ individuals like Kristy and Dana Dumont, or people of different faiths, to foster or adopt children. They limit the pool of potential foster or adoptive parents for children in foster care and allow religious organizations to deny LGBTQ foster youth the support and services they need to thrive. And they feed into harmful, stigmatic messaging about the fitness of LGBTQ parents and the “deviance” of the LGBTQ community.<sup>173</sup> All of these harms weigh against religious exemptions for child welfare providers.

Responding to the concerns about harms imposed by religious exemption laws for child welfare organizations, advocates in favor of such laws argue that the true harm to third parties would actually stem from elimination of religious exemptions. They raise the concern that elimination of exemptions would force religious organizations to shut down and cease providing adoption and foster care-related services, making it more difficult for children to find placements.<sup>174</sup> In their

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<sup>170</sup> *Id.* at 710. In some respects, this decision could also be understood as a reaffirmation of the requirement that states not favor certain religions over others, or religions over nonreligion. *See id.* (noting that the statute has the effect of advancing a “particular religious practice” (emphasis added)). But the Court’s decision to focus on the burdens the law imposes on others—as opposed to, say, the statute’s preference for religions that celebrate a Sabbath—lends support for considering it distinctive.

<sup>171</sup> *See, e.g.,* Schwartzman et al., *supra* note 165, at 788. Schwartzman, Tebbe, and Schragger identify several examples of decisions where the Court found no likelihood of third-party harms, including *Cutter v. Wilkinson*, 544 U.S. 709 (2005), which upheld the Religious Land Use and Institutionalized Persons Act in part because the Act required a consideration of the burdens that accommodations could inflict on third parties. *Id.*

<sup>172</sup> *See supra* Section I.L.C. (discussing the harms that religious exemption laws in the child welfare sphere impose).

<sup>173</sup> *See Woods, supra* note 92, at 2401–02 (discussing how religious exemption laws in child welfare both stem from and convey a message of LGBTQ deviance and unacceptability).

<sup>174</sup> *See, e.g.,* Monica Burke, *Trump Administration Has Sided with a Faith-Based Adoption Provider. Here’s Why That Matters*, HERITAGE FOUND. (Jan. 25, 2019), <https://www.heritage.org/religious-liberty/commentary/trump-administration-has-sided-faith-based-adoption-provider-heres-why> (“When adults politicize adoption and foster care like this, children are the ones who suffer.”); Natalie Goodnow, *Faith-Based Adoption Agencies Are Too Valuable To Shut Down*, THE HILL (June 12, 2018), <https://thehill.com/opinion/civil-rights/391848-faith-based-adoption-agencies-are-too-valuable-to-shut-down> (raising similar arguments).

view, the missed opportunities for adoption due to religious refusals are outweighed by the number of children who are currently served by religious organizations. Meanwhile, they downplay the harm to prospective parents, suggesting that prospective parents who are rejected by a religious organization can always go to another agency to foster or adopt.<sup>175</sup>

However, according to experts, child welfare organizations turning away prospective families for discriminatory reasons discourages families from seeking to foster children even if other organizations are available that will accept all comers.<sup>176</sup> Thus, the continued involvement of discriminatory organizations in the foster care system indeed makes it more difficult for children to find foster families.

Claims that religious exemption laws are necessary to prevent agency closures and ensure children receive services have also not played out in practice. First, not all religious child welfare organizations would choose to shut down if they could no longer deny services to LGBTQ individuals as a condition for receiving government funding. For example, Bethany Christian Services in Michigan chose to begin working with same-sex couples after Michigan began to enforce nondiscrimination requirements against religious organizations,<sup>177</sup> and it has recently decided to do so nationwide.<sup>178</sup> Some Catholic Charities affiliates in Illinois disaffiliated with the Church and comply with antidiscrimination requirements.<sup>179</sup> And although the Catholic Charities in San Francisco ceased placing children in adoptive homes directly, it designed a partnership with the California

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<sup>175</sup> See, e.g., Monica Burke, *States Must Stop the War on Faith-Based Adoption Agencies*, DAILY SIGNAL (Aug. 29, 2018), <https://www.dailysignal.com/2018/08/29/states-must-stop-the-war-on-faith-based-adoption-agencies> (“Nor did leaving those agencies open prevent a single LGBT person from adopting, as such adoptions are legal across all 50 states.”); TRAVIS WEBER, FAM. RSCH. COUNCIL, *ISSUE ANALYSIS: THE CHILD WELFARE PROVIDER INCLUSION ACT: ENSURING A FREE MARKETPLACE OF ADOPTION PROVIDERS 5–6* (2018), <https://downloads.frc.org/EF/EF18D31.pdf> (“These couples have plenty of agencies to work with; they just can’t work with certain religious organizations.”).

<sup>176</sup> See, e.g., Brief of Voice for Adoption et al. as Amici Curiae in Support of Respondents at 15, *Fulton v. City of Philadelphia*, No. 19-123 (U.S. Aug. 20, 2020) (“Requiring states and cities to permit agencies to discriminate would create a significant barrier to fostering. Discriminatory policies will discourage some potential LGBTQ foster parents from ever contacting a foster care agency about the potential to foster children.”).

<sup>177</sup> Beth LeBlanc, *Bethany Christian Services Changes Same-Sex Foster Care, Adoption Policy*, DETROIT NEWS (Apr. 22, 2019, 10:55 AM), <https://www.detroitnews.com/story/news/local/michigan/2019/04/22/bethany-christian-services-changes-same-sex-adoption-policy/3537404002>.

<sup>178</sup> Ruth Graham, *Major Evangelical Adoption Agency Will Now Serve Gay Parents Nationwide*, N.Y. TIMES (Mar. 1, 2021), <https://www.nytimes.com/2021/03/01/us/bethany-adoption-agency-lgbtq.html>.

<sup>179</sup> Nelson Tebbe, *Religion and Marriage Equality Statutes*, 9 HARV. L. & POL’Y REV. 25, 35 & n.37 (2015).

Kids Connection that enabled it to provide support services and refer prospective parents to adoption resources.<sup>180</sup> Additionally, even when some organizations choose to stop offering services, other organizations can (and do) step in. For example, Catholic Charities ceased doing adoption work in Massachusetts after the state determined that its refusals to place children with same-sex couples violated the state's licensing laws for adoption agencies.<sup>181</sup> But Catholic Charities's decision did not harm the state's placement numbers because other organizations were able to step in.<sup>182</sup> Similar results have been observed in other places that have imposed nondiscrimination requirements, including Philadelphia and Washington, D.C.<sup>183</sup> These experiences cast serious doubts on the claim that religious exemption laws are in children's best interests. Instead, they suggest that closure of religious child welfare organizations and a decrease in placements of children are not at all guaranteed results of removing these laws.

Contrary to religious organizations' claims, the third-party harms alleged by prospective parents and foster youth as a result of these religious exemption laws run deep. The laws force prospective parents and foster youth to bear the burdens of an organization's religious refusal. Meanwhile, the counterarguments raised by religious organizations—particularly the supposed efficiency or capacity benefits of religious exemptions—have not played out in practice. Under the third-party harms approach to the Establishment Clause, religious exemption laws for publicly funded child welfare organizations should be deemed unconstitutional.

## CONCLUSION

Religious exemption laws in the child welfare sphere such as those in Mississippi and South Dakota violate the Establishment

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<sup>180</sup> See *S.F. Diocese Teams with Adoption Agency*, L.A. TIMES (Aug. 3, 2006, 12:00 AM), <https://www.latimes.com/archives/la-xpm-2006-aug-03-me-adopt3-story.html> (noting that the program will enable the partner organization to increase the number of children they work with by easing staffing concerns).

<sup>181</sup> Tebbe, *supra* note 179, at 34–35.

<sup>182</sup> *Id.* at 35.

<sup>183</sup> See *Fulton v. City of Philadelphia*, 320 F. Supp. 3d 661, 702–03 (E.D. Pa. 2018), *aff'd*, 922 F.3d 140 (3d Cir. 2019) (noting that ending intake referrals to a Catholic agency did not increase reliance on less preferred care settings like congregate care and also that the city has previously adapted to the closure of an agency without problems by transferring responsibility for those foster children to other agencies); Julia Duin, *Catholics End D.C. Foster-Care Program*, WASH. TIMES (Feb. 18, 2010), <https://www.washingtontimes.com/news/2010/feb/18/dc-gay-marriage-law-archdiocese-end-foster-care> (noting that, when Catholic Charities in D.C. ended its foster care program due to a requirement that they work with same-sex couples, their caseload was transferred to another agency “so as not to disrupt client care”).

Clause. Belief-specific laws like Mississippi's favor certain religions and religious beliefs over others. Rather than simply toeing the line of separation between church and state, they run roughshod over it. Meanwhile, more generalized laws like South Dakota's still permit religious entities to use religious criteria to determine who should benefit from a public service and public funding. Finally, both variations of government-funded religious exclusion laws impose dignitary harms on people with different religions and religious beliefs from those of the agency. The time has come to eliminate these laws and ensure protection from religious discrimination—both for the LGBTQ community and for anyone else who holds their faith (or lack of faith) dear.