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Wolves in Sheep's Clothing: How Religious Exemption Laws for Discriminatory Private Agencies Violate the Constitution and Harm LGBTQ+ Families

Kharis Lund
klund@law.cardozo.yu.edu

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*Wolves in Sheep’s Clothing: How Religious Exemption Laws for Discriminatory Private
Agencies Violate the Constitution and Harm LGBTQ+ Families*

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INTRODUCTION

Kristy and Dana Dumont, who have been together for over a decade, seemed on paper to be the “ideal” prospective parents.¹ They had been preparing for the last several years to welcome children into their home, moving to an idyllic neighborhood in the suburbs with a spacious yard and no shortage of nature trails nearby.² They had also made sure that there was a good school district nearby and that their new house was ready for their future children.³ Despite all of their preparation and enthusiasm however, they were denied twice by tax-funded child placing agencies in their area.⁴ The reason for the denial? Their sexual orientation. The fact that they were a same-sex couple meant that they did not meet the religious criteria for either of the faith-based child placing agencies they had attempted to work with.⁵

Their story is in no way unique. Dr. Christopher Harris—a remarkably accomplished pediatric pulmonologist and the President of the Gay and Lesbian Medical Association Board—struggled to adopt for several years.⁶ He would wait months without word from faith-based child

¹ *States of Equality: Dana & Christy in MI*, FAM. EQUAL. COUNCIL (Nov. 25, 2012) <https://www.familyequality.org/stories/states-of-equality-dana-christy-in-mi/>.

² *Id.*

³ *Id.*

⁴ *Id.*

⁵ *Id.*; *Dumont v. Lyon*, 341 F. Supp. 3d 706 (E.D. Mich. 2018); As part of a settlement agreement with the Dumonts, Michigan’s Child Services Agency agreed to enforce a non-discrimination clause that would ensure that they no longer contracted with child placing agencies (CPAs) that turned away or referred to other CPAs “otherwise potentially qualified LGBTQ individual[s] or same-sex couples that may be a suitable foster or adoptive family for any child accepted by the CPA.” Stip. of Dismissal by all Pl.s, *Dumont v. Gordon*, No. 2:17-cv-13080 (E.D. Mich. Sept. 20, 2017), ECF No. 82.

Michigan is the first state to reverse course on this issue. Leslie Cooper, *Same-Sex Couples Are Being Turned Away From Becoming Foster and Adoptive Parents in Michigan. So We’re Suing.*, AM. CIV. LIBERTIES UNION (Sept. 10, 2017, 10:30 AM) <https://www.aclu.org/blog/lgbt-rights/lgbt-parenting/same-sex-couples-are-being-turned-away-becoming-foster-and-adoptive>.

⁶ *How Discrimination Against Qualified LGBTQ Parents Almost Stopped One of America’s Most Decorated Pediatric Pulmonologists from Ever Adopting His Daughter*, FAM. EQUAL. COUNCIL (Aug. 22, 2018) <https://www.familyequality.org/stories/how-discrimination-against-qualified-lgbtq-parents-almost-stopped-one-of-americas-most-decorated-pediatric-pulmonologists-from-ever-adopting-his-daughter/>.

placing agencies, only to find out that heterosexual couples in his parenting classes, who had arrived long after him, had already been placed with children.⁷

Government-funded faith-based child placing agencies—many of which still refuse to place children with LGBTQ+ couples or singles—have a long history in the United States.⁸

Faith-based agencies were some of the first child welfare organizations to emerge in the United States in the mid-nineteenth century.⁹ More recently, in the years following *Roe v. Wade*,¹⁰ a host of conservative Christian agencies have gained prominence,¹¹ with networks that span the country and the globe.¹² Some of these organizations make their policies regarding whether they place children with same-sex and/or transgender parents clear.¹³ For other faith-based organizations, the policies are less clear, and prospective parents are often unaware that they fail

⁷ Dr. Harris was eventually able to adopt his daughter Mia through an LGBTQ+ friendly agency. *Id.*

⁸ RAQUEL BERNAL ET AL., CHILD ADOPTION IN THE UNITED STATES: HISTORICAL TRENDS AND THE DETERMINANTS OF ADOPTION DEMAND AND SUPPLY, 1951-2002 4–6 (2007); Charles Loring Brace, a Protestant minister and social reformer, started—along with a group of Protestant clergymen—one of the first prominent child welfare organizations, the New York Children’s Aid Society. Ellen Herman, *Timeline of Adoption History*, DEP’T OF HISTORY, U. OF OR.: THE ADOPTION HIST. PROJECT (Feb. 2012), <https://pages.uoregon.edu/adoption/people/brace.html>. Other early faith-based child welfare organizations include the Catholic Home Bureau, the Free Synagogue Child Adoption Committee (later renamed Louise Wise Services), Catholic Charities Adoption Services, and St. Dominic’s Family Services. *Id.* See also *Adoption Services*, Catholic Charities Archdiocese of New York (Feb. 2020) <https://catholiccharitiesny.org/general-category/adoption-services>.

⁹ *Id.*

¹⁰ Following *Roe v. Wade*, the seminal Supreme Court case that made abortion legal in the United States, conservative Christian organizations and churches started a movement surrounding Christian adoption, encouraging their congregations to adopt as another method to curb abortions. Kathryn Joyce, *Shotgun Adoption*, THE NATION (Aug. 26, 2009), <https://www.thenation.com/article/archive/shotgun-adoption/>. See also *Roe v. Wade*, 410 U.S. 113, 93 S. Ct. 705 (1973).

¹¹ Bethany Christian Services, Catholic Charities, and Focus on the Family are among some of the most prominent conservative Christian organizations that have extensive foster care and adoption networks in the United States. See *Locations by State*, BETHANY CHRISTIAN SERV., <https://bethany.org/locations/us> (last visited Apr. 17, 2020); *Find Help*, CATH. CHARITIES USA, <https://www.catholiccharitiesusa.org/find-help/> (last visited Apr. 16, 2020); *Wait No More: Focus on the Family’s Foster Care and Adoption Program*, FOCUS ON THE FAM.: WAIT NO MORE (2010), <https://www.focusonthefamily.com/family-qa/wait-no-more-focus-on-the-familys-foster-care-and-adoption-program/>.

¹² *Id.* See also HOLT INT’L, <https://www.holtinternational.org/adoption/adoption-meeting.php> (last visited Apr. 24, 2020).

¹³ Focus on the Family is very clear about their views on marriage; they state explicitly that their view is that marriage is only between one man and one woman. *Our Vision*, FOCUS ON THE FAM., <https://www.focusonthefamily.com/about/foundational-values/> (last visited Apr. 24, 2020).

to meet the agency's religious criteria until after they have expended significant time trying to work with the organization.¹⁴

This lack of transparency leaves LGBTQ+ parents with few options, especially for those who live in states where a select few private agencies control the placement of a majority of the state's children.¹⁵ Since states often contract with faith-based private child welfare agencies to provide foster care and adoption services, the distinction between public and private action has become blurred.¹⁶

This is all particularly concerning given that LGBTQ+ people are seven times more likely to foster or adopt than their cisgender, straight counterparts.¹⁷ With over 430,000 children currently in foster care¹⁸ and 114,000 children waiting to be adopted,¹⁹ more loving and capable parents are needed.²⁰ To turn away otherwise qualified prospective parents solely based on their

¹⁴ Bethany Christian Services and St. Vincent Catholic Charities were less obvious about their policies, and as a result of turning away multiple same-sex couples, the state of Michigan was sued by those couples. Vanessa Romo, *State-Funded Adoption Agencies In Michigan Barred From Refusing LGBTQ Parents*, NPR (7:39 PM, Mar. 22, 2019), <https://www.npr.org/2019/03/22/706049119/state-funded-adoption-agencies-in-michigan-barred-from-refusing-lgbtq-parents>. Catholic Charities also does not say on their website that they do not certify LGBTQ+ prospective parents. CATHOLIC CHARITIES USA, <https://www.catholiccharitiesusa.org/> (last visited Apr. 5, 2020).

¹⁵ In 2003, Child Protective Services of Texas contracted with private agencies to care for almost 75% of the children in foster care. Policy Brief, *Privatization of Child Protective Services*, CENTER FOR PUBLIC POLICY PRIORITIES (Mar. 2005), http://library.cppp.org/files/4/privatization_pb.pdf. By 2017, with a spike in child death rates as a result of abuse, the Texas Legislature passed Senate Bill 11, which privatized its child welfare services entirely. Katy Vine, *As Texas Privatizes Child Protective Services, Will the Horror Stories Go Unheard?*, Tex. Monthly (Mar. 6, 2019), <https://www.texasmonthly.com/news/texas-privatizes-child-protective-services-will-horror-stories-go-unheard/>. The bill, which allowed private contracted organizations to monitor children in foster care and adoptive homes, also included an amendment allowing the governor's office to establish a grant for faith-based groups helping in the child welfare system. Marissa Evans, *Texas House passes child welfare reforms* (May 18, 2017), <https://www.texastribune.org/2017/05/18/Texas-House-passes-child-welfare-reforms/>.

¹⁶ Jessica Troisi Franey, *Dependency is Different: Why Religious Accommodations in Agency Adoptions Violate the Constitutional Rights of Same-Sex Families and Foster Youth*, 16 DUKEMINIER AWARDS 1, 3 (2017).

¹⁷ *Id.*

¹⁸ *The AFCARS Report*, U.S. DEP'T OF HEALTH AND HUMAN SERV., ADMIN. FOR CHILD. AND FAM., CHILDREN'S BUREAU (Aug. 22, 2019) <https://www.acf.hhs.gov/sites/default/files/cb/afcarsreport26.pdf>

¹⁹ Derrick Bryson Taylor, *Adoption Groups Could Turn Away L.G.B.T. Families Under Proposed Rule*, N.Y. TIMES (Nov. 2, 2019) <https://www.nytimes.com/2019/11/02/us/trump-hhs-lgbtq-rule.html>.

²⁰ Dr. John DeGarmo, *The Foster Care Crisis: The Shortage Of Foster Parents In America*, Huffington Post (8:54 AM, May 1, 2017), https://www.huffingtonpost.com/entry/the-foster-care-crisis-the-shortage-of-foster-parents_us_59072dcfe4b05279d4edb9.

sexual orientation or gender identity is to further deprive a system that is already burdened of one of its key components, directly antithetical to the primary goal of the child welfare system.²¹

Additionally, often forgotten from these debates are the actual children in foster care and those awaiting adoption, many of whom identify as LGBTQ+ themselves.²² These children and youth are particularly vulnerable, and placing them with loving families who will affirm their identities is crucial to their mental health and well-being.²³ Furthermore, LGBTQ+ people are more likely to foster and/or adopt children deemed “hard to place,”²⁴ which include children with severe disabilities, older children, and children who are ethnic minorities.²⁵

While there is no doubt that faith-based organizations often do fill a gap in child welfare services and perform crucial functions for the community,²⁶ using taxpayer dollars to fund such organizations when they discriminate presents not just ethical questions, but grave constitutional ones as well. In examining both the caselaw and policy implications related to LGBTQ+ parenting in the United States, the government should refuse to allow faith-based exemptions for organizations that wish to engage in discrimination against same-sex couples and/or transgender couples in child welfare services, recognizing that such discrimination in child welfare based on sexual orientation and/or gender identity is both a violation of the Fourteenth Amendment’s Equal Protection Clause and the First Amendment’s Establishment Clause.²⁷ Not only does

²¹ Allison M. Whelan, *Denying Tax-Exempt Status to Discriminatory Private Adoption Agencies*, 8 U.C. IRVINE L. REV. 711, 754; *National Goals*, CHILD AND FAMILY SERVICES REVIEWS, <https://training.cfsrportal.acf.hhs.gov/section-2-understanding-child-welfare-system/2988> (last visited Apr. 23, 2020).

²² Jordan Blair Woods, *Religious Exemptions and LGBTQ Child Welfare*, 103 Minn. L. Rev. 2343, 2402 (2019).

²³ Children’s Bureau, *Supporting Your LGBTQ Youth: A Guide for Foster Parents*, CHILD WELFARE INFO. GATEWAY FACTSHEET FOR FAM. (May 2013), <https://www.childwelfare.gov/pubPDFs/LGBTQyouth.pdf>.

²⁴ Maryland Family Policy Impact Seminar, *State Gay Adoption Laws and Permanency for Foster Youth* (May 2006), <https://sph.umd.edu/sites/default/files/files/GayadoptionbriefFINAL0806.pdf>.

²⁵ *Id.*

²⁶ Children’s Bureau, *Community Partnerships: Improving the Response to Child Maltreatment*, CHILD ABUSE AND NEGLECT USER MANUAL SERIES 8, 13 (2010), <https://www.childwelfare.gov/pubPDFs/partners.pdf>.

²⁷ *See* U.S. Const., amend. XIV, § 1; U.S. Const., amend. I.

discriminating against otherwise qualified LGBTQ+ parents have no rational relationship to a legitimate governmental objective,²⁸ it actually undermines the government’s stated interest in providing for the safety and well-being of the children in their care.²⁹ Furthermore, discriminatory faith-based organizations who are contracted to perform a government function and receive government funds also violate the Establishment Clause, which mandates separation of church and state and bars states from stipulating religious criteria as a prerequisite to receiving services.³⁰

This essay advances a critique to challenge the constitutionality of religious-based exemptions in the context of child welfare agencies, contextualized through case law and legislation that have laid the groundwork for the current LGBTQ+ parenting landscape in the United States. In examining important case law for LGBTQ+ parenting rights in the nation, this essay also attempts to frame the critical constitutional questions at issue here in light of *Fulton v. Philadelphia*, a case currently on the Supreme Court’s docket that will address whether or not city agencies may stop contracting with private child welfare services when those services have policies of turning away same-sex couples.³¹

This essay proceeds in three parts. Part I begins with a background on the brief history of LGBTQ+ fostering and adoption laws in the United States, focusing on a few major cases that

²⁸ The stated mission of the Children’s Bureau is to provide for the health and well-being of the nation’s children. *About, CHILD. BUREAU*, <https://www.acf.hhs.gov/cb/about> (last visited April 15, 2020). Discriminating against LGBTQ+ parents does not further this goal, especially when LGBTQ+ youth who are in need of affirming families are overrepresented in foster care. *LGBTQ Youth in the Foster Care System*, Human Rights Campaign <https://www.hrc.org/resources/lgbt-youth-in-the-foster-care-system> (last visited April 13, 2020).

²⁹ The rational basis test states that legislation is generally presumed valid and constitutional if the “classification drawn by the statute is rationally related to a legitimate state interest.” *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 440 (1985). In this case, allowing exemptions for agencies that discriminate against LGBTQ+ in child welfare is not rationally related to the stated government purpose of doing what is in “the best interests of the child.” *Determining the Best Interests of the Child*, CHILD. BUREAU (Mar. 2016), https://www.childwelfare.gov/pubPDFs/best_interest.pdf.

³⁰ The Establishment Clause states that “Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof” U.S. Const., amend. I.

³¹ *Fulton v. City of Phila.*, 140 S. Ct. 1104 (2020); *see also* *Fulton v. City of Phila.*, 922 F.3d 140 (3d Cir. 2019).

have grounded those laws both on the state and the federal level. Part II will discuss the merits of the arguments in *Fulton v. Philadelphia*, focused specifically on expanding on the constitutional arguments in favor of denying religious exemptions to faith-based and government-contracted organizations that discriminate against LGBTQ+ parents. Finally, Part III of this essay will look at the Department of Health and Human Services' (the Department) 2019 proposed rule to eliminate existing non-discrimination protections for LGBTQ+ individuals in all federal grants administered by the Department,³² highlighting the work that is yet to be done in providing real protections to LGBTQ+ prospective parents.

I. BACKGROUND

The first laws restricting LGBTQ+ parents' rights to foster and adopt in the United States started to gain prominence as both the LGBTQ+ civil rights movement and the conservative pro-adoption/anti-abortion movement were pushed to the center of the nation's collective consciousness.³³ Before the 1960s and 70s, LGBTQ+ people were rarely discussed in the public sphere, and while it was nearly impossible for LGBTQ+ parents to adopt children without great difficulty, few states had laws explicitly banning or limiting LGBTQ+ parents' ability to adopt.³⁴

³² Stephanie Armour & Michelle Hackman, *Trump Administration Stops Enforcing Some Nondiscrimination Provisions in Federal Grants*, WALL ST. J. (5:30 PM, Nov. 1, 2019), <https://www.wsj.com/articles/trump-administration-stops-enforcing-some-nondiscrimination-provisions-in-federal-grants-11572632036>.

³³ See Gary J. Gates et al., *Adoption and Foster Care by Gay and Lesbian Parents in the United States*, THE WILLIAMS INST. (Mar. 2007) <https://www.urban.org/sites/default/files/publication/46401/411437-Adoption-and-Foster-Care-by-Lesbian-and-Gay-Parents-in-the-United-States.PDF>; see also Kathryn Joyce, *Shotgun Adoption*, THE NATION. (Aug. 26, 2009), <https://www.thenation.com/article/archive/shotgun-adoption/>. The pro-adoption movement sprung out of the anti-adoption movement as a tangible way for crisis pregnancy centers and faith-based child welfare services to both prevent abortions and promote traditional family structures. *Id.*

³⁴ See What to Know About the History of Same-Sex Adoption, CONSIDERING ADOPTION, <https://consideringadoption.com/adopting/can-same-sex-couples-adopt/history-of-same-sex-adoption> (last visited Apr. 2, 2020); see also Dana Rudolph, *Custody and Adoption*, FAM. EQUAL. COUNCIL (Oct. 20, 2017), <https://www.familyequality.org/2017/10/20/a-very-brief-history-of-lgbtq-parenting/>.

A. The History of a Florida Statute Banning Same-Sex Adoption

In 1977, the Florida State Legislature enacted Fla. Stat. § 63.042(3), which provided that “[n]o person eligible to adopt under this statute may adopt if that person is a homosexual.”³⁵ This law, which remained in place for over three decades after its enactment, was consistently upheld even into the early 2000s.³⁶ In fact, in 2004, when several same-sex parents and the children they had been fostering in the state sued, alleging that the law violated their fundamental rights and equal protection by not allowing them to adopt, the Eleventh Circuit rejected their claim.³⁷ The court in *Lofton* refused appellants’ invitation to recognize a new fundamental right to family integrity for groups of individuals who had formed deeply loving emotional bonds, stating that “[h]istorically, the Court’s family- and parental-rights holdings have involved biological families.”³⁸ Furthermore, the court stated that the recent Supreme Court decision in *Lawrence v. Texas*³⁹ could not be inferred to create a fundamental right to adopt for “homosexual persons,” since the context here was different than in *Lawrence*.⁴⁰ With regards to the Equal Protection challenge, the court accepted as plausible Florida’s arguments that the statute rationally related to the state’s interests in furthering “the best interests” of adopted children by placing them in families with a married mother and a father for stability and “heterosexual role-modeling.”⁴¹

³⁵ This law remained in place until it was officially amended in 2011. Fla. Stat. § 63.042(3) (McKinney 2020).

³⁶ Between 1977 and 2010, both State and Federal Courts continued to uphold the ban. *See, e.g.,* *Lofton v. Sec’y of Dep’t of Children and Family Servs.*, 358 F.3d 804 (11th Cir. 2004).

³⁷ *Lofton*, 358 F.3d at 807.

³⁸ *Lofton*, 358 F.3d at 812.

³⁹ *Lawrence v. Texas*, 539 U.S. 558 (2003) invalidated a long-standing Texas sodomy law that criminalized “deviate sexual intercourse,” holding that criminalizing private same-sex sexual acts was a violation of the Fourteenth Amendment’s Equal Protection Clause and the Fifth Amendment’s Due Process Clause. *Id.* at 563.

⁴⁰ According to the court, because *Lofton* involved minor children and a statutory right, in contrast to *Lawrence*, which involved a criminal prohibition and consenting adults, it could not be inferred from *Lawrence* that a fundamental right for LGBTQ+ parents to adopt existed. *Lofton*, 358 F.3d at 815.

⁴¹ *Id.* at 818–820.

It was not until *Fla. Dep't of Children & Families v. X.X.G.* in September 2010 that the statute was deemed unconstitutional by the Florida Court of Appeals.⁴² In 2015, Governor Rick Scott signed into law a bill to formally repeal the ban on LGBTQ+ adoption in Florida, making Florida the last state to officially overturn a ban on adoption by gay men and lesbians.⁴³

B. “The Best Interests of the Child,” *Obergefell*, and the Rise of Religious Exemptions

While fear-based language similar to that employed in *Lofton* has been commonly utilized in decisions to legitimize discrimination against LGBTQ+ parents in custody proceedings since as far back as the 1950s,⁴⁴ *Lofton* remains one of only a handful of federal appellate adoption cases about LGBTQ+ parents’ rights to adopt.⁴⁵ Nevertheless, amorphous and arbitrary language about “the best interests of the child”⁴⁶—which has historically been fraught with anti-LGBTQ+ bias despite evidence that the LGBTQ+ identity of the parents has no impact on the stability of the home or the child’s sexual orientation or gender identity⁴⁷—continues to pervade the child welfare landscape and the vast majority of court opinions on adoption and foster care.⁴⁸

⁴² The court held that the best interests of the children were not preserved by banning same-sex adoption, and also stated that the record did not support the Department’s contention that LGBTQ+ people should be barred from adopting because their homes may have been less stable and more prone to domestic violence. *Fla. Dep’t of Children & Families v. X.X.G.*, 45 So. 3d 79 (Fla. Dist. Ct. App. 2010).

⁴³ WILLIAM N. ESKRIDGE JR. ET AL., *SEXUALITY, GENDER AND THE LAW* 882 (Robert C. Clark et al. eds., 4th ed. 2018).

⁴⁴ During early lesbian and gay custody disputes, many courts applied *per se* rules that either categorically discriminated against LGB parents or stated that homosexuality automatically disqualified a parent from custody. *See, e.g.*, *Bennett v. Clemons*, 196 S.E.2d 842 (1973); *Immerman v. Immerman*, 176 Cal.App.2d 122 (1959); *Commonwealth v. Bradley*, 91 A.2d 379 (1952).

⁴⁵ Adoption proceedings in general generate much less appellate litigation than custody proceedings, since most are resolved internally through an agency or with a department of social services. ESKRIDGE JR., *supra* note 43, at 878.

⁴⁶ This is the standard by which courts generally make decisions about children. Determining the Best Interests of the Child, CHILD. BUREAU (Mar. 2016), https://www.childwelfare.gov/pubPDFs/best_interest.pdf.

⁴⁷ Scott D. Ryan & Scottye Cash, *Adoptive Families Headed by Gay or Lesbian Parents: A Threat ... Or Hidden Resource?*, 15 U. Fla. J.L. & Pub. Pol’y 443, 446–51 (2004); *see also* LESLIE COOPER & PAUL CATES, *TOP HIGH A PRICE: THE CASE AGAINST RESTRICTING GAY PARENTING* 25–73 (Am. Civ. Liberties Union, 2nd ed. 2006).

⁴⁸ When courts moved away from explicit anti-LGBTQ+ decisions towards those that focused on “the best interests of the child,” they often relied on a range of harmful stereotypes about LGBTQ+ people, including that sick gay

One illustration of the way in which “the best interests of the child” framework was used to delegitimize LGBTQ+ parents was through Amendment § 78-30-9(3)(a) of the Utah Code. On March 14, 2000, Utah amended its child welfare law relating to “Decree of adoption—Best interest of child” to explicitly require prospective parents to be in a “binding marriage under the laws of this state” as a prerequisite to be eligible to foster or adopt.⁴⁹ Since marriage equality had not yet reached Utah in 2000, the primary purpose of this legislation was to keep LGB people who lived with their partners from being able to adopt or foster.⁵⁰

Following Florida’s amendment in 1977,⁵¹ and prior to Utah’s amendment in 2000, other states enacted or introduced similar amendments explicitly banning LGB parents from fostering or adopting.⁵² New Hampshire serves as one such example; it amended its adoption statute in 1987 to provide that, “any individual not a minor and not a homosexual may adopt.”⁵³

In addition to amendments explicitly banning LGB adoption made in the supposed “best interests of the child,” anti-sodomy statutes were also used in an attempt to deny LGBTQ+ prospective parents the opportunity to adopt or foster.⁵⁴ *Johnston v. Missouri Dep’t of Soc. Servs.* is a glaringly recent case from 2006 and an instance where “the best interests of the child” argument was utilized in conjunction with an anti-sodomy law to attempt to discriminate against

parents might infect their children with HIV, that having gay parents might influence the children to become gay, that the children of gay or transgender parents would face an increased amount of shame and stigma, and that unmarried gay parents were not as good role-models as straight married mothers and fathers. See ESKRIDGE JR., *supra* note 4343, at 878; See also Lofton, 358 F.3d at 818–819 (11th Cir. 2004).

⁴⁹ Utah Code Ann. § 78-30-9(3)(a) (2000) (repealed).

⁵⁰ News reports from the time stated specifically that the purpose of the legislation was to forbid LGB adoptions. ESKRIDGE JR., *supra* note 43, at 882.

⁵¹ See *Supra*, Part I, A.

⁵² Alabama, South Carolina, Michigan, New Hampshire, Texas, Indiana, Arkansas, and Oklahoma all either enacted or proposed bills that would prohibit LGB people from adopting. HJ Langemak, *The “Best Interest of the Child”: Is a Categorical Ban on Homosexual Adoption an Appropriate Means to This End?*, 83 MARQ. L. REV. 825, 830–32 (2000).

⁵³ N.H. REV. STAT. ANN. § 170-B:4 (1987).

⁵⁴ Mo. Ann. Stat. § 566.090 (West) (prior version held unconstitutional by *Johnston v. Missouri Dep’t of Soc. Servs.*, No. 0516-CV09517, 2006 WL 6903173 (Mo. Cir. Ct. Feb. 17, 2006)).

LGBTQ+ prospective parents.⁵⁵ This case tells the story of Lisa Johnston, a woman who sued the Children’s Division of Missouri Department of Social Services (DDS) after they denied her application for a Missouri foster care license, conceding that had she not been a lesbian (and therefore a presumptive violator of the state sodomy law), she and her partner would have made exemplary prospective foster parents.⁵⁶ The director of DDS had affirmed the agency’s denial, noting that the agency’s policy required it to consider “first and foremost the best interests of the child to be fostered,” and that it was not in the best interests of a foster child to be placed with lesbian parents.⁵⁷ The court ultimately held that the agency’s finding that Johnston lacked the “reputable character” required to be a foster care parent was unsupported by the evidence in the administrative record.⁵⁸ The court further stated that the director had erroneously based his determination that Johnston lacked “reputable character” solely on the Missouri sodomy statute, which was in violation of The Supreme Court’s decision in *Lawrence v. Texas*.⁵⁹

Beginning in the early- and mid-2000s, states finally began to drop their outright bans on LGBTQ+ fostering and adopting,⁶⁰ culminating in 2015 with the seminal marriage equality case *Obergefell v. Hodges* that explicitly stated that one of the benefits of marriage involved the

⁵⁵ *Johnston*, 2006 WL 6903173 (Mo. Cir. Ct. Feb. 17, 2006).

⁵⁶ ESKRIDGE JR., *supra* note 43, at 885; *Johnston*, 2006 WL 6903173 (Mo. Cir. Ct. Feb. 17, 2006).

⁵⁷ *Johnston*, 2006 WL 6903173, at *3.

⁵⁸ The agency had originally denied Ms. Johnston the foster care license because of their conclusion that she “was not a person of reputable character,” as required by law in Missouri in order to foster. However, it was soon made clear that this determination was based solely on Ms. Johnston’s sexual orientation. *Id.* at *4.

⁵⁹ The Missouri State Sodomy Law, Mo. Ann. Stat. § 566.090, made it a misdemeanor for a person to have sexual intercourse with another person of the same sex. Mo. Ann. Stat. § 566.090 (West) (prior version held unconstitutional by *Johnston*, 2006 WL 6903173 (Mo. Cir. Ct. Feb. 17, 2006)). The court here held that this was contrary to *Lawrence v. Texas*, which had struck down a similar sodomy law in Texas for being a violation of due process. *Johnston*, 2006 WL 6903173, at *3.

⁶⁰ New Hampshire’s adoption statute was amended again to remove the prohibition on LGB adoption and foster parenting in 1999. H.R. 90, 156th Sess. (N.H. 1999) (enacted).

ability to adopt children.⁶¹ In a post *Obergefell* world, all fifty states now allow adoption by married LGBTQ+ parents.⁶²

Although *Obergefell* certainly changed the landscape for married LGBTQ+ prospective parents, since many adoption laws required marriage as a prerequisite for joint adoption,⁶³ Justice Kennedy's opinion had nothing to say about unmarried couples or single people.⁶⁴ It also failed to mention whether or not private organizations could discriminate against same-sex or transgender couples in adoption services.⁶⁵ Moreover, in what some have described as a backlash to the arguably extensive reach of *Obergefell*, a number of states have since enacted laws that carve out exemptions that allow faith-based, government-funded child welfare agencies to refuse to place children with LGBTQ+ people.⁶⁶

According to the Movement Advancement Project, eleven states now permit state-licensed child welfare agencies to refuse to place children with LGBTQ+ foster parents, if doing so would conflict with their sincerely-held religious beliefs.⁶⁷ For LGBTQ+ prospective parents, fostering and adopting has become that much more difficult, particularly since many of these eleven states have either partially or completely privatized their child welfare systems.⁶⁸ The

⁶¹ *Obergefell v. Hodges*, 135 S. Ct. 2584, 2600–01 (2015).

⁶² Dana Rudolph, *Custody and Adoption*, FAM. EQUAL. COUNCIL (Oct. 20, 2017), <https://www.familyequality.org/2017/10/20/a-very-brief-history-of-lgbtq-parenting/>.

⁶³ *Adoption and Same-Sex Couples: Overview*, THOMSON REUTERS: FINDLAW (Nov. 16, 2018), <https://family.findlaw.com/adoption/adoption-and-same-sex-couples-basics.html>; Michael S. Wald, *Obergefell: A Victory for Children*, STAN. LAW BLOG (June 26, 2015), <https://law.stanford.edu/2015/06/26/obergefell-a-victory-for-children/>.

⁶⁴ *Adoption and Same-Sex Couples: Overview*, THOMSON REUTERS: FINDLAW (Nov. 16, 2018), <https://family.findlaw.com/adoption/adoption-and-same-sex-couples-basics.html>; see *Obergefell v. Hodges*, 135 S. Ct. 2584, 2600–01 (2015).

⁶⁵ *Adoption and Same-Sex Couples: Overview*, THOMSON REUTERS: FINDLAW (Nov. 16, 2018), <https://family.findlaw.com/adoption/adoption-and-same-sex-couples-basics.html>.

⁶⁶ Ian Simpson, *Kansas lawmakers pass adoption bill critics say biased against gay couples*, THOMPSON REUTERS (12:46 PM, May 4, 2018), <https://www.reuters.com/article/us-kansas-adoption/kansas-lawmakers-pass-adoption-bill-critics-say-biased-against-gay-couples-idUSKBN1I524F>.

⁶⁷ *Equality Maps: Religious Exemption Laws*, MOVEMENT ADVANCEMENT PROJECT, https://www.lgbtmap.org/equality-maps/religious_exemption_laws (last visited April 1, 2020).

⁶⁸ See *Privatization of Child Welfare Services: Challenges and Successes Executive Summary*, CHILD. RIGHTS, http://www.childrensrights.org/wp-content/uploads/2008/06/privatization_of_child_welfare_services_exec_sum.pdf

result is a fierce clash, on one side of which are those who argue that exemptions for faith based agencies is an important aspect of religious liberty.⁶⁹ On the other side of this divide, there are those who argue that providing exemptions for agencies that discriminate is a potent violation of both the Equal Protection Clause and the Establishment Clause.⁷⁰ As a result of this clash, litigation about the limits of free speech and religious liberty in child welfare services has increased exponentially in the few years since *Obergefell*.⁷¹

II. ANALYZING FULTON V. PHILADELPHIA

One example of this type of litigation, where the clash about the limits of free speech and free exercise is extraordinarily evident, is *Fulton v. Philadelphia*, a case which is currently pending before the United States Supreme Court on appeal.⁷² The central issue in *Fulton* is whether Catholic Social Services (CSS)—a faith-based agency that contracts with the city but has a policy that denies their publicly-funded services to married same-sex couples—is entitled to a preliminary injunction on its First Amendment Free Exercise claim.⁷³ The preliminary

(last visited Apr. 4, 2020); see also Children’s Bureau, *Frequently Asked Questions From Lesbian, Gay, Bisexual, Transgender, and Questioning LGBTQ Prospective Foster and Adoptive Parents*, CHILD WELFARE INFO. GATEWAY FACTSHEET FOR FAM. (Sept. 2016), https://www.childwelfare.gov/pubPDFs/faq_lgbt.pdf#page=4&view=Q:%20What%20do%20I%20do%20if%20I%20think%20an%20agency%20is%20discriminating%20or%20being%20unfair?.

⁶⁹ See Brad Polumbo, *Protecting Religious Adoption Agencies Won’t Stop LGBT People from Adopting*, NAT. REV. (6:30 AM, Jul 31, 2018) <https://www.nationalreview.com/2018/07/protecting-faith-based-adoption-agencies-will-not-stop-lgbt-people-from-adopting/>; see also Ryan Colby, *Supreme Court will decide fate of faith-based foster care*, BECKET FUND FOR RELIGIOUS LIBERTY (Feb. 24, 2020), <https://www.becketlaw.org/media/supreme-court-will-decide-fate-faith-based-foster-care/>.

⁷⁰ See Sean Cahill et al., *Executive branch actions promoting religious refusal threaten LGBT health care access*, THE FENWAY INSTITUTE 1, 12–13 (2016), <https://fenwayhealth.org/wp-content/uploads/The-Fenway-Institute-Religious-Refusal-Laws-Policy-Brief.pdf>; see also Franey, *supra* note 16, at 33–36.

⁷¹ Mark Rienzi, *Symposium: The calm before the storm for religious-liberty cases?*, SCOTUSBLOG (10:42 AM, Jul. 26, 2019), <https://www.scotusblog.com/2019/07/symposium-the-calm-before-the-storm-for-religious-liberty-cases/>.

⁷² *Fulton v. City of Phila.*, 140 S. Ct. 1104 (2020).

⁷³ *Fulton v. City of Phila.*, 922 F.3d 140 (3d Cir. 2019).

injunction challenges Philadelphia's termination of foster referrals to the agency in accordance with the City's non-discrimination policy.⁷⁴

A. *Fulton's* Facts and Procedural Posture

The suit originated when *Philadelphia Inquirer* reporter called the Department of Human Services (DHS) Commissioner Figueroa to state that the newspaper was working on an article about how two publicly-funded foster care agencies, CSS and Bethany Christian Services, would not work with same-sex couples as foster parents.⁷⁵ Subsequently, Figueroa contacted both Bethany Christian Services and CSS, along with several other faith-based foster care agencies and one secular agency that contracted with the City, to determine what these agencies' policies were regarding LGBTQ+ couples.⁷⁶ CSS and Bethany confirmed that they have policies to deny foster care certification to married same-sex couples.⁷⁷ None of the other organizations that Figueroa contacted had such policies discriminating against LGBTQ+ couples.⁷⁸

Figueroa met unsuccessfully with CSS to attempt to resolve the dispute, but ultimately, CSS maintained that in accordance to their religious beliefs, they would continue to not certify same-sex married couples.⁷⁹ Shortly after the meeting, CSS received notice that DHS would no longer be referring new children to their agency, instituting an "intake freeze."⁸⁰

At the district court level, the case ultimately turned on two questions. The threshold question, whether CSS's provision of services met the definition of public accommodations

⁷⁴ *Id.*

⁷⁵ *Fulton*, 922 F.3d at 148.

⁷⁶ *Fulton v. City of Phila.*, 320 F. Supp. 3d 661, 672 (E.D. Pa. 2018).

⁷⁷ *Fulton*, 922 F.3d at 148. CSS also noted that it would not certify or provide home studies to LGBTQ+ individuals unless they vowed to live single. *Fulton*, 320 F. Supp. 3d at 672 (E.D. Pa. 2018).

⁷⁸ *Fulton*, 922 F.3d at 148 (3d Cir. 2019).

⁷⁹ *Id.*

⁸⁰ *Id.* at 149. So-called "intake freezes" have been instituted by the DHS before when they have serious concerns that they may have to stop working with an agency. *Id.*

according to Philadelphia’s Fair Practices Ordinance (this was primarily a disagreement about contract interpretation), was dispensed with quickly.⁸¹

B. Constitutional Issues

The second question that the case turned on, and ultimately the question that survives on appeal, is whether CSS may nevertheless disregard the non-discrimination provisions of the Fair Practices Ordinance under a theory that forcing it to comply is a violation of both the Free Exercise Clause and the Establishment Clause.⁸² CSS first argues, in an attempt to have the court subject the Defendants’ actions to strict scrutiny, that the City and DHS have targeted them “purely based on its religious beliefs.”⁸³ However, both lower courts found that there was no evidence in the record that showed that DHS or the City had unfairly targeted CSS.⁸⁴ In fact, the record seemed to suggest that DHS had actually worked to try and keep their relationship with CSS, and on a case-by-case basis, had continued to work with CSS to relocate children to CSS foster families when it was in the child’s best interests, despite the “intake freeze.”⁸⁵ Although the record did show that there was some religiously-tinged language used by Figueroa in her meeting with CSS,⁸⁶ CSS’ argument that this is evidence of targeting based on religious belief is unlikely to sway the High Court. Looked at in context, the language Figueroa used—while no

⁸¹ *Fulton*, 320 F. Supp. 3d at 679.

⁸² *Id.* The Free Exercise Clause of the First Amendment states that “Congress shall make no law . . . prohibiting the free exercise [of religion].” U.S. Const. amend. I. This applies to states through the Fourteenth Amendment Due Process Clause. *Fulton*, 320 F. Supp. 3d at 680.

⁸³ *Fulton*, 320 F. Supp. 3d at 687.

⁸⁴ *See id.*; *see also* *Fulton*, 922 F.3d at 164 (3d Cir. 2019). *Compare with* *Masterpiece Cakeshop, Ltd. v. Colo. Civil Rights Comm’n*, 138 S. Ct. 1719 (2018).

⁸⁵ *Fulton*, 922 F.3d at 141–51.

⁸⁶ *Id.* at 157 (3d Cir. 2019).

doubt religious—was arguably simply an attempt to find some common ground and a solution to their impasse.⁸⁷

CSS also claimed as part of their Free Exercise challenge that because Figueroa called mostly faith-based agencies to determine what their policies were on serving same-sex couples, that the laws were not applied with neutrality.⁸⁸ However, Figueroa had only been tipped off that two agencies—CSS and Bethany—refused to work with same-sex couples, and they did so for religious reasons.⁸⁹ The Third Circuit reasoned that it made sense she would then primarily call religious organizations that contracted with the City, since she had little reason to think nonreligious agencies would similarly discriminate.⁹⁰ As an additional bulwark to the City’s argument that they applied their anti-discrimination laws neutrally, Figueroa also called a non-faith based agency to check their policy regarding same-sex couples.⁹¹ Ultimately, the Third Circuit noted that while sincerely-held religious belief is always protected, conduct motivated by those religious beliefs is not entitled to special protections or exemptions from “general, neutrally applied legal requirements.”⁹²

CSS’s second constitutional argument is that their First Amendment Rights under the Establishment Clause were violated by the City’s actions.⁹³ As evidence of discriminatory treatment because of its Catholic religious values, CSS primarily pointed to Figueroa’s statement

⁸⁷ Figueroa herself is Catholic, and the court stated that her comment about Pope Francis was an attempt at finding common ground through their shared religious tradition. *Id.*

⁸⁸ *Id.*

⁸⁹ *Id.*

⁹⁰ *Id.*

⁹¹ *Id.*

⁹² *Id.* at 159.

⁹³ *Id.* at 159–60. The Establishment Clause of the First Amendment states that “Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.” U.S. Const., amend. I.

that “it would be great if we could follow the teachings of Pope Francis.”⁹⁴ The Third Circuit did not seem to think much of this argument, noting that CSS was not the only organization that had had their foster care intake frozen; Bethany Christian Services, a non-Catholic faith-based agency, also had their foster care intake frozen because they maintained their religious opposition to certifying same-sex married couples.⁹⁵

While the Third Circuit’s ruling in the case may appear straight forward, with a conservative Supreme Court that has in recent years been friendly to those who file constitutional challenges with the aim of “protecting” religious liberty, it remains to be seen whether this decision will be an affirmation that religious beliefs do not entitle faith-based child welfare organizations to special exemptions or whether it will be a gross misapplication of First Amendment religious liberty protections.

C. Exemptions for Faith-Based Agencies Violate Equal Protection and the Establishment Clause

The central mandate of Equal Protection under a rational nexus test is that “the sovereign may not draw distinctions between individuals based solely on differences that are irrelevant to a legitimate governmental objective.”⁹⁶ For LGBTQ+ individuals, this mandate suggests that unless there is posed a legitimate and plausible governmental objective for differentiating between LGBTQ+ prospective parents and non-LGBTQ+ prospective parents, the state may not treat LGBTQ+ individuals differently in public child welfare services. While the issue may not appear quite so simple when applied to private faith-based agencies that contract with the

⁹⁴ *Fulton*, 922 F.3d at 159–60.

⁹⁵ *Id.* at 160.

⁹⁶ *Lehr v. Robertson*, 463 U.S. 248, 265 (1983).

government and receive public funds, *Fulton* itself suggested that Philadelphia and DHS were aware of the likelihood of such a constitutional challenge from same-sex married couples.⁹⁷

One of the biggest initial hurdles of an Equal Protection challenge in this context is establishing that faith-based and publicly-funded agencies that contract with the state to provide child welfare services are actually considered “state actors.”⁹⁸ The First Circuit is instructive here, as it has articulated that in some cases, “private actors may align themselves so closely with either state action or state actors,” that they may be properly pulled into the term.⁹⁹ In the context of faith-based child welfare services, performance of a crucial government function in close tandem with state government ensures that these agencies are no longer purely private.¹⁰⁰

Importantly, in some states (i.e. Florida, Kansas, and Texas), there has been total statewide privatization of all child welfare case management services.¹⁰¹ In these cases, private agencies have completely assumed the role of the state in child welfare, and LGBTQ+ prospective parents have no choice but to work with a private agency.¹⁰² In other states, private agencies also have positions on the boards of state-mandated child welfare advisory committees, with widespread decision-making power.¹⁰³

Despite this indication that faith-based child welfare agencies may sometimes function as the state and perform tasks traditionally reserved to the state, the three main tests that Circuits

⁹⁷ The district court in *Fulton* stated that DHS and Philadelphia have an interest in avoiding possible Equal Protection and Establishment Clause claims that would result if CSS and other faith-based government contractors were allowed exemptions to the public accommodations/anti-discrimination laws in the Fair Practices Ordinance. *Fulton*, 320 F. Supp. 3d at 704.

⁹⁸ Edward Queen, *History, Hysteria, and Hype: Government Contracting with Faith-Based Social Service Agencies*, 8 RELIGIONS 22, 34 (2017); see also Franey, *supra* note 16, at 27–34.

⁹⁹ *Roche v. John Hancock Mut. Life Ins. Co.*, 81 F.3d 249, 253 (1st Cir. 1996).

¹⁰⁰ Franey, *supra* note 16, at 8.

¹⁰¹ *Privatization in Child Welfare National Overview*, NAT’L CONF. OF STATE LEGIS. (NCSL) (2018), <https://leg.mt.gov/content/Committees/Interim/2017-2018/Children-Family/Meetings/Mar-2018/march2018-ncsl-cps-privatization-report.pdf>.

¹⁰² *Id.*

¹⁰³ This is the case in Illinois, where there has been large-scale privatization of case management services. *Id.*

utilize in this arena have usually been interpreted extremely narrowly.¹⁰⁴ The public function test, which asks if a private party “exercised powers traditionally reserved exclusively to the state,”¹⁰⁵ has only been found applicable for state powers such as holding elections, exercising eminent domain, and operating a town.¹⁰⁶ The second test, the state compulsion test, requires that the state exercise “such coercive power. . . that in law the choice of the private actor is deemed to be that of the state.”¹⁰⁷ For the purposes of publicly-funded faith-based child welfare agencies discriminating against LGBTQ+ prospective parents, this test is not immediately relevant and thus warrants no further discussion here.

The third and final test, the nexus/joint action test, provides that a private actor can be considered a state actor where “an examination of the totality of the circumstances reveals that the state has ‘so far insinuated itself into a position of interdependence with the [private party] that it was a joint participant in [the challenged activity].’”¹⁰⁸ The required nexus here is a strong showing of “mutual interdependence.”¹⁰⁹ This test is particularly useful, given that there are a number of factors that reveal that faith-based child welfare organizations have indeed embedded themselves into a position of interdependence with the state, such that they become joint participants in providing child welfare services. As a result, states have also become joint participants in the private faith-based agencies’ discriminatory actions against LGBTQ+ prospective parents.

¹⁰⁴ Brent v. Wayne Cty. Dep’t of Human Servs., No. 11-10724, 2012 U.S. Dist. LEXIS 163204, at *37 (E.D. Mich. Nov. 15, 2012).

¹⁰⁵ *Id.* at *38.

¹⁰⁶ *Id.*

¹⁰⁷ *Id.* at *39.

¹⁰⁸ Sherkat v. New Eng. Vill., Inc., Civil Action No. 15-cv-11074-IT, 2015 U.S. Dist. LEXIS 164379, at *13 (D. Mass. Dec. 8, 2015); *see also* Brent, 2012 U.S. Dist. LEXIS 163204, at *39 (E.D. Mich. Nov. 15, 2012).

¹⁰⁹ *Id.* at *14.

In addition to the factors showing interdependence mentioned above, there is other evidence of private child welfare agencies performing government functions, as well as evidence of these private actors “entwined with government policies or management.”¹¹⁰ Not only do state officials and private agencies sit on advisory boards together that allocate funding to child welfare services and participate in joint decision-making,¹¹¹ they also perform frontline case management functions in conjunction with the state.¹¹² These intertwined functions include providing services to children and parents, setting case goals, keeping track of changes in a child’s situation, and overseeing an array of resources aimed at meeting the needs of the child and their family.¹¹³ Furthermore, performance-based contracts (PBCs) have allowed private agencies to maintain a degree of government and decision-making authority without the equivalent level of government accountability that public entities have.¹¹⁴ By shifting the government function of case management and other frontline functions in child welfare to private agencies, the government has, whether consciously or unconsciously, shielded these functions from constitutional challenges.¹¹⁵

Another option LGBTQ+ prospective parents have to sidestep the hurdle of proving that a private party is a state actor is by going ahead and suing a state actor or state agency directly.¹¹⁶

¹¹⁰ *Oliver v. SEIU Local 668*, 415 F. Supp. 3d 602, 610 (E.D. Pa. 2019).

¹¹¹ *Privatization in Child Welfare National Overview*, NAT’L CONF. OF STATE LEGIS. (NCSL) (2018), <https://leg.mt.gov/content/Committees/Interim/2017-2018/Children-Family/Meetings/Mar-2018/march2018-ncsl-cps-privatization-report.pdf>.

¹¹² Franey, *supra* note 16, at 18.

¹¹³ See MADELYN FREUNDLICH & CHARLOTTE MCCULLOUGH, *PRIVATIZATION OF CHILD WELFARE SERVICES: A GUIDE FOR STATE ADVOCATES 2* (2012).

¹¹⁴ PBCs are contracts that make private agency reimbursements contingent upon placement outcomes, essentially putting public and private agencies on equal footing in their authoritative power and responsibilities under the law. Franey, *supra* note 16, at 18.

¹¹⁵ Franey, *supra* note 16, at 18.

¹¹⁶ *Dumont v. Lyon*, 341 F. Supp. 3d 706, 744 (E.D. Mich. 2018). This was the route that Kristy and Dana Dumont utilized when they filed a 42 U.S.C. § 1983 Complaint alleging that the Director of the Michigan Department of Health and Human Services “DHHS” and the Executive Director of the Michigan Children’s Services Agency had a practice of permitting state-contracted and publicly-funded child placing agencies to use religious criteria to screen prospective foster and adoptive parents for children in the foster care system. *Id.*

Based on the recent *Dumont* litigation,¹¹⁷ this seems like a potentially successful route, though its yields for actually affecting the private agencies' ability to discriminate are less direct.

Once it has been established that there is a sufficient "sovereign" for the purposes of the Equal Protection Clause, the next inquiry is whether or not there is a legitimate and plausible governmental objective for differentiating between LGBTQ+ prospective parents and non-LGBTQ+ prospective parents in child welfare services. As for the appropriate standard of review that will be considered when determining whether there is a legitimate and plausible government objective, the level is determined by the nature of the right at issue or the class of people that the right affects.¹¹⁸ As sexual orientation and gender identity are not considered "suspect or quasi-suspect class[es]," rational basis review is presumed to be the standard.¹¹⁹ This level of scrutiny, occupying the lowest level, simply asks if there is a conceivable rational relationship between the challenged action and a legitimate government interest.¹²⁰ However, an Equal Protection challenge in this case is not without some teeth. In several seminal cases involving LGBTQ+ people, the Supreme Court has utilized a standard of review somewhere between rational basis and intermediate scrutiny.¹²¹ This level of review is sometimes referred to as "rational basis with bite," and has most commonly been utilized where the rule or law has no rational relationship to a stated governmental interest and where it discriminates against LGBTQ+ people or other unpopular minority groups.¹²²

¹¹⁷ *Dumont*, 341 F. Supp. 3d at 744.

¹¹⁸ Jeremy B. Smith, Note, *The Flaws of Rational Basis With Bite: Why the Supreme Court Should Acknowledge Its Application of Heightened Scrutiny to Classifications Based on Sexual Orientation*, 73 *FORDHAM L. REV.* 2769, 2772 (2005).

¹¹⁹ Kristapor Vartanian, *Equal Protection*, 10 *GEO. J. GENDER & L.* 227, 235 (2009).

¹²⁰ *Id.*

¹²¹ Intermediate scrutiny is a slightly more heightened level of scrutiny that is used for gender. Smith, *supra* note 118, at 2774.

¹²² See Smith, *supra* note 118, at 2774; see also *Romer v. Evans*, 517 U.S. 620 (1996); *Lawrence v. Texas*, 539 U.S. 558 (2003); *United States v. Windsor*, 570 U.S. 744 (2013).

Whatever the level of scrutiny, the requirement remains that there be a legitimate governmental objective.¹²³ In this case, it is unclear how allowing faith-based agencies to discriminate against LGBTQ+ people is rationally related to any governmental objective. In child welfare, the framework that decisions are made under is still generally the nebulous and judicially arbitrary “best interests of the child.”¹²⁴ However, the Children’s Bureau has attempted to provide a clearer picture of how “best interests of the child” determinations are made, noting that a variety of factors are taken into account, with the “child’s ultimate safety and well-being the paramount concern.”¹²⁵ In 2020, arguing that safety of children is a reason to discriminate against LGBTQ+ parents is a ridiculous and dangerous proposition. Study after study has shown that children of LGBTQ+ parents are just as well-adjusted and healthy as children of heterosexual parents.¹²⁶ In a series of social science studies, it was also consistently found that children of LGBTQ+ parents made friends and formed healthy peer relationships just as well as their peers.¹²⁷ Additionally, for LGBTQ+ children, having a home that is affirming of their identities is actually closely tied with safety and well-being.¹²⁸

The government also presumably has the objective of wanting to place as many children in homes with loving families as possible. Since LGBTQ+ people are seven times more likely to adopt than their straight counterparts, especially when it comes to “hard to place” children,¹²⁹

¹²³ *Lehr v. Robertson*, 463 U.S. 248, 265 (1983).

¹²⁴ *Determining the Best Interests of the Child*, CHILD. BUREAU (Mar. 2016), https://www.childwelfare.gov/pubPDFs/best_interest.pdf.

¹²⁵ *Determining the Best Interests of the Child*, CHILD. BUREAU 2 (Mar. 2016), https://www.childwelfare.gov/pubPDFs/best_interest.pdf.

¹²⁶ *also* LESLIE COOPER & PAUL CATES, *TOP HIGH A PRICE: THE CASE AGAINST RESTRICTING GAY PARENTING* 25–73 (Am. Civ. Liberties Union, 2nd ed. 2006).

¹²⁷ *Id.*

¹²⁸ *See LGBTQ Affirming Foster and Adoptive Parents Needed*, NYC Admin. for Child. Serv., https://www1.nyc.gov/assets/acs/pdf/lgbtq/ACS_AffirmingFamiliesBrochure.pdf (last Apr. 23, 2020); *LGBTQ Youth in the Foster Care System*, HUM. RTS. CAMPAIGN 1, 2–6 (2015), <https://assets2.hrc.org/files/assets/resources/HRC-YouthFosterCare-IssueBrief-FINAL.pdf>.

¹²⁹ Maryland Family Policy Impact Seminar, *State Gay Adoption Laws and Permanency for Foster Youth* (May 2006), <https://sph.umd.edu/sites/default/files/files/GayadoptionbriefFINAL0806.pdf>.

this also seems to tilt in favor of there being no legitimate governmental objective advanced through discriminating against LGBTQ+ parents.

In addition to the Equal Protection Clause, providing exemptions to faith-based agencies that discriminate against LGBTQ+ prospective parents is also a violation of the Establishment Clause of the First Amendment.¹³⁰ This sort of challenge utilizes the Establishment Clause in a way that is diametrically opposed to how CSS uses the same clause in *Fulton*. The Establishment Clause, which protects from the establishment of religion,¹³¹ prohibits the government from passing laws that favor a certain religion over another, or that favors religion over non-religion.¹³² Laws that exempt faith-based private agencies in child welfare do in fact impermissibly accommodate and advance religion to the detriment of LGBTQ+ prospective parents.¹³³ When the government contracts with and funds faith-based private agencies in child welfare that do not serve LGBTQ+ people, it allows these agencies to discriminate based on their specific set of religious beliefs.¹³⁴ By advancing these particular beliefs in a way that constricts the availability of child welfare services to LGBTQ+ people, it irreparably harms those groups and entangles church with state.

Estate of Thornton v. Caldor, Inc. is instructive here, as it highlights the grave issue of imposing a certain religious framework onto people who may not share that framework.¹³⁵ In this case, The Supreme Court invalidated a Connecticut statute that required that all grave workers be allowed to refuse to work on the Sabbath, noting that by providing Sabbath observers with this

¹³⁰ The Establishment Clause states that “Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof” U.S. Const., amend. I.

¹³¹ *Id.*

¹³² See Sean Cahill et al., *Executive branch actions promoting religious refusal threaten LGBT health care access*, THE FENWAY INSTITUTE 1, 12–13 (2016), <https://fenwayhealth.org/wp-content/uploads/The-Fenway-Institute-Religious-Refusal-Laws-Policy-Brief.pdf>.

¹³³ *Id.*

¹³⁴ *Id.*

¹³⁵ *Estate of Thornton v. Caldor, Inc.*, 472 U.S. 703, 105 S. Ct. 2914 (1985).

right, they were forcing secular businesses to conform to religious concerns in violation of the Establishment Clause.¹³⁶ Just as that Connecticut statute unconstitutionally gave grave workers the right to summarily refuse to work on the Sabbath, so too do religious exemptions unconstitutionally give faith-based organizations the right to summarily refuse to work with LGBTQ+ people. The whole concept of separation of church and state is essentially a dead letter if religious organizations are not only deeply embedded in the crucial government function of providing child welfare services using government funds, but also using their position of authority to discriminate against and harm an already-marginalized group.

III. IMPERMISSIBLE FEDERAL LAWS: HHS' PROPOSED RULE

Despite the serious constitutional issues and the negative social policy implications of denying child welfare services to LGBTQ+ prospective parents, anti-LGBTQ+ legislation under the guise of religious liberty is still being passed,¹³⁷ even at the federal level.¹³⁸ The current administration, which many view as hostile to LGBTQ+ rights and interests, has been supportive of a push for greater religious liberty exemptions at the expense of LGBTQ+ people. HHS announced in November that it would stop enforcing a non-discrimination rule from Obama's administration, and proposed a new rule offering recipients of federal grants religious liberty protections under federal law.¹³⁹ With one fell swoop, the Obama administration's protections for gender identity, sexual orientation, and religion in HHS grants are set to be completely

¹³⁶ *Id.*

¹³⁷ <https://www.hrw.org/news/2018/04/30/anti-lgbt-bills-us-states-could-derail-adoptions>

¹³⁸ *Coalition Letter on Discrimination in Child Welfare System*, AM. CIV. LIBERTIES UNION (Feb. 14, 2019), <https://www.aclu.org/letter/coalition-letter-discrimination-child-welfare-system>; *The Discrimination Administration: Anti-Transgender and Anti-LGBTQ Actions*, NAT'L CTR. FOR TRANSGENDER EQUAL. (2020), <https://transequality.org/the-discrimination-administration>.

¹³⁹ Harris Meyer, *HHS sued to block elimination of non-bias protections in grants*, MODERN HEALTHCARE (4:12 PM, Mar. 19, 2020), <https://www.modernhealthcare.com/law-regulation/hhs-sued-block-elimination-non-bias-protections-grants>.

undone.¹⁴⁰ While HHS contends that these policy changes will allow it to not infringe on religious freedoms in its operations of grants, what it actually does in practice is allow these religious agencies to infringe on the rights of LGBTQ+ people and the hundreds of thousands of children in foster care/awaiting adoption that the government is tasked with taking care of.¹⁴¹

Democracy Forward, an organization whose stated mission is “fighting government corruption in court,”¹⁴² sued HHS in February 2020 after it failed to comply with a FOIA request seeking records related to the administration’s decision to stop enforcing the non-discrimination protections and the proposed roll back of federal regulatory protections in a broad range of programs funded by the HHS.¹⁴³ In March, three LGBTQ+ equality organizations also sued HHS to challenge its proposed November 2019 rule relating to grant administration and regulation, stating that HHS’ actions run contrary to their stated mission of enhancing the health and well-being of all Americans, putting LGBTQ+ youth’s health and well-being at increased risk.¹⁴⁴ The complaint also alleged that by gutting anti-discrimination laws in favor of laws protecting “religious liberty,” HHS was allowing religion to be weaponized to discriminate against LGBTQ+ people and disregarding other constitutional constraints on such discrimination.¹⁴⁵ While it remains to be seen what will come of these lawsuits, it is clear that the work of securing rights for LGBTQ+ prospective parents at all levels of government is far from over.

¹⁴⁰ Harris Meyer, *HHS sued to block elimination of non-bias protections in grants*, MODERN HEALTHCARE (4:12 PM, Mar. 19, 2020), <https://www.modernhealthcare.com/law-regulation/hhs-sued-block-elimination-non-bias-protections-grants>.

¹⁴¹ Harris Meyer, *HHS sued to block elimination of non-bias protections in grants*, MODERN HEALTHCARE (4:12 PM, Mar. 19, 2020), <https://www.modernhealthcare.com/law-regulation/hhs-sued-block-elimination-non-bias-protections-grants>.

¹⁴² DEMOCRACY FORWARD, <https://democracyforward.org/> (last visited Apr. 20, 2020).

¹⁴³ Press Release, *Democracy Forward Sues for Records on Trump Administration’s Rollback of Protections from Discrimination in Federal Grant Programs*, DEMOCRACY FORWARD (Feb. 27, 2020), <https://democracyforward.org/press/trump-administrations-rollback-of-protections-from-discrimination-in-federal-grant-programs/>.

¹⁴⁴ Compl., *Family Equality et al v. Azar et al*, No. 1:20-cv-02403 (S.D.N.Y. Mar. 19, 2020), ECF No. 1.

¹⁴⁵ Compl., *Family Equality et al v. Azar et al*, No. 1:20-cv-02403 (S.D.N.Y. Mar. 19, 2020), ECF No. 1.

IV. CONCLUSION

Private faith-based agencies have for many years provided essential child welfare services to an often under-resourced and over-burdened public sector. In so doing though, the line between public and private has been blurred. Despite that blurred line, faith-based agencies argue that exemptions to non-discrimination laws allow them to continue to serve children in need, while maintaining their religious values. As *Fulton* discusses though, while religious belief is certainly protected, conduct motivated by those beliefs is not entitled to special protections or exemptions from “general, neutrally applied legal requirements.”¹⁴⁶ With hundreds of thousands of children in the country in foster care and waiting to be adopted, the misapplication of constitutional protections for faith-based agencies that discriminate is an unaffordable error. Loving and qualified parents willing to foster and adopt are more crucial now than ever, and LGBTQ+ people are the group most likely to do that. Beyond just the child welfare implications of allowing private, faith-based agencies to discriminate, these exemptions for private agencies are a violation of both the Equal Protection Clause and the Establishment Clause. Laws that continue to provide exemptions for faith-based agencies to discriminate against LGBTQ+ people are an egregious abuse of discretion that put an already marginalized community at further risk. Instead of leaving vulnerable communities at risk with no recourse and using taxpayer money to sanction discrimination, the government should be focused on continuing to expand the pool of prospective foster and adoptive parents, including the thousands of LGBTQ+ parents who are equipped and willing to help the government meet this crucial need.

¹⁴⁶ *Fulton v. City of Phila.*, 922 F.3d 140, 159 (3d Cir. 2019).