

FAITH OR FAIRNESS: THE LEGAL BATTLE OVER LGBTQ RIGHTS IN ADOPTION AND FOSTER CARE

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INTRODUCTION

Many states permit state-licensed and taxpayer-funded adoption and foster agencies to refuse to provide services to children and families based on sexual orientation or gender identity if doing so conflicts with their religious beliefs.¹ By allowing adoption agencies to refuse service to LGBTQ parents, states fail to protect the interests of children who need foster and adoption services. In 2021, in *Fulton v. City of Philadelphia*, the Supreme Court of the United States held that a city violated the Free Exercise Clause when it required Catholic Social Services (CSS) to certify same-sex couples as foster parents.² Lower courts, however, have begun addressing whether discriminatory policies may survive challenges under the Establishment and Equal Protection Clauses.³ The Supreme Court of the United States, however, has not yet addressed the constitutionality of religious discrimination on the basis of sexual orientation and gender identity in adoption and foster care.⁴

This Article explores the constitutionality of state-licensed faith-based child welfare agencies that discriminate on the basis of sexual orientation and gender identity. This Article analyzes potential Free

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¹ See, e.g., ARIZ. REV. STAT. ANN. § 8-921 (2022); N.D. CENT. CODE ANN. § 50-12-07.1 (West 2023); S.D. CODIFIED LAWS § 26-6-39 (2024); KAN. STAT. ANN. § 60-5322 (West 2018); OKLA. STAT. ANN. tit. 10a, § 1-8-112 (West 2018); H.B. No. 3859, 85th Legis. Reg. Sess. (Tx. 2017); TEX. HUM. RES. CODE ANN. § 45.004 (West 2017); MISS. CODE ANN. § 11-62-3-5 (West 2024); ALA. CODE § 26-10D-5 (2024); Exec. Order No. 2018-12, 42 S.C. Reg. 5 (2018); S.C. Acts 4950 § 38.29; TENN. CODE ANN. § 36-1-147 (West 2020); VA. CODE ANN. § 63.2-1709.3 (West 2012); MICH. COMP. LAWS ANN. § 722.124e (West 2018).

² See generally *Fulton v. City of Philadelphia*, 593, U.S. 522 (2021).

³ *Dumont v. Lyon*, 341 F. Supp. 3d 706 (E.D. Mich. 2018).

⁴ See *Fulton*, 593 U.S. at 526 (deciding whether a nondiscrimination policy violated the Free Exercise Clause).

Exercise, Establishment, and Equal Protection claims, concluding that faith-based discrimination is unconstitutional.

This Article's Background section is composed of three parts. Part I provides background on child welfare systems and anti-discrimination policies applicable to adoption and foster care agencies. Part II outlines legal principles relevant to religious and discrimination claims, including the standards of judicial review, the Free Exercise Clause, the Establishment Clause, and the Equal Protection Clause. Part III discusses *Fulton v. City of Philadelphia*, in which the Supreme Court held that Philadelphia violated the Free Exercise Clause when it refused to contract CSS for the provision of foster care services unless CSS agreed to certify same-sex couples as foster parents.⁵ The Analysis section examines the tension between discriminatory adoption policies and the rights guaranteed by the First and Fourteenth Amendments, focusing on the claims in *Fulton* and *Dumont v. Lyon*. This Article concludes that faith-based discrimination on the basis of sexual orientation and gender identity in taxpayer-funded and state-licensed child welfare agencies is unconstitutional because licensing and protecting faith-based child welfare services at the expense of LGBTQ children and parents violates constitutional principles that mandate separation of church and state.

BACKGROUND

I. CHILD WELFARE SERVICES

Child welfare agencies may provide adoption and foster care services.⁶ Foster care is when the State removes a child from their biological family, usually as a result of abuse or neglect, and places them in the temporary care of relatives or foster parents.⁷ Generally, child welfare agencies must place children in foster care while attempting to reunify the family, but if the biological family remains unfit, then a

⁵ *Id.*

⁶ *Child Welfare: Purposes, Federal Programs, and Funding*, CONG. RSCH. SERV. (May 16, 2024), <https://sgp.fas.org/crs/misc/IF10590.pdf>.

⁷ *Foster Care*, CHILD WELFARE INFO. GATEWAY, <https://www.childwelfare.gov/topics/outofhome/foster-care/> (last visited June 29, 2024); THOMAS A. JACOBS ET AL., CHILDREN AND THE LAW: RIGHTS AND OBLIGATIONS § 4.6 (2024), Westlaw.

court may sever the parental rights and allow the agency to place the child for adoption.⁸

Adoption is a legally binding agreement by someone other than biological parents to provide permanent care for children under the age of 18 in exchange for the rights that a biological parent would have.⁹ Adoption agencies play an active role in recruiting qualified families to adopt children.¹⁰ Agencies screen and certify prospective parents as well as facilitate the adoption process.¹¹ Many also provide adoptive parents with services, such as counseling to prepare them for the family adjustment.¹²

There are different types of adoption agencies in the United States, including public agencies, licensed private agencies, and unlicensed agencies.¹³ Public adoption agencies typically have different processes, policies, and requirements than private adoption agencies.¹⁴ Public agencies, for example, are governed by statute and receive state funding.¹⁵ States and local governments are primarily responsible for carrying out their child welfare activities.¹⁶ Alternatively, biological parents may seek out private agencies to voluntarily relinquish their parental rights and give their children up for adoption.¹⁷ Private agencies tend to be either religious non-profit or secular for-profit organizations that maintain waiting lists of prospective adoptive parents.¹⁸ States do not typically fund private agencies, but they are still subject to state-licensing procedures and child placement regulations.¹⁹ Thus, both

⁸ THOMAS A. JACOBS ET AL., CHILDREN AND THE LAW: RIGHTS AND OBLIGATIONS § 4.6 (2024), Westlaw.

⁹ Veera Korhonen, *Foster Care and Adoption in the U.S. – Statistics & Facts*, STATISTICA (Jul. 3, 2024), <https://www.statista.com/topics/2243/foster-care-and-adoption-in-the-us/#topicOverview>.

¹⁰ HEIDI MELZ & COLLEEN M. KILLIAN, DILIGENT RECRUITMENT OF FAMILIES FOR CHILDREN IN THE FOSTER CARE SYSTEM, CHILDREN'S BUREAU, 1 (Aug. 2019), <https://www.acf.hhs.gov/sites/default/files/documents/cb/diligentrecruitmentreport.pdf>.

¹¹ *Id.* at 37.

¹² *Id.* at 21.

¹³ Veera Korhonen, *Foster Care and Adoption in the U.S. – Statistics & Facts*, STATISTICA (Sept. 30, 2022), <https://www.statista.com/topics/2243/foster-care-and-adoption-in-the-us/#topicOverview>.

¹⁴ Jacobs et al., *supra* note 8.

¹⁵ *Id.*

¹⁶ *Child Welfare: Purposes, Federal Programs, and Funding*, CONG. RSCH. SERV. (May 16, 2024), <https://sgp.fas.org/crs/misc/IF10590.pdf>.

¹⁷ Jacobs et al., *supra* note 8.

¹⁸ *Id.*

¹⁹ *Id.*

public and private agencies receive state support in the form of funding or licensing, and they are both subject to state regulation.²⁰

The regulations that govern adoption and foster care agencies differ between states, but there are minimum standards across the United States.²¹ All states, for example, require child welfare agencies to conduct background checks of prospective foster and adoptive parents which includes checking for criminal records and history of child abuse and neglect.²² All states also require agency professionals to conduct an assessment or home study of the prospective family.²³ Home studies include evaluations of the applicants, their family members, parenting abilities, personal characteristics, and safety of their home.²⁴ Other standard requirements for prospective parents include having a secure place to live, completing a training program, and having sufficient income to support a family.²⁵ In addition to state requirements, most private agencies have their own standards for adoptive and foster parents.²⁶ Private agencies may, for example, set standards for age, marital status, years of marriage, number of children in a home, religion, and sexual orientation.²⁷

States have the power to limit agencies' ability to implement their own requirements by passing statutes and regulations.²⁸ States with statutes, regulations, and policies governing discrimination on the basis of sexual orientation and gender identity fall into three categories: (1) states that prohibit such discrimination in child welfare services; (2) states that have no explicit protections against such discrimination

²⁰ *Child Welfare: Purposes, Federal Programs, and Funding*, CONG. RSCH. SERV. (last visited May 16, 2024), <https://sgp.fas.org/crs/misc/IF10590.pdf>.

²¹ Child Welfare Information Gateway, *Background Checks for Prospective Foster, Adoptive, and Kinship Caregivers*, CHILDREN'S BUREAU, 1, 2 (Sept. 2018), <https://www.childwelfare.gov/resources/background-checks-prospective-foster-adoptive-and-kinship-caregivers/>.

²² *Id.*

²³ Child Welfare Information Gateway, *Home Study Requirements for Prospective Parents in Domestic Adoption*, CHILDREN'S BUREAU, 1 (Aug. 2020), <https://www.childwelfare.gov/resources/home-study-requirements-prospective-parents-domestic-adoption/>.

²⁴ Child Welfare Information Gateway, *Home Study Requirements for Prospective Parents in Domestic Adoption*, CHILDREN'S BUREAU, 1, 3 (Aug. 2020), https://cwig-prod-prod-drupal-s3fs-us-east-1.s3.amazonaws.com/public/documents/homestudyreqs_adoption.pdf?VersionId=SrRitjRX5GENfoR8fPs5g4uKhgJbY_G3.

²⁵ Child Welfare Information Gateway, *The Adoption Home Study Process*, CHILDREN'S BUREAU, 1, 5 (Oct. 2020), <https://www.childwelfare.gov/resources/adoption-home-study-process/>.

²⁶ Jacobs et al., *supra* note 8.

²⁷ *Id.*

²⁸ *Id.*

in child welfare services; and (3) states that permit state-licensed child welfare agencies to refuse to provide services to children and adults on the basis of sexual orientation and gender identity if doing so conflicts with their religious beliefs.²⁹

Many states explicitly prohibit licensed child welfare agencies from discriminating against prospective foster and adoptive parents on the basis of sexual orientation or gender identity.³⁰ New York state law, for example, provides:

Authorized agencies providing adoption services shall... prohibit discrimination and harassment against applicants for adoption services on the basis of race, creed, color, national origin, age, sex, sexual orientation, gender identity or expression, marital status, religion, or disability, and, shall take reasonable steps to prevent such discrimination...³¹

New York has a similar non-discrimination statute for its foster services³² and a similar policy for its Office of Children and Family Services.³³

Twelve states, however, expressly permit state-licensed child welfare agencies to refuse service to LGBTQ children and prospective

²⁹ See *Foster and Adoption Laws*, MOVEMENT ADVANCEMENT PROJECT (Mar. 6, 2023), https://www.lgbtmap.org/equality-maps/foster_and_adoption_laws.

³⁰ See, e.g., *Discrimination Complaints Policy No. 4.10.1*, STATE OF HAWAII DEP'T OF HUM. SERVS. POLICIES & PROCEDURES MANUAL (2014), <https://humanservices.hawaii.gov/wp-content/uploads/2014/10/Policy-4.10.1-Disc-Complaint.pdf>; CAL. WELF. AND INST. CODE § 16001.9 (West 2024); CAL. WELF. AND INST. CODE § 16013 (West 2023); CAL. HEALTH & SAFETY CODE § 1522.41 (West 2023); *Adoptive LGBTQ Parents In Colorado React To Supreme Court Ruling That Catholic Adoption Organization Had First Amendment Rights Violated*, CBS NEWS (June 17, 2021), <https://www.cbsnews.com/colorado/news/adoption-lgbtq-supreme-court-catholic-first-amendment/> (“Colorado’s Attorney General says anti-discrimination laws still protect LGBTQ parents” post-Fulton.); *Division of Diversity, Equity and Inclusion (DEI)*, ILLINOIS DCFS (June 29, 2024), <https://dcfs.illinois.gov/about-us/aaa.html>; MD CODE REGS. 0701.03.03 (2024); *Delaware Children Department Policy No. 217, NON-DISCRIMINATION POLICY* (Apr. 1, 2019), <https://kidsfiles.delaware.gov/policies/dscyf/dsc217-non-discrimination.pdf>; N.Y. COMP. CODES R. & REGS. tit.18, § 421.3(d) (2021); *Nondiscrimination Notice*, MAINE DEP'T OF HEALTH & HUM. SERVS. (June 2017), https://www.maine.gov/dhhs/documents/Nondiscrimination_Notice_June%202017.pdf; and *Specialized Child Welfare Subject Matter: Non-Discrimination of LGBTQIAA Individuals 21-16*, CONNECTICUT DEP'T OF CHILDREN & FAMILIES (Jan. 2, 2019), <https://portal.ct.gov/-/media/DCF/Policy/Chapters/21-16.pdf?la=en>.

³¹ N.Y. COMP. CODES R. & REGS. tit.18, § 421.3(d) (2021).

³² N.Y. COMP. CODES R. & REGS. tit.18, § 441.24 (2021).

³³ *Lesbian, Gay, Bisexual, Transgender and Questioning Youth (PPM 3442.00)*, NEW YORK STATE OFF. OF CHILDREN AND FAMILY SERVS. POLICY & PROCEDURES MANUAL (Mar. 17, 2008), <https://www.nycourts.gov/ip/judicialinstitute/transgender/220U.pdf>.

parents if doing so conflicts with their religious beliefs.³⁴ Texas, for example, passed the Freedom to Serve Children Act in 2017.³⁵ The Act provides:

A governmental entity or any person that contracts with this state or operates under governmental authority to refer or place children for child welfare services may not discriminate or take any adverse action against a child welfare services provider on the basis, wholly or partly, that the provider: (1) has declined or will decline to provide, facilitate, or refer a person for child welfare services that conflict with, or under circumstances that conflict with, the providers' sincerely held religious beliefs.³⁶

Similarly, Virginia state law provides the following protections for religious child welfare organizations:

(A) To the extent allowed by federal law, no private child-placing agency shall be required to perform, assist, counsel, recommend, consent to, refer, or participate in any placement of a child for foster care or adoption when the proposed placement would violate the agency's written religious or moral convictions or policies. (B) The Commissioner shall not deny an application for an initial license or renewal of a license or revoke the license of a private child-placing agency because of the agency's objection. (C) A state or local government entity may not deny a private child-placing agency any grant, contract, or participation in a government program because of the agency's objection to performing, assisting, counseling, recommending, consenting to, referring, or participating in a placement that violates the agency's written religious or moral convictions or policies.³⁷

States with New York-type laws protect the interests of children in adoption and foster systems by prohibiting child welfare agencies from discriminating against LGBTQ parents and children.³⁸ In states like Texas and Virginia, however, state and local governments cannot refuse to contract child welfare agencies that refuse to service LGBTQ parents

³⁴ *Foster and Adoption Laws*, MOVEMENT ADVANCEMENT PROJECT (Mar. 6, 2023), https://www.lgbtmap.org/equality-maps/foster_and_adoption_laws.

³⁵ Marissa Evans, *Abbott OKs religious refusal of adoptions in Texas*, THE TEXAS TRIBUNE (June 15, 2017), <https://www.texastribune.org/2017/06/15/abbott-signs-religious-protections-child-welfare-agencies/>.

³⁶ H.B. No. 3859, 85th Legis. Reg. Sess. (Tx. 2017).

³⁷ VA. CODE ANN. § 63.2-1709.3(A)–(C) (West 2012).

³⁸ N.Y. COMP. CODES R. & REGS. tit.18, § 421.3(d) (2021).

and children if doing so conflicts with their religious beliefs.³⁹ Thus, those states protect the religious interests of child welfare agencies more than the interests of the children that the agencies are meant to serve.

Furthermore, some states are silent on the issue of whether child welfare agencies may discriminate against children and adults on the basis of LGBTQ status. In 2015, for example, Florida repealed the portion of its statutes that prohibited adoption by LGBTQ people, but it has not enacted any specific protections against discrimination for LGBTQ people in adoption or foster care.⁴⁰ The lack of any explicit prohibition against discrimination leaves the door open for child welfare agencies in the state to discriminate regardless of whether servicing LGBTQ people conflicts with the agency's religious beliefs.

Policies that permit discrimination on the basis of gender identity and sexual orientation affect approximately two million LGBTQ people who are interested in adopting.⁴¹ More importantly, these policies affect the children subject to the control of agencies who deny children loving parents simply because their sexual orientation or gender identity conflicts with the agencies' own religious beliefs. In addition to Texas and Virginia, other states that permit discrimination based on religious beliefs include Arizona, North Dakota, South Dakota, Kansas, Oklahoma, Tennessee, Mississippi, Alabama, and South Carolina.⁴²

II. LEGAL PRINCIPLES RELATING TO RELIGIOUS AND DISCRIMINATION CLAIMS

LGBTQ plaintiffs are likely to invoke two legal principles to challenge the constitutionality of state statutes that permit state-licensed and taxpayer-funded child welfare agencies to discriminate on the basis

³⁹ H.B. No. 3859, 85th Legis. Reg. Sess. (Tx. 2017); VA. CODE ANN. § 63.2-1709.3(A)–(C) (West 2012).

⁴⁰ See FLA. STAT. ANN. § 63.042(3) (West 2015); Child Welfare Information Gateway, *Working With Lesbian, Gay, Bisexual, Transgender, and Questioning (LGBTQ) Families in Foster Care and Adoption*, CHILDREN'S BUREAU (Sept. 2016), https://www.myflfamilies.com/sites/default/files/2023-05/f_profbulletin.pdf.

⁴¹ *LGBT Adoption Statistics*, LIFELONG ADOPTIONS (Sept. 2022), <https://www.lifelongadoptions.com/lgbt-adoption/lgbt-adoption-statistics>.

⁴² *Foster and Adoption Laws*, MOVEMENT ADVANCEMENT PROJECT (Mar. 6, 2023), https://www.lgbtmap.org/equality-maps/foster_and_adoption_laws.

of sexual orientation and gender identity: the Establishment Clause and the Equal Protection Clause.⁴³ Faith-based child welfare agencies, on the other hand, are likely to invoke the Free Exercise Clause to justify their actions. In these types of cases, courts are tasked with striking an appropriate balance between equal protection of LGBTQ people and the free exercise of religion.⁴⁴

This Section will discuss the legal principles that guide courts when dealing with tension between the First and Fourteenth Amendments. First, this Section will describe the standards of review that courts use to evaluate the constitutionality of various government actions. Second, this Section will explain the First and Fourteenth Amendments as they apply to discrimination in child welfare agencies.

A. *The Three – or Five – Levels of Judicial Review*

There are three official standards of review that courts use to evaluate the constitutionality of state and federal government actions when individual liberties are at issue: rational basis, intermediate scrutiny, and strict scrutiny.⁴⁵ First, rational basis review applies where a challenge does not implicate a fundamental right or a protected group.⁴⁶ Rational basis is the lowest standard of review, and it is extremely deferential to the government.⁴⁷ To survive rational basis, the government must show that its actions are rationally related to a legitimate governmental interest.⁴⁸ A government action will only be struck down under rational basis when there is “no conceivable legitimate interest” to support it or when the government’s means to advance its interest are “clearly irrational.”⁴⁹ Sometimes, however, the Supreme Court applies “rational basis with bite,” a heightened rational

⁴³ See, e.g., *Barber v. Bryant*, 193 F. Supp. 3d 677, 688 (S.D. Miss. 2016), *rev’d en banc*, 860 F.3d 345 (5th Cir. 2017).

⁴⁴ See, e.g., *Elane Photography, LLC v. Willock*, 309 P.3d 53, 59–60 (N.M. 2013).

⁴⁵ R. Randall Kelso, *Standards of Review Under the Equal Protection Clause and Related Constitutional Doctrines Protecting Individual Rights: The “Base Plus Six” Model and Modern Supreme Court Practice*, 4 U. PA. J. CONST. L. 225, 230 (2002).

⁴⁶ See *Dobbs v. Jackson Women’s Health Org.*, 597 U.S. 215, 300 (2022) (“Under our precedents, rational-basis review is the appropriate standard for such challenges. As we have explained, procuring an abortion is not a fundamental constitutional right...”).

⁴⁷ Raphael Holoszyc-Pimentel, *Reconciling Rational-Basis Review: When Does Rational Basis Bite?*, 90 N.Y.U. L. REV. 2070 (2015).

⁴⁸ See *Box v. Planned Parenthood of Indiana and Kentucky, Inc.*, 587 U.S. 490, 491 (2019).

⁴⁹ Kelso, *supra* note 45, at 230.

basis standard that may involve reviewing the record and evidence to determine whether the government's motive is improper.⁵⁰ The Court has never articulated the requirements of "rational basis with bite," nor the circumstances that trigger it, but this unofficial standard has appeared in several equal protection challenges.⁵¹

Second, intermediate scrutiny applies to equal protection challenges where the government draws classifications based on gender, illegitimacy, or illegal alien status.⁵² Intermediate scrutiny is a higher standard than rational basis, requiring that "a statutory classification must be substantially related to an important governmental objective."⁵³ Additionally, the government action may not be "substantially more burdensome than necessary to advance this interest."⁵⁴ Sometimes the Court states that it applies intermediate scrutiny but requires a "direct relationship" rather than a "substantial relationship."⁵⁵ Many scholars refer to this heightened standard as "intermediate plus."⁵⁶

Third, strict scrutiny applies where the government infringes on fundamental rights and liberties that the Constitution explicitly or implicitly protects, or where the government draws classifications on the basis of race, ethnicity, or national origin.⁵⁷ Strict scrutiny is the highest standard of review, requiring a law to be narrowly tailored to

⁵⁰ Holoszyc-Pimentel, *supra* note 47, at 2075.

⁵¹ See *id.* at 2076–78 (citing cases where the Court applied rational basis with bite); Kendra LaCour, *License to Discriminate: How A Washington Florist Is Making the Case for Applying Intermediate Scrutiny to Sexual Orientation*, 38 SEATTLE U.L. REV. 107, 123 (2014).

⁵² See *United States v. Virginia*, 518 U.S. 515, 518 (1996) ("The Fourth Circuit plainly erred in exposing Virginia's VWIL plan to a deferential analysis, for 'all gender-based classifications today' warrant 'heightened scrutiny.'"); RODNEY A. SMOLLA, L. OF LAWYER ADVERT. § 2:4 (2024), Westlaw; Sunanda K. Ray-Holmes, *Discrimination Based on One's Sexual Preference: Should Strict Scrutiny Apply?*, 34 HOW. L. J. 341, 364 (1991).

⁵³ See *Clark v. Jeter*, 486 U.S. 456, 461 (1988).

⁵⁴ Kelso, *supra* note 45, at 234.

⁵⁵ *Id.* at 227; See, e.g., *Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n of New York*, 447 U.S. 557, 564 (1980).

⁵⁶ See, e.g., Ellen P. Goodman, *Media Policy and Free Speech: The First Amendment at War with Itself*, 35 HOEFSTRA L. REV. 1211, 1219 (2007).

⁵⁷ See *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 2 (1973) (strict scrutiny "is reserved for cases involving laws that operate to the disadvantage of suspect classes or interfere with the exercise of fundamental rights and liberties explicitly or implicitly protected by the Constitution."); *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 227 (1995) ("Federal racial classifications, like those of a state, must serve compelling governmental interest and must be narrowly tailored to further that interest."); *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 38 (1973) ("...The Court has applied strict scrutiny to state or federal legislation touching upon constitutionally protected rights. Each of our prior cases involved legislation which 'deprived,'

advance a compelling governmental interest.⁵⁸ Unlike rational basis review, the court does not defer to the government and it independently determines whether the ends justify the means.⁵⁹

Which standard of review the court applies to any given case will have a significant impact on the burden of proof and the success of the challenge.⁶⁰ Under rational basis, the petitioner bears the burden of proof that a law is invalid, and the government usually prevails.⁶¹ Under strict scrutiny, however, the petitioner usually prevails because the government action is presumed invalid unless and until the government meets its burden of proof.⁶² Thus, it is important to consider which standard attaches to the constitutional provisions at issue in any given case.

B. *The First Amendment*

Several constitutional issues may come into play when considering laws that permit organizations to discriminate on the basis of sexual orientation and gender identity: the Establishment Clause, the Free Exercise Clause, and the Equal Protection Clause. The First Amendment right to freedom of religion is made up of two clauses, each having distinct legal implications.⁶³ First, the Establishment Clause mandates that “Congress shall make no law respecting an establishment of religion.”⁶⁴ Under this clause, state and federal governments may not act in a way to disapprove of a particular religion or religion in general, nor may it benefit religion or particular religions.⁶⁵ Second, the Free Exercise Clause mandates that “Congress shall make no law ... prohibiting the free exercise [of religion].”⁶⁶ This means that the

‘infringed,’ or ‘interfered’ with the free exercise of some such fundamental personal right or liberty.”).

⁵⁸ *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 531–32 (1993).

⁵⁹ Ray-Holmes, *supra* note 52, at 364.

⁶⁰ Roy G. Spece, Jr. & David Yokum, *Scrutinizing Strict Scrutiny*, 40 VT. L. REV. 285, 310 (2015).

⁶¹ Holoszye-Pimentel, *supra* note 47, at 2074.

⁶² Roy G. Spece, Jr. & David Yokum, *Scrutinizing Strict Scrutiny*, 40 VT. L. REV. 285, 310 (2015).

⁶³ *Church of the Lukumi Babalu Aye, Inc.*, 508 U.S. at 531–32.

⁶⁴ U.S. CONST. amend. I.

⁶⁵ *Church of the Lukumi Babalu Aye, Inc.*, 508 U.S. at 532.

⁶⁶ U.S. CONST. amend. I.

government may not discriminate against religious beliefs nor regulate or prohibit conduct because it is undertaken for religious reasons.⁶⁷

Free exercise issues frequently arise in cases that involve discrimination on the basis of sexual orientation because many faith-based organizations argue that endorsing homosexual conduct is against their religious beliefs.⁶⁸ In *Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Commission*, for example, a Christian man owned and operated a bakery.⁶⁹ The owner told a same-sex couple that he would not create their wedding cake because of his religious opposition to same-sex marriage.⁷⁰ The Colorado Civil Rights Commission found that the owner's refusal to provide services violated the Colorado Anti-Discrimination Act (CADA),⁷¹ but the Supreme Court held that the Commission's actions violated the Free Exercise Clause by applying CADA in a manner that was not neutral toward religion.⁷²

Similarly, in *Elane Photography, LLC v. Willock*, a photography business refused to photograph a same-sex commitment ceremony because one of the business's owners was religiously opposed to same-sex marriage.⁷³ The New Mexico Human Rights Commission found that the owner discriminated against the customer based on her sexual orientation in violation of the New Mexico Religious Freedom Restoration Act (NMHRA).⁷⁴ Unlike the Court in *Masterpiece Cakeshop*, however, the Supreme Court of New Mexico agreed with the Commission and found that enforcing NMHRA against the owner did not violate the Free Exercise Clause.⁷⁵ The court reasoned that NMHRA is a neutral law of general applicability because the statutory

⁶⁷ *Church of the Lukumi Babalu Aye, Inc.*, 508 U.S. at 532.

⁶⁸ See, e.g., *Masterpiece Cakeshop, Ltd. v. Colorado Civil Rts. Comm'n*, 584 U.S. 617, 621 (2018); *Elane Photography, LLC v. Willock*, 309 P.3d 53, 59–60 (N.M. 2013).

⁶⁹ *Masterpiece Cakeshop, Ltd.*, 584 U.S. at 621.

⁷⁰ *Id.* at 621.

⁷¹ *Id.* at 617 (CADA prohibits discrimination based on sexual orientation in a “place of business engaged in any sales to the public and any place offering services . . . to the public.”); *Id.* (“Under CADA’s administrative review system, the Colorado Civil Rights Division first found probable cause for a violation and referred the case to the Commission. The Commission then referred the case for a formal hearing before a state Administrative Law Judge (ALJ), who ruled in the couple’s favor.”).

⁷² *Id.* at 640.

⁷³ *Elane Photography, LLC v. Willock*, 309 P.3d 53, 59–60 (N.M. 2013).

⁷⁴ *Id.* at 60.

⁷⁵ *Id.* at 77.

“exemptions do not prefer secular conduct over religious conduct or evince any hostility toward religion.”⁷⁶

The Supreme Court has held that “religious beliefs need not be acceptable, logical, consistent, or comprehensible to others in order to merit First Amendment protection.”⁷⁷ If a law has the “incidental effect of burdening a particular religious practice,” it is subject to rational basis review as long as it is “neutral and of general applicability.”⁷⁸ If, however, a law fails to satisfy the neutrality and general applicability requirements, then strict scrutiny applies.⁷⁹

The Establishment Clause also comes into play when LGBTQ plaintiffs argue that state or federal policies favor certain religious beliefs.⁸⁰ In *Barber v. Bryant*, for example, LGBTQ plaintiffs sought to enjoin a new law from taking effect because it granted special rights to citizens who “sincerely held religious beliefs or moral convictions” reflecting disapproval of lesbian, gay, transgender, and unmarried persons.⁸¹ The District Court for the Northern District of Mississippi granted a preliminary injunction because it found that the statute violated the Establishment Clause by failing to protect people who hold contrary religious beliefs.⁸²

Under the Establishment Clause, no government may “aid, foster, or promote one religion or religious theory against another.”⁸³ Nor may the government act with the “ostensible and predominant purpose of advancing religion.”⁸⁴ The Establishment Clause’s central value is “official religious neutrality”⁸⁵ and it protects against “sponsorship, financial support, and active involvement of the sovereign in religious activity.”⁸⁶ There is “no neutrality when the government’s ostensible

⁷⁶ *Id.* at 75.

⁷⁷ *Thomas v. Review Bd. of Indiana Emp’t Sec. Div.*, 450 U.S. 707, 714 (1981).

⁷⁸ *Church of the Lukumi Babalu Aye, Inc.*, 508 U.S. at 521, 531.

⁷⁹ *Id.* at 908.

⁸⁰ *See, e.g., Barber v. Bryant*, 193 F. Supp. 3d 677, 688 (S.D. Miss. 2016), *rev’d en banc*, 860 F.3d 345 (5th Cir. 2017).

⁸¹ *Id.*

⁸² *Id.* (The Fifth Circuit, however, reversed and dismissed the case because it found that the plaintiffs lacked Article III standing to bring a claim under the Establishment Clause.).

⁸³ *Epperson v. Arkansas*, 393 U.S. 97, 104 (1968).

⁸⁴ *McCreary Cnty., Kentucky v. ACLU of Kentucky*, 545 U.S. 844, 860 (2005) (citation omitted).

⁸⁵ *Id.*

⁸⁶ *Lemon v. Kurtzman*, 403 U.S. 602, 612 (1971) (quoting *Walz v. Tax Comm’n*, 397 U.S. 664, 668 (1970)).

object is to take sides.”⁸⁷ Under these principles, the government should not act in ways that advance religious beliefs at the expense of LGBTQ peoples’ individual liberties.

A court’s first inquiry for an Establishment Clause claim is whether legislation discriminates on the basis of religion.⁸⁸ If it does, then strict scrutiny review determines whether the legislation is unconstitutional.⁸⁹ If not, then courts have traditionally applied the three-part *Lemon* test.⁹⁰ The *Lemon* test imposes the following requirements on statutes: (1) must have a secular legislative purpose; (2) the principal or primary effect must be one that neither advances nor inhibits religion; and (3) must not foster excessive government entanglement with religion.⁹¹ Under the excessive entanglement prong, courts consider the following elements: the character and purpose of the institutions that are benefitted; the nature of the public aid; and the resulting relationship between government and religious authority.⁹² If the legislation fails the *Lemon* test at any step, then the law is unconstitutional.⁹³

Courts have begun to apply the *Lemon* test more loosely, or not at all.⁹⁴ In the past few decades, the Supreme Court has bypassed Establishment Clause challenges by invalidating government action based on the Free Exercise Clause.⁹⁵ Some Justices have also expressed interest in replacing the *Lemon* test with the history and tradition test.⁹⁶ The Court, however, has never expressly overruled *Lemon*.⁹⁷ Thus, the *Lemon* test framework would likely guide the review of an establishment claim against legislation that exempts faith-based child welfare agencies from non-discrimination policies.⁹⁸

⁸⁷ *McCreary Cnty.*, 545 U.S. at 860.

⁸⁸ *Larson v. Valente*, 456 U.S. 228, 246 (1982).

⁸⁹ *Id.*

⁹⁰ *Lemon*, 403 U.S. at 612–13.

⁹¹ *Id.*

⁹² *Id.* at 615.

⁹³ *Id.* at 612–13.

⁹⁴ *Kennedy v. Bremerton Sch. Dist.*, 597 U.S. 507, 535 (2022) (“In place of *Lemon* and the endorsement test, this Court has instructed that the Establishment Clause must be interpreted by reference to historical practices and understandings.”) (internal citations omitted).

⁹⁵ *Id.* at 543–44 (holding that the school district could not infringe on its employee’s free exercise and free speech rights to avoid violating the Establishment Clause).

⁹⁶ See *Lee v. Weisman*, 505 U.S. 577, 633 (1992) (Scalia, J., dissenting).

⁹⁷ *Id.*

⁹⁸ See *Dumont*, 341 F. Supp. 3d at 706 (applying *Lemon* test to nondiscrimination adoption and foster care policy).

C. *The Fourteenth Amendment*

The Supreme Court incorporated the Establishment Clause and the Free Exercise Clause from the First Amendment to the states through the Fourteenth Amendment, thereby prohibiting state governments from endorsing religion or hindering the free practice of religion.⁹⁹ The Fourteenth Amendment to the United States Constitution provides that “[n]o State shall... deny to any person within its jurisdiction the equal protection of the laws.”¹⁰⁰ The Equal Protection Clause mandates states to govern impartially and prohibits them from drawing distinctions between classes of persons without proper justification.¹⁰¹ There are two ways to show that a policy discriminates against LGBTQ people.¹⁰² First, a plaintiff may show that a law has “a discriminatory intent and disproportionate impact.”¹⁰³ Alternatively, a plaintiff may show that a classification “appears on the face” of the policy.¹⁰⁴ As discussed above, the level of justification that the government must satisfy depends on the classifications that they draw.¹⁰⁵

The Supreme Court has not yet decided which standard of review applies to laws that discriminate on the basis of sexual orientation and gender identity,¹⁰⁶ but some lower courts have indicated that a heightened scrutiny should apply.¹⁰⁷ In *Windsor v. United States*, for

⁹⁹ U.S. CONST. amend. I; U.S. CONST. amend. XIV.

¹⁰⁰ U.S. CONST. amend. XIV.

¹⁰¹ *Equal Protection*, CORNELL L. SCH. LEGAL INFO. INST. (last accessed June 29, 2024), https://www.law.cornell.edu/wex/equal_protection.

¹⁰² *Vill. of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 265 (1977); *Shaw v. Reno*, 509 U.S. 630, 642–43 (1993).

¹⁰³ *Vill. of Arlington Heights*, 429 U.S. at 265.

¹⁰⁴ *Shaw v. Reno*, 509 U.S. 630, 642 (1993).

¹⁰⁵ See *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 17 (1973) (Strict scrutiny applies when a government policy “operates to the disadvantage of some suspect class or impinges upon a fundamental right explicitly or implicitly protected by the Constitution.”).

¹⁰⁶ Kaleb Byars, *Bostock: An Inevitable Guarantee of Heightened Scrutiny for Sexual Orientation and Transgender Classifications*, 89 TENN. L. REV. 483, 513 (2022) (“The state of the Equal Protection Clause as applied to LGBTQ classifications is unsettled.”).

¹⁰⁷ Stacey L. Sobel, *When Windsor Isn’t Enough: Why the Court Must Clarify Equal Protection Analysis for Sexual Orientation Classifications*, 24 CORNELL J. L. & PUB. POL’Y 493, 504 (2015); see, e.g., *Romer v. Evans*, 517 U.S. 620, 635 (1996) (striking down an amendment to the Colorado Constitution that prohibited action designed to protect homosexual persons from discrimination because it did not satisfy rational basis with bite standard and therefore violated the Equal Protection Clause).

example, the Second Circuit reviewed section three of the Defense of Marriage Act (DOMA), which defined marriage as only between one man and one woman, and stated that the review required “heightened scrutiny.”¹⁰⁸ The court reasoned that LGBTQ people qualify as a quasi-suspect class under the Supreme Court’s factors.¹⁰⁹ Specifically, the court stated:

[A]ll four factors justify heightened scrutiny: A) homosexuals as a group have historically endured persecution and discrimination; B) homosexuality has no relation to aptitude or ability to contribute to society; C) homosexuals are a discernible group with non-obvious distinguishing characteristics, especially in the subset of those who enter same-sex marriages; and D) the class remains a politically weakened minority.¹¹⁰

The Supreme Court affirmed the decision without ruling on which standard of review applied.¹¹¹

The Fourth Circuit also found that heightened scrutiny applied when a Board of Education bathroom policy discriminated against transgender people.¹¹² The court reasoned that the policy “rests on sex-based classifications,” and that “transgender people constitute at least a quasi-suspect class.”¹¹³ Therefore, the court applied intermediate scrutiny, stating that the Board’s bathroom policy must be “substantially related to a sufficiently important governmental interest.”¹¹⁴

Moreover, many scholars argue that intermediate scrutiny should apply to sexual orientation discrimination because it applies to gender discrimination.¹¹⁵ Sexual orientation and gender are inherently linked.¹¹⁶ Sexual orientation is necessarily based on the gender identities of individuals and their romantic partners, so discrimination

¹⁰⁸ *Windsor v. United States*, 699 F.3d 169, 181 (2d Cir. 2012), *aff’d*, 570 U.S. 744 (2013).

¹⁰⁹ *Id.*

¹¹⁰ *Id.* at 181–82.

¹¹¹ *United States v. Windsor*, 570 U.S. 744, 755 (2013).

¹¹² *Grimm v. Gloucester Cnty. Sch. Bd.*, 972 F.3d 586, 607 (4th Cir. 2020); *Id.* at 593 (The bathroom policy as issue required transgender high school students to use restrooms matching their “biological gender” or use “alternative” single-stall restrooms.).

¹¹³ *Id.* at 607.

¹¹⁴ *Id.*

¹¹⁵ *See, e.g., Ray-Holmes, supra* note 52, at 365; Byars, *supra* note 106, at 512; LaCour, *supra* note 51, at 124.

¹¹⁶ *See Bostock v. Clayton Cnty.*, 590 U.S. 644, 660 (2020).

against LGBTQ people is a form of gender discrimination.¹¹⁷ In fact, the Supreme Court recently held, in *Bostock v. Clayton County*, that discrimination on the basis of sexual orientation or gender identity is discrimination on the basis of sex for the purposes of Title VII.¹¹⁸ While reviewing an employment policy that discriminated against LGBTQ applicants, the Court stated:

There is no way for an applicant to decide whether to check the homosexual or transgender box without considering sex. To see why, imagine an applicant doesn't know what the words homosexual or transgender mean. Then try writing out instructions for who should check the box without using the words man, woman, or sex (or some synonym). It can't be done. Likewise, there is no way an employer can discriminate against those who check the homosexual or transgender box without discriminating in part because of an applicant's sex. By discriminating against homosexuals, the employer intentionally penalizes men for being attracted to men and women for being attracted to women. By discriminating against transgender persons, the employer unavoidably discriminates against persons with one sex identified at birth and another today. Any way you slice it, the employer intentionally refuses to hire applicants in part because of the affected individuals' sex, even if it never learns any applicant's sex.¹¹⁹

As the Supreme Court explained, sexual orientation and gender are inextricably linked.¹²⁰ Since *Bostock*, lower courts have applied intermediate scrutiny to discrimination against LGBTQ people in other areas of law, including Title IX.¹²¹ “LGBTQ discrimination is simply a type of sex discrimination,” and, “[b]ecause courts apply intermediate scrutiny to sex-based classifications, then, courts equally should apply intermediate scrutiny to sexual orientation and transgender classifications.”¹²² By applying heightened scrutiny to classifications on the basis of sexual orientation and gender identity, courts shift the burden of proof in Equal Protection cases from the challenger to the

¹¹⁷ *Id.*

¹¹⁸ *Id.* at 657–58.

¹¹⁹ *Id.* at 668–69.

¹²⁰ *Id.* at 660.

¹²¹ B.P.J. by Jackson v. W. Virginia State Bd. of Educ., No. 23-1078, 2024 WL 1627008, at *6 (4th Cir. Apr. 16, 2024) (striking down a West Virginia law that prohibited transgender girls from playing on female school sport teams because the law violated the “discrimination on the basis of sex” provision under Title IX).

¹²² Byars, *supra* note 106.

government. Heightened scrutiny also requires the government to show it has proper justification, rather than any conceivable basis, for treating LGBTQ people differently than others. Thus, courts should recognize the link between sexual orientation and gender to ensure that LGBTQ people have adequate protection under the law.

III. *FULTON AND DUMONT*

The Supreme Court considered the tension between the Free Exercise Clause and non-discrimination policies in child welfare agencies for the first time in *Fulton v. City of Philadelphia*.¹²³ In *Fulton*, the City of Philadelphia held a policy of inclusivity in foster care and adoption.¹²⁴ The City's standard foster care contracts, for example, contained the following provision:

Rejection of Referral. Provider shall not reject a child or family including, but not limited to, . . . prospective foster or adoptive parents, for Services based upon . . . sexual orientation . . . unless an exception is granted by the Commissioner or the Commissioner's designee, in his/her sole discretion.¹²⁵

Philadelphia also enforced the Fair Practices Ordinance, which prohibits "deny[ing] or interfer[ing] with the public accommodations opportunities of an individual or otherwise discriminat[ing] based on his or her...sexual orientation, . . . marital status, familial status," or other protected categories.¹²⁶ So when the City discovered that CSS, a foster care agency in Philadelphia, refused to certify same-sex couples as foster parents and place LGBTQ children in foster care, the City stopped referring children to CSS.¹²⁷ The City agreed to renew its foster care contract with CSS only if the agency agreed to certify same-sex couples.¹²⁸

In response, CSS and three foster parents filed suit in District Court, claiming that the City's actions violated the Free Exercise Clause of the First Amendment.¹²⁹ The District Court denied the plaintiffs'

¹²³ *Fulton v. City of Philadelphia*, 593 U.S. 522, 534–35 (2021).

¹²⁴ *Id.* at 535.

¹²⁵ *Id.*

¹²⁶ *Id.* at 531, 538; 9 PHILA. CODE § 9–1106(1) (2016).

¹²⁷ *Fulton*, 593 U.S. at 526–27.

¹²⁸ *Id.* at 527.

¹²⁹ *Id.* at 531.

request for a preliminary injunction, finding that the “contractual non-discrimination requirement and the Fair Practices Ordinance were neutral and generally applicable,” and that “the free exercise claim was therefore unlikely to succeed.”¹³⁰ The Third Circuit affirmed on the grounds that, because the contract between the parties had expired, “the City could insist on the inclusion of new language forbidding discrimination on the basis of sexual orientation as a condition of contract renewal.”¹³¹ CSS and the foster parents appealed to the Supreme Court, challenging the lower court’s finding that the City’s nondiscrimination policies were neutral and generally applicable.¹³²

The Supreme Court made three major findings to support its reversal of the lower courts’ decisions.¹³³ First, the Supreme Court found that the nondiscrimination policy of the Fair Practices Ordinance did not apply because foster care agencies are not within the scope of public accommodations due to the selective nature of certifying foster parents.¹³⁴ Second, with respect to the City’s standard foster care contracts, the Court found that the nondiscrimination policy was not neutral and generally applicable because the Rejection of Referral provision was discretionary, and the Commissioner had granted other exceptions.¹³⁵ Because the nondiscrimination policy was not neutral and generally applicable, the Court applied strict scrutiny.¹³⁶ Third, the Court held that the City’s action failed strict scrutiny.¹³⁷ The City argued that it had a compelling interest in denying an exception for CSS’s religious exercise to increase the number of available foster parents and ensure equal treatment.¹³⁸ The Court, however, conclusively stated that refusing to contract CSS would likely decrease available foster parents and that the City’s discretionary policy did not ensure equality.¹³⁹ It therefore concluded that the City’s refusal to contract with CSS for foster care services violated the Free Exercise Clause.¹⁴⁰

¹³⁰ *Id.*

¹³¹ *Id.* at 532.

¹³² *Id.*

¹³³ *Fulton*, 593 U.S. at 536–38, 541–42.

¹³⁴ *Id.* at 538.

¹³⁵ *Id.* at 536–37.

¹³⁶ *Id.* at 540–41.

¹³⁷ *Id.* at 541–42.

¹³⁸ *Id.* at 541.

¹³⁹ *Fulton*, 593 U.S. at 542.

¹⁴⁰ *Id.* at 542–43.

The Supreme Court has not considered how the Equal Protection or Establishment Clauses apply to child welfare agencies that discriminate against LGBTQ children and adults, but some lower courts have.¹⁴¹ Several District Courts have found that LGBTQ parents stated causes of action against faith-based exceptions to anti-discrimination laws under both the Establishment Clause and the Equal Protection Clause.¹⁴² In *Dumont v. Lyon*, for example, a same-sex couple challenged the constitutionality of the state Department of Health and Human Services' practice of allowing state-contracted and taxpayer-funded child placement agencies to use religious criteria to screen prospective foster and adoptive parents.¹⁴³ The District Court appeared to apply rational basis with bite to the Equal Protection claim because it considered the state's actual intention rather than looking for any conceivable legitimate interest.¹⁴⁴ The court stated that "the desire to effectuate one's animus against homosexuals can never be a legitimate governmental purpose, [and] a state action based on that animus alone violates the Equal Protection Clause."¹⁴⁵ Regarding the Establishment Clause, the court found that the plaintiffs alleged sufficient endorsement and excessive entanglement between church and state under the *Lemon* test because licensing agencies may convey the message that the State endorses their religious views.¹⁴⁶ Thus, the court concluded that the same-sex couple stated sufficient claims to survive the State's motion to dismiss.¹⁴⁷

Although *Fulton* and *Dumont* appear to address similar issues, *Fulton* should not determine the outcome of the claims in *Dumont*. Several distinctions between the two cases are relevant. First, the plaintiff in *Fulton* was a faith-based foster care and adoption agency that sought a contract for referrals with the City.¹⁴⁸ In *Dumont*, however, the plaintiffs

¹⁴¹ See, e.g., *Dumont v. Lyon*, 341 F. Supp. 3d 706, 722 (E.D. Mich. 2018); Campaign for S. Equal. v. Mississippi Dep't of Hum. Servs., 175 F. Supp. 3d 691, 709–10 (S.D. Miss. 2016).

¹⁴² See, e.g., *Dumont v. Lyon*, 341 F. Supp. 3d 706 (E.D. Mich. 2018); Campaign for S. Equal. v. Mississippi Dep't of Hum. Servs., 175 F. Supp. 3d 691, 709 (S.D. Miss. 2016) (finding that a Mississippi law prohibiting same-sex married couples from adopting violated the Equal Protection Clause).

¹⁴³ *Dumont*, 341 F. Supp. 3d at 706.

¹⁴⁴ *Id.* at 742.

¹⁴⁵ *Id.*

¹⁴⁶ *Id.* at 735–36.

¹⁴⁷ *Id.* at 740.

¹⁴⁸ *Fulton*, 593 U.S. at 531.

were a same-sex couple who sought to adopt.¹⁴⁹ Second, the constitutional claims are different.¹⁵⁰ Whereas *Fulton* concerned the Free Exercise Clause,¹⁵¹ *Dumont* concerned the Establishment and Equal Protection Clauses. Because the parties claimed different constitutional injuries, the redress would be different in each case as well.¹⁵² Third, the policies at issue in each case are distinguishable because the plaintiffs in *Fulton* challenged the City's refusal to contract CSS unless it agreed to certify prospective LGBTQ parents,¹⁵³ but the plaintiffs in *Dumont* challenged the State's policy of allowing child placement agencies to use religious criteria to screen prospective foster and adoptive parents.¹⁵⁴

The distinctions between the plaintiffs and their claims are relevant for determining which party bears the burden of proof and which level of justification they must meet.¹⁵⁵ In *Fulton*, the standard of review turned on whether the City's policy was neutral and generally applicable.¹⁵⁶ The Court found that it was not, so strict scrutiny applied, and the City thus bore the burden of proving it had a compelling interest.¹⁵⁷ In *Dumont*, however, the standard of review for the equal protection claim turned on the classification of the group that the State discriminated against.¹⁵⁸ Since the Supreme Court has not explicitly stated that intermediate scrutiny applies to LGBTQ discrimination, the court applied rational basis and the State only had to show a legitimate interest.¹⁵⁹ Furthermore, the *Lemon* test governed the court's review of the plaintiffs' Establishment Clause claim.¹⁶⁰ Thus, given these distinctions, the Supreme Court has not addressed the particular issues raised in *Dumont*.

The Supreme Court may not rule on the issues raised in *Dumont* anytime soon because the *Dumont* litigation is no longer

¹⁴⁹ *Dumont*, 341 F. Supp. 3d at 706.

¹⁵⁰ Compare *Fulton*, 593 U.S. at 531, with *Dumont*, 341 F. Supp. 3d at 706.

¹⁵¹ *Fulton*, 593 U.S. at 531; *Dumont*, 341 F. Supp. 3d at 706.

¹⁵² Compare *Fulton*, 593 U.S. at 531, with *Dumont*, 341 F. Supp. 3d at 706 (the plaintiffs in *Dumont* sought a change in agency policy to allow LGBTQ parents, compared with *Fulton*, in which the plaintiffs sought for the city's nondiscrimination policy not to be enforced against them).

¹⁵³ *Fulton*, 593 U.S. at 531.

¹⁵⁴ *Dumont*, 341 F. Supp. 3d at 706.

¹⁵⁵ Compare *Fulton*, 593 U.S. at 537–38 with *Dumont*, 341 F. Supp. 3d at 741.

¹⁵⁶ *Fulton*, 593 U.S. at 537.

¹⁵⁷ *Id.* at 537–38.

¹⁵⁸ *Dumont*, 341 F. Supp. 3d at 742.

¹⁵⁹ *Id.* at 741.

¹⁶⁰ *Id.* at 735.

proceeding.¹⁶¹ In March 2019, the *Dumont* parties settled when the state of Michigan agreed to require all taxpayer-funded, state-contracted child welfare agencies to accept all qualified families, including same-sex couples.¹⁶² The settlement was a victory for the LGBTQ rights movement, but it left the constitutional issues unresolved. Given the inconsistent state policies across the nation, it is important to consider claims that may arise concerning the constitutionality of state policies that grant religious child welfare agencies a license to discriminate against LGBTQ children and prospective parents.

ANALYSIS

In Section III, this Article will argue three main points. First, the Supreme Court decided *Fulton* incorrectly because the City had compelling governmental interests that were sufficient to survive strict scrutiny. Second, *Fulton* is a narrow ruling that courts should confine to its specific factual circumstances. Third, state statutes that permit child welfare agencies to discriminate based on religious beliefs violate the Establishment and Equal Protection Clauses.

I. *FULTON* WAS INCORRECTLY DECIDED

Policies that prohibit discrimination against LGBTQ children and adults in adoption and foster care should not run afoul of the Free Exercise Clause. Even where strict scrutiny applies, as in *Fulton*, courts should find that governments have compelling interests in eradicating discrimination and maximizing the number of available foster parents.

A. *There is a Compelling Government Interest in Maximizing the Number of Foster and Adoptive Parents.*

In *Fulton*, the City asserted that its nondiscrimination policies served the compelling interest of maximizing the number of foster families.¹⁶³ The Court, however, stated that the City asserted its interest

¹⁶¹ *Dumont v. Gordon*, AMERICAN CIVIL LIBERTIES UNION (June 29, 2024), <https://www.aclu.org/cases/dumont-v-gordon>.

¹⁶² *Id.*

¹⁶³ *Fulton*, 593 U.S. at 541.

too broadly and failed to show that granting CSS an exception would put that interest at risk.¹⁶⁴ And then without any evidence, the Court speculated that “[i]f anything, including CSS in the program seems likely to increase, not reduce, the number of available foster parents.”¹⁶⁵

The Court’s conclusion regarding CSS’s effect on the number of foster parents is not persuasive. If the City refused to contract CSS, those Catholic foster parents who would have gone to CSS could seek out secular agencies to certify them as foster parents. The Court cited no evidence that the City’s refusal to contract CSS would deter adults seeking to foster from identifying an alternative agency to work with.¹⁶⁶ Thus, other child welfare agencies could fill the gap and service both the parents and children that CSS serves. In fact, the plaintiffs in *Dumont* introduced evidence that there was no basis for believing that faith-based agencies would close if they were not granted religious exemptions or even that closing religious agencies would reduce the number of prospective parents.¹⁶⁷ On the other hand, if the City continues to contract CSS and refer children to it, logic suggests that there will be fewer foster parents available to those children because CSS excludes LGBTQ foster parents.

Moreover, there are too many children in the adoption and foster care system for the court to decide that maximizing the number of adoptive and foster parents is not a compelling government interest.¹⁶⁸ In 2021, more than 113,000 children were placed for adoption in the United States,¹⁶⁹ and an additional 391,000 children were placed in foster care.¹⁷⁰ Only 53,500 children, less than 10%, were adopted.¹⁷¹ On average, children wait at least three years before being adopted,¹⁷²

¹⁶⁴ *Id.* at 541–42.

¹⁶⁵ *Id.* at 542.

¹⁶⁶ *Id.* at 541–542 (The Court merely concluded that “[m]aximizing the number of foster families and minimizing liability are important goals, but the City fails to show that granting CSS an exception will put those goals at risk. If anything, including CSS in the program seems likely to increase, not reduce, the number of available foster parents.”).

¹⁶⁷ *Dumont*, 341 F. Supp. 3d at 743.

¹⁶⁸ See Congressional Coalition on Adoption Institute, *U.S. Foster Care & Adoption Statistics*, (last visited Oct. 9, 2024), <https://www.ccaainstitute.org/resources/fact-sheets>.

¹⁶⁹ *Id.*

¹⁷⁰ *Id.*

¹⁷¹ Facts Sheets, CONG. COAL. ON ADOPTION INST., <https://www.ccaainstitute.org/resources/fact-sheets>.

¹⁷² *Id.*

and about 20,000 children per year turn 18 years-old and have to leave the system without ever finding a permanent family.¹⁷³ When children remain in foster care and adoption agencies, their likelihood of adoption decreases,¹⁷⁴ and the risk of experiencing abuse and neglect increases.¹⁷⁵

Maximizing access to adoptive parents is important because children in foster care and children awaiting adoption are more likely to experience adverse childhood experiences that increase their chances of developing psychological problems. Children in the foster care system are more likely than other children to be exposed to adverse childhood experiences including abuse, violence, mental illness, and substance abuse.¹⁷⁶ A 2012 survey of children adopted from or placed in foster care found that 31.1% experienced violence, 34.2% experienced abuse, and 53.8% experienced a household member with substance abuse problems.¹⁷⁷ These experiences place children at higher risk for developing various psychosocial and academic problems as they grow older, thereby compounding their societal disadvantages.¹⁷⁸

Based on the effect that the child welfare system has on children, the City's interest in maximizing the number of foster and adoptive parents is rooted in an interest in the welfare of children. United States courts have repeatedly reaffirmed that the welfare of children

¹⁷³ Frank J. Bewkes, Shabab Ahmed Mirza, & Caitlyn Rooney, *Welcoming All Families*, CTR. FOR AM. PROGRESS (Nov. 20, 2018), <https://www.americanprogress.org/article/welcoming-all-families/>; *Religious Exemption Laws Exacerbating Foster and Adoption 'Crisis,' Report Finds*, NBC NEWS (Nov. 22, 2018), <https://www.nbcnews.com/feature/nbc-out/religious-exemption-laws-exacerbating-foster-adoption-crisis-report-finds-n939326>.

¹⁷⁴ *Older Child Adoption*, N. AM. COUNCIL ON ADOPTABLE CHILDREN (June 29, 2024), <https://nacac.org/help/adoption-practice/older-child-adoption/>.

¹⁷⁵ Kristin Turney & Christopher Wildeman, *Adverse Childhood Experiences Among Children Placed in and Adopted from Foster Care: Evidence from a Nationally Representative Survey*, 64 CHILD ABUSE & NEGLECT 117–29 (2017), <https://doi.org/10.1016/j.chiabu.2016.12.009>.

¹⁷⁶ *Id.*

¹⁷⁷ *Id.*

¹⁷⁸ David Brooks, Joan Allen & Richard P. Barth, *Adoption Services Use, Helpfulness, and Need: A Comparison of Public and Private Agency and Independent Adoptive Families*, 24 CHILDREN & YOUTH SERVS. REVIEW 213–38 (2002), https://www.researchgate.net/profile/Devon-Brooks/publication/4822846_Adoption_Services_Use_Helpfulness_and_Need_A_Comparison_of_Public_and_Private_Agency_and_Independent_Adoptive_Families/links/5ed4624692851c9c5e71d62d/Adoption-Services-Use-Helpfulness-and-Need-A-Comparison-of-Public-and-Private-Agency-and-Independent-Adoptive-Families.pdf.

is a government interest that outweighs other individual rights.¹⁷⁹ For example, courts have widely applied the “best interest of the child” standard in cases where the welfare of a child is at stake.¹⁸⁰ In fact, the general rule in child custody disputes is that courts may not consider religion when determining which custody arrangement is in the best interest of the child.¹⁸¹ When the City refers children to agencies like CSS, those children need foster and adoptive parents.¹⁸² Because foster care and adoption concerns the custody of children, the best interest of the child standard should apply to all decisions about the qualification and certification of foster and adoptive parents. Considering how many children require foster care and adoption, it is in the best interest of the children to certify as many qualified foster and adoptive parents as possible to increase their chances of finding healthy home environments, regardless of religion or LGBTQ status.

Similarly, the Supreme Court stated in *New York v. Ferber* that “[i]t is evident beyond the need for elaboration that a State’s interest in safeguarding the physical and psychological well-being of a minor is compelling.”¹⁸³ The United States’ “society rests, for its continuance, upon the healthy, well-rounded growth of young people into full maturity as citizens.”¹⁸⁴ The Court has repeatedly upheld government action “aimed at protecting the physical and emotional well-being of youth” even when government actions “have operated in the sensitive area of constitutionally protected rights.”¹⁸⁵ Finding qualified parents to foster and adopt children would likely reduce the number of children exposed to adverse childhood experiences and help ensure safe and healthy environments for developing children. Thus, the City’s interest in maximizing the number of foster and adoptive parents is inextricably linked to its interest in promoting the welfare of children. So, the *Fulton*

¹⁷⁹ See Steven N. Peskind, *Determining the Undeterminable: The Best Interest of the Child Standard As an Imperfect but Necessary Guidepost to Determine Child Custody*, 25 N. ILL. U. L. REV. 449, 455 (2005) (discussing how the best interests standard is applied in child custody cases).

¹⁸⁰ *Id.*

¹⁸¹ See J. Michael Fitzgerald, *An Overview of Religious Considerations in Child Custody Disputes*, 32 THE CATHOLIC LAWYER 129, 134 (2017).

¹⁸² See *Fulton*, 593 U.S. at 535.

¹⁸³ *New York v. Ferber*, 458 U.S. 747, 756–57 (1982) (internal quotation marks omitted).

¹⁸⁴ *Id.* at 757.

¹⁸⁵ *Id.*

Court should have found that the City had a compelling government interest in requiring CSS to certify same-sex foster parents.

B. *There is a Compelling Government Interest in Eradicating Discrimination Against LGBTQ Children and Adults.*

The City in *Fulton* also asserted a compelling interest in ensuring equal treatment of prospective foster parents and foster children.¹⁸⁶ The Court, citing *Masterpiece Cakeshop*, acknowledged that “[o]ur society has come to the recognition that gay persons and gay couples cannot be treated as social outcasts or as inferior in dignity and worth.”¹⁸⁷ The Court immediately thereafter concluded that ensuring equal treatment of LGBTQ foster parents was not a sufficient compelling interest to deny CSS an exception for its religious exercise merely because the non-discrimination policy permitted exceptions.¹⁸⁸

The Court’s conclusion in *Fulton*, however, is inconsistent with the Court’s own precedent. The Court has repeatedly found that “discrimination eradication” is a compelling government interest.¹⁸⁹ In *Roberts v. United States Jaycees*, for example, the Court was “persuaded that Minnesota’s compelling interest in eradicating discrimination against its female citizens justify[ed] the impact that application of the statute to the [plaintiffs] may have on the male members’ associational freedoms.”¹⁹⁰ In that case, the Court found that the statute at issue reflected “the State’s strong historical commitment to eliminating discrimination” and “[t]hat goal, which is unrelated to the suppression of expression, plainly serves compelling state interests of the highest order.”¹⁹¹

¹⁸⁶ *Fulton*, 593 U.S. at 541.

¹⁸⁷ *Id.* at 542 (quoting *Masterpiece Cakeshop v. Colorado Civil Rts. Comm’n*, 584 U.S. 617, 631 (2018)).

¹⁸⁸ *Id.* at 542.

¹⁸⁹ *E.g.*, *Roberts v. United States Jaycees*, 468 U.S. 609, 623 (1984) (holding that discrimination eradication was a compelling state interest that justified infringement on First Amendment right of association); *Miller v. Johnson*, 515 U.S. 900, 920 (1995) (“There is a ‘significant state interest in eradicating the effects of past racial discrimination.’”); *Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267, 286 (1986) (O’Connor, J., concurring) (“The Court is in agreement that, whatever the formulation employed, remedying past or present racial discrimination by a state actor is a sufficiently weighty state interest to warrant the remedial use of a carefully constructed affirmative action program.”).

¹⁹⁰ *Roberts*, 468 U.S. at 623.

¹⁹¹ *Id.* at 624.

Similarly, in *Fulton*, the City's refusal to contract CSS was unrelated to the suppression of the agency's religious exercise.¹⁹² Rather, the City sought to ensure equal treatment of prospective foster parents and foster children by requiring CSS to certify LGBTQ foster parents.¹⁹³ The City did not impose any requirements on CSS other than the one requirement necessary to achieve equal treatment.¹⁹⁴ And the fact that the City's rejection of the referral provision contained a discretionary clause is insufficient to completely dispel that interest, which is a compelling government interest of the "highest order."¹⁹⁵ Furthermore, the Court held in *Roberts* that eradicating gender discrimination is a compelling government interest¹⁹⁶ and it held in *Bostock* that sexual orientation discrimination is gender discrimination.¹⁹⁷ Thus, precedent clearly indicates that the Court in *Fulton* should have found that the City had a sufficient compelling interest in eliminating discrimination against LGBTQ adults and children.¹⁹⁸

C. *Fulton is a Narrow Holding That Courts Should Confine to Cases with Discretionary Nondiscrimination Policies.*

The *Fulton* Court was incorrect when it found that the City did not have compelling interests in enforcing its nondiscrimination policy. But regardless of whether the holding was proper, the *Fulton* decision

¹⁹² See *Fulton*, 593 U.S. at 527 ("After receiving a complaint about a different agency, a newspaper ran a story in which a spokesman for the Archdiocese of Philadelphia stated that CSS would not be able to consider prospective foster parents in same-sex marriages. The City Council called for an investigation, saying that the City had 'laws in place to protect its people from discrimination that occurs under the guise of religious freedom.' . . . The Philadelphia Commission on Human Relations launched an inquiry. And the Commissioner of the Department of Human Services held a meeting with the leadership of CSS. She remarked that 'things have changed since 100 years ago,' and 'it would be great if we followed the teachings of Pope Francis, the voice of the Catholic Church.' . . . Immediately after the meeting, the Department informed CSS that it would no longer refer children to the agency. The City later explained that the refusal of CSS to certify same-sex couples violated a non-discrimination provision in its contract with the City as well as the non-discrimination requirements of the citywide Fair Practices Ordinance.").

¹⁹³ *Fulton*, 593 U.S. at 541.

¹⁹⁴ *Id.* at 542.

¹⁹⁵ *Roberts*, 468 U.S. at 624.

¹⁹⁶ *Id.*

¹⁹⁷ *Bostock*, 590 U.S. at 668–69.

¹⁹⁸ See *Roberts*, 468 U.S. at 623.

is binding authority.¹⁹⁹ The Court concluded that the City could not enforce its discretionary nondiscrimination policies to require CSS to certify LGBTQ foster parents.²⁰⁰ This holding, however, is actually quite narrow because the Court did not consider mandatory nondiscrimination policies nor the effects of the Establishment and Equal Protections Clauses. Thus, the *Fulton* decision left the door open for future cases with distinguishable facts to offer more protection to LGBTQ people in adoption and foster care.

Much of the *Fulton* decision turned on the fact that the City's foster care nondiscrimination policy was discretionary.²⁰¹ Specifically, the foster care contracts prohibited discrimination "unless an exception is granted by the Commissioner or the Commissioner's designee, in his/her sole discretion."²⁰² The Court used the discretionary clause as its basis for finding that the nondiscrimination policy was not neutral and generally applicable and that the City did not have a compelling interest in eradicating discrimination.²⁰³ Thus, the Court's reliance on the discretionary provision has at least two major implications for future litigation over similar issues. First, states with non-discretionary nondiscrimination policies may be neutral and generally applicable, and therefore subject to rational basis review.²⁰⁴ Second, states with non-discretionary nondiscrimination policies may have a compelling government interest in eradicating discrimination.²⁰⁵

The Court held, in *Fulton*, that the City's nondiscrimination policy in its foster care contracts was not neutral and generally applicable because the Commissioner had the authority to grant agencies exemptions.²⁰⁶ It follows that as long as nondiscrimination policies are non-discretionary, then they are neutral and generally applicable.²⁰⁷

¹⁹⁹ ABA, Understanding Stare Decisis, (Dec. 16, 2022), https://www.americanbar.org/groups/public_education/publications/preview_home/understand-stare-decisis/ ("To put it simply, stare decisis holds that courts and judges should honor 'precedent'—or the decisions, rulings, and opinions from prior cases.").

²⁰⁰ *Fulton*, 593 U.S. at 542.

²⁰¹ *Id.* at 542.

²⁰² *Id.* at 535.

²⁰³ *Id.* at 542.

²⁰⁴ *See id.*

²⁰⁵ *See id.*

²⁰⁶ *Fulton*, 593 U.S. at 537 (holding that the policy was not generally applicable because the Commissioner had used his discretion to grant exception to other agencies).

²⁰⁷ *See id.*

Thus, *Fulton* is distinguishable from many state nondiscrimination policies which do not authorize discretionary exemptions.²⁰⁸ For example, New York's statute prohibiting discrimination in foster care services provides in relevant part:

Authorized agency staff and volunteers shall not engage in or condone discrimination or harassment against prospective foster parents, foster parents, or children in foster care or any family members being served by the agency, on the basis of race, creed, color, national origin, age, sex, religion, sexual orientation, gender identity or expression, marital status, or disability.²⁰⁹

Unlike the nondiscrimination policy at issue in *Fulton*, the New York statute does not permit any exemptions.²¹⁰ Similar to the New Mexico nondiscrimination statute in *Elane Photography*, the New York statute does not have any exemptions that “prefer secular conduct over religious conduct or evince any hostility toward religion.”²¹¹ Even if the New York statute has the incidental effect of burdening religious exercise, the policy is neutral and generally applicable because every foster care agency in the state is bound by the same policy.²¹² Thus, the *Fulton* decision regarding neutrality and general applicability should be narrowly confined to cases with discretionary nondiscrimination policies.²¹³

Whether a nondiscrimination policy is neutral and generally applicable is important because that issue determines whether rational basis or strict scrutiny applies in Free Exercise challenges.²¹⁴ In *Fulton*, the policy was not neutral and generally applicable, so strict scrutiny applied, and the City had to prove that its action was narrowly tailored to a compelling government interest.²¹⁵ The New York nondiscrimination statute, on the other hand, is neutral and generally applicable.²¹⁶ Thus, if New York faced a Free Exercise challenge to

²⁰⁸ See, e.g., N.Y. COMP. CODES R. & REGS. tit.18, § 441.24(a) (2021).

²⁰⁹ N.Y. COMP. CODES R. & REGS. tit.18, § 441.24(a) (2021).

²¹⁰ See *id.*

²¹¹ *Elane Photography, LLC v. Willock* 309 P.3d 53, 68 (N.M. 2013).

²¹² See *id.*

²¹³ See *Fulton*, 593 U.S. at 542.

²¹⁴ *Smith*, 494 U.S. at 879.

²¹⁵ *Fulton*, 593 U.S. at 541.

²¹⁶ See N.Y. COMP. CODES R. & REGS. tit.18, § 441.24(a) (2021).

its law, rational basis would likely apply.²¹⁷ Rational basis places the burden on the challenger to show that state action is not rationally related to a legitimate government interest.²¹⁸ Because rational basis favors state action and strict scrutiny favors private parties, courts are more likely to uphold non-discretionary nondiscrimination policies subject to rational basis than discretionary nondiscrimination policies subject to strict scrutiny.²¹⁹

Furthermore, the *Fulton* Court stated that the City did not have a compelling interest in ensuring equal treatment of prospective foster parents and foster children because “the creation of a system of exceptions under the contract undermines the City’s contention that its non-discrimination policies can brook no departures.”²²⁰ The Court provided no reason that eradicating discrimination does not constitute a compelling interest²²¹ other than the fact that the discretionary nature undermines the state’s interest. Accordingly, a mandatory policy should be more likely to withstand the Court’s reasoning because it is not undermined by “a system of exceptions.”²²² Therefore, the Court is more likely to find that a mandatory nondiscrimination policy serves a compelling interest in ensuring equal treatment in adoption and foster care thereby,²²³ is more likely to satisfy both strict scrutiny and rational basis.²²⁴

Thus, the *Fulton* decision is narrow because the Court focused on the Commissioner’s authority to use discretion in granting exceptions and, therefore,²²⁵ the ruling that the City’s nondiscrimination policy violated the Free Exercise Clause is not broadly applicable to all nondiscrimination policies. Mandatory nondiscrimination policies, like the New York foster care statute, would likely survive a Free Exercise challenge because it is neutral and generally applicable, rational basis applies, and eradication of discrimination in foster care easily satisfies the legitimate state interest element.

²¹⁷ See generally *Elane Photography, LLC v. Willock*, 309 P.3d 53, 75.

²¹⁸ *Bd. of Trustees of U. of Alabama v. Garrett*, 531 U.S. 356, 367 (2001).

²¹⁹ *Id.* at 368, 373.

²²⁰ *Fulton*, 593 U.S. at 541–42.

²²¹ *Id.*

²²² *Id.*

²²³ See *id.*

²²⁴ *Id.*

²²⁵ See *Fulton*, 593 U.S. at 542.

II. STATUTES THAT PERMIT CHILD WELFARE AGENCIES TO DISCRIMINATE AGAINST LGBTQ PEOPLE BASED ON RELIGIOUS BELIEFS VIOLATE THE ESTABLISHMENT AND EQUAL PROTECTION CLAUSES.

Dumont presented an opportunity for federal courts to consider issues surrounding child welfare agencies and discrimination that *Fulton* did not raise.²²⁶ Because the *Dumont* case settled after the court denied the State's motion to dismiss, however, the court never issued a final ruling on the merits of the case.²²⁷ This Section argues that the *Dumont* plaintiffs likely would have succeeded on their Establishment and Equal Protection claims because state-supported discrimination on the basis of sexual orientation and gender identity is unconstitutional.

A. *Establishment Clause Claims*

In *Dumont*, the plaintiffs argued that Michigan violated the Establishment Clause because its policy failed the endorsement and excessive entanglement prongs of the *Lemon* test.²²⁸ Under the endorsement prong, the plaintiffs argued that “the State’s practice of contracting with faith-based child placing agencies, acknowledging that the agencies may use the religious belief exemption provided in [Pennsylvania law] to turn away same-sex couples, conveys the message that the State endorses the view that opposes same-sex marriage.”²²⁹ And under the excessive entanglement prong, the plaintiffs argued that the State’s “delegation of public child welfare services to faith-based child placing agencies with permission to use religious eligibility criteria violates the Establishment Clause.”²³⁰ In considering the State’s motion to dismiss, the court focused on whether the State’s implementation of the statute had “the primary effect of advancing religion,” and whether it involved “an excessive entanglement between church and state.”²³¹ The court found that the plaintiffs plausibly stated a claim under the

²²⁶ Compare *Fulton*, 593 U.S. at 542 (deciding free exercise claims) with *Dumont*, 341 F. Supp. 3d at 753 (raising establishment clause and equal protection clause claims).

²²⁷ *Dumont v. Gordon*, AMERICAN CIVIL LIBERTIES UNION (June 29, 2024), <https://www.aclu.org/cases/dumont-v-gordon>.

²²⁸ *Id.* at 713.

²²⁹ *Id.* at 734.

²³⁰ *Id.* at 739 (internal quotation marks omitted).

²³¹ *Id.* at 734.

endorsement prong by alleging that the State acted with both subjective and objective purposes to endorse the religious view of those agencies that oppose same-sex marriage.²³² It also found that the plaintiffs plausibly suggested excessive entanglement by alleging that the State delegated government duties to a religious institution and allowed it to “carry out the duties of government according to their own religious beliefs.”²³³

Similar to the policy at issue in *Dumont*, many states permit faith-based child welfare agencies to refuse service to LGBTQ children and adults if doing so conflicts with their religious beliefs.²³⁴ Virginia law, for example, provides that state and local governments “may not deny a private child-placing agency any grant, contract, or participation in a government program because of the agency’s objection to performing, assisting, counseling, recommending, consenting to, referring, or participating in a placement that violates the agency’s written religious or moral convictions or policies.”²³⁵ Texas law similarly provides that state and local governments “may not discriminate or take any adverse action against a child welfare services provider on the basis, wholly or partly, that the provider: (1) has declined or will decline to provide, facilitate, or refer a person for child welfare services that conflict with, or under circumstances that conflict with, the providers’ sincerely held religious beliefs.”²³⁶

Laws like Virginia’s and Texas’s, which protect religious child welfare agencies that do not abide by nondiscrimination policies, would likely fail each prong of the *Lemon* test. First, a court should not find that there is any secular legislative purpose in permitting faith-based child welfare agencies to reject LGBTQ parents and children. States may argue that these types of laws merely seek to “alleviate significant government interference with” religious practice.²³⁷ The effect of these laws, however, is impermissible because “the government itself has advanced religion through its own activities and influence”²³⁸ by, in effect, requiring the State to contract religious child welfare agencies

²³² *Id.*

²³³ *Dumont*, 341 F. Supp. 3d at 739.

²³⁴ See, e.g., VA CODE ANN. § 63.2-1709.3 (West 2012); Tex. Hum. Res. Code § 45.004(1).

²³⁵ VA CODE ANN. § 63.2-1709.3 (West 2012).

²³⁶ TEX. HUM. RES. CODE § 45.004(1).

²³⁷ *Dumont*, 341 F. Supp. 3d at 735 (citing *Corporation of Presiding Bishop of Church of Jesus Christ of Latter-day Saints v. Amos*, 483 U.S. 327, 335 (1987)).

²³⁸ *Id.* at 735.

that do not abide by nondiscrimination policies.²³⁹ As in *Dumont*, these types of laws harbor “the impermissible purpose of authorizing discrimination by those with religious opposition to same-sex couples.”²⁴⁰ Thus, states that protect religious child welfare agencies, such as Virginia and Texas, do not have a secular legislative purpose because they have “the primary effect of advancing religion.”²⁴¹

Second, when states license, fund, and contract child welfare agencies that reject LGBTQ children and parents based on religious beliefs, courts should find that the state endorses those religious beliefs. Licensing, funding, and contracting are state actions that constitute “sponsorship, financial support, and active involvement of the sovereign in religious activity,” which the Establishment Clause aims to preclude.²⁴² In fact, when states refer children and parents to agencies that function according to religious beliefs, they compel those children and parents to participate in the agencies’ religions.²⁴³ Accordingly, courts should find that states endorse the religious views of the agencies that they license, fund, and contract.²⁴⁴

Third, courts should find that states like Virginia and Texas, in effect, require their state and local governments to contract and fund agencies that refuse to service LGBTQ children and adults.²⁴⁵ Even if child welfare agencies are private entities, their function of servicing children and parents is still related to government action because the government refers children in need of foster care or adoption to private agencies.²⁴⁶ These allow private institutions to carry out government

²³⁹ See VA CODE ANN. § 63.2-1709.3 (West 2012); TEX. HUM. RES. CODE § 45.004(1) (prohibiting government from discriminating against child welfare agencies that refuse services based on religious beliefs).

²⁴⁰ *Id.* at 736.

²⁴¹ *Id.* at 734.

²⁴² *Amos*, 483 U.S. at 337.

²⁴³ Compare with *Kennedy v. Bremerton Sch. Dist.*, 597 U.S. 507, 531 (2022) (finding that football coach’s prayer at school game did not violate the Establishment Clause because students were not compelled to pray along him).

²⁴⁴ See *id.*

²⁴⁵ See *Fulton*, 593 U.S. at 526 (explaining how state and local governments refer children to private child welfare agencies).

²⁴⁶ See *Santa Fe Indep. Sch. Dist. v. Doe*, 530 U.S. 290, 302 (2000) (holding that student led prayer at football games violated the Establishment Clause because the football games are related to government action).

functions pursuant to religious criteria and, therefore, fail the excessive entanglement prong of the *Lemon* test.²⁴⁷

Thus, states should not permit faith-based child welfare agencies to discriminate on the basis of sexual orientation and gender identity because the Establishment Clause provides that states cannot act in a way that favors religion over non-religion.²⁴⁸

B. *Equal Protection Clause Claims*

States that permit religious child welfare agencies to discriminate against LGBTQ children and adults draw classifications on the basis of sexual orientation and gender identity, thereby implicating the Equal Protection Clause.²⁴⁹ As discussed previously, intermediate scrutiny should apply to government actions that discriminate on the basis of LGBTQ status because sexual orientation discrimination is a form of gender discrimination.²⁵⁰ Even assuming that most courts, like the *Dumont* court,²⁵¹ will apply rational basis with bite, courts should find that religious exemptions to nondiscrimination policies do not survive that lower standard.²⁵² Under rational basis with bite, the *Dumont* court found that the plaintiffs' equal protection claim was sufficient to survive a motion to dismiss because it is impermissible for states to draw classifications based on animus toward one group.²⁵³ The child welfare agencies in both *Fulton* and *Dumont* discriminated against LGBTQ children and parents because of their religious opposition to homosexuality, same-sex marriage, and same-sex couples raising families.²⁵⁴ States that permit religious exemptions for nondiscrimination policies to state-licensed and taxpayer-funded child welfare agencies perpetuate religious animus against the LGBTQ community in foster care and adoption by protecting religious practice at the expense of LGBTQ individuals' rights and the best interests of the children. Because the states' purpose in granting religious exemption is to allow agencies to advance their animus against the LGBTQ community, courts should

²⁴⁷ See *Dumont*, 341 F. Supp. 3d at 737.

²⁴⁸ See *Hialeah*, 508 U.S. at 532.

²⁴⁹ See Byars, *supra* note 106.

²⁵⁰ *Id.*

²⁵¹ See *Dumont*, 341 F. Supp. 3d at 741.

²⁵² See *id.* at 722.

²⁵³ *Id.*

²⁵⁴ *Id.* at 735; *Fulton*, 593 U.S. at 536.

find that their governmental interest in doing so is impermissible.²⁵⁵ Thus, courts should find that states that permit discrimination against LGBTQ children and adults in foster care and adoption fail under the rational basis with bite standard of review and violate the Equal Protection Clause.²⁵⁶

As the *Dumont* Court noted, “the desire to effectuate one’s animus against homosexuals can never be a legitimate governmental purpose, [and] a state action based on that animus alone violates the Equal Protection Clause.”²⁵⁷ Thus, courts should find that state-licensed and taxpayer-funded child welfare agencies that discriminate on the basis of sexual orientation and gender identity cannot survive rational basis with bite.²⁵⁸

III. THERE IS A NEED TO PROTECT LGBTQ RIGHTS.

There is a special need for courts to protect the rights of LGBTQ individuals in adoption and foster care, even if such protection incidentally infringes on religious practice because the United States has a long history of denying LGBTQ people equal rights to engage in intimate relationships and raise families. Many states criminalized same-sex intimacy until 2003 when the Supreme Court concluded, in *Lawrence v. Texas*, that those criminal laws were unconstitutional.²⁵⁹ The Supreme Court did not recognize the right to marry for same-sex couples until 2015 in *Obergefell v. Hodges*.²⁶⁰ Furthermore, it was not legal for same-sex couples to adopt in every state until 2017.²⁶¹

Although same-sex adoption is now legal in every state, LGBTQ people continue to face barriers to adoption. In 2016, then-President Obama issued a rule prohibiting discrimination in Department of

²⁵⁵ See *Dumont*, 341 F. Supp. 3d at 741–42.

²⁵⁶ *Id.*

²⁵⁷ *Dumont*, 341 F. Supp. 3d at 742.

²⁵⁸ *Id.* at 735; *Fulton*, 593 U.S. at 536.

²⁵⁹ *Lawrence v. Texas*, 539 U.S. 558, 558 (2003) (holding that a Texas statute making it a crime for two persons of the same sex to engage in certain intimate sexual conduct was unconstitutional, as applied to adult males who had engaged in consensual act of sodomy in privacy of home).

²⁶⁰ *Obergefell v. Hodges*, 576 U.S. 644, 644 (2015) (holding that the right to marry is a fundamental right inherent in the liberty of the person, and under the Due Process and Equal Protection Clauses of the Fourteenth Amendment couples of the same-sex may not be deprived of that right and that liberty).

²⁶¹ Frank J. Bewkes et al., *Welcoming All Families*, CTR. FOR AM. PROGRESS (Nov. 20, 2018), <https://www.americanprogress.org/article/welcoming-all-families/>.

Health and Human Services (HHS) grant-making, but, in 2019, then-President Trump announced he would no longer enforce that rule.²⁶² When LGBTQ advocacy groups brought suits to challenge discriminatory adoption laws, the Trump Administration granted waivers.²⁶³ And at the end of Trump's presidency, his Administration issued a new rule to allow federally-funded foster care and adoption agencies to exclude LGBTQ people and others from their services based on religious beliefs.²⁶⁴ President Biden reversed that rule when he took office, but many agencies continue to discriminate.²⁶⁵ HHS recently issued a proposed rule that would require child welfare agencies to place LGBTQ children in "environments free of hostility, mistreatment, or abuse" based on the child's sexual orientation, gender identity or expression.²⁶⁶ The Rule would also require "caregivers to undergo cultural competency training to ensure LGBTQ youths are placed in homes where their identities are affirmed."²⁶⁷ This proposed rule would go far in protecting LGBTQ children in the adoption and foster system, but many Republicans in Congress oppose it.²⁶⁸

Furthermore, states must afford protection to the LGBTQ community with regard to foster and adoption because the Supreme Court's recent decision in *Dobbs v. Jackson Women's Health* has had two major effects on this issue. First, the decision impacted the number of children in need of adoption by allowing states to restrict access to abortion. Second, the *Dobbs* decision jeopardizes LGBTQ

²⁶² Akela Lacy, *How the Trump Era Encouraged Publicly Funded Discrimination in Adoption and Foster Care*, THE INTERCEPT (Feb. 8, 2021), <https://theintercept.com/2021/02/08/adoption-foster-discrimination-law/>.

²⁶³ Julie Moreau, *LGBTQ Parents Face 'State-Sanctioned Discrimination,' American Bar Association Says*, NBC NEWS (Feb. 6, 2019), <https://www.nbcnews.com/feature/nbc-out/lgbtq-parents-face-state-sanctioned-discrimination-american-bar-association-says-n968456>.

²⁶⁴ Akela Lacy, *How the Trump Era Encouraged Publicly Funded Discrimination in Adoption and Foster Care*, THE INTERCEPT (Feb. 8, 2021), <https://theintercept.com/2021/02/08/adoption-foster-discrimination-law/>; Brooke Sopelsa, *Rule Would Let Faith-Based Adoption Groups Exclude LGBTQ Parents*, NBC NEWS (Nov. 1, 2019), <https://www.nbcnews.com/feature/nbc-out/rule-would-let-faith-based-adoption-groups-exclude-lgbtq-parents-n1075341>.

²⁶⁵ Nathaniel Weixel, *Biden Administration Reverses Trump-era Waivers of Nondiscrimination Protections*, THE HILL (Nov. 18, 2021), <https://thehill.com/policy/healthcare/582274-biden-administration-reverses-trump-era-waivers-of-nondiscrimination/>.

²⁶⁶ Brooke Migdon, *New Rule Designed to Protect LGBTQ Foster Children Draws GOP Opposition*, THE HILL (Jan. 3, 2024), <https://thehill.com/homenews/lgbtq/4385391-new-rule-designed-to-protect-lgbtq-foster-children-draws-gop-opposition/>.

²⁶⁷ *Id.*

²⁶⁸ *Id.*

individuals' rights to marry and adopt by overturning another right that was similarly rooted in substantive due process.²⁶⁹ Since *Dobbs* overturned *Roe v. Wade* and the right to have an abortion, many states have heavily restricted pregnant people's access to abortion services.²⁷⁰ Researchers have found that the number of births increased 2.3% on average in states with abortion bans as a result of those policies.²⁷¹ And adoption agencies in these states have experienced rising numbers of birth parents choosing to put their children up for adoption.²⁷² In fact, the Supreme Court *expected* the *Dobbs* decision to result in more unwanted births and more children placed for adoption.²⁷³ During oral arguments in *Dobbs*, Justice Amy Coney Barrett stated that parents who do not seek to raise a child have the benefit of widespread "safe haven laws," which allow people to anonymously drop off newborn babies.²⁷⁴ Simultaneously, the *Dobbs* decision, in effect, threatened substantive due process by overturning a right that the Court found was not "deeply rooted in this Nation's history and tradition" nor "implicit in the concept of ordered liberty."²⁷⁵ This decision is alarming for LGBTQ people because substantive due process was the Court's basis for finding that same-sex couples have the right to get married.²⁷⁶ Justice Thomas went so far as to state in his concurrence that "any substantive due process decision is demonstrably erroneous" and, "in future cases,

²⁶⁹ *Dobbs v. Jackson Women's Health Org.*, 597 U.S. 215, 231 (2022).

²⁷⁰ Caroline Kitchner et al., *States Where Abortion is Legal, Banned or Under Threat*, THE WASH. POST (June 24, 2022), <https://www.washingtonpost.com/politics/2022/06/24/abortion-state-laws-criminalization-roe/>.

²⁷¹ Margot Sanger-Katz & Claire Cain Miller, *How Many Abortions Did the Post-Roe Bans Prevent?*, THE N. Y. TIMES (Nov. 22, 2023), <https://www.nytimes.com/2023/11/22/upshot/abortion-births-bans-states.html>.

²⁷² Kate Plummer, *Adoption Agencies Under Pressure 18 Months After Roe v. Wade Overturned*, NEWSWEEK (Dec. 24, 2023), <https://www.newsweek.com/roe-wade-abortion-dobbs-adoption-1853724>.

²⁷³ Joanne Keening, *The Post-Dobbs Adoption Thud*, POLITICO (July 18, 2023), <https://www.politico.com/newsletters/politico-nightly/2023/07/18/the-post-dobbs-adoption-thud-00106919>.

²⁷⁴ *Id.*

²⁷⁵ *Dobbs*, 597 U.S. at 231.

²⁷⁶ *Id.* at 231 ("We hold that *Roe* and *Casey* must be overruled. The Constitution makes no reference to abortion, and no such right is implicitly protected by any constitutional provision, including the one on which the defenders of *Roe* and *Casey* now chiefly rely—the Due Process Clause of the Fourteenth Amendment. That provision has been held to guarantee some rights that are not mentioned in the Constitution, but any such right must be 'deeply rooted in this Nation's history and tradition' and 'implicit in the concept of ordered liberty.'").

[the Court] should reconsider all of this Court's substantive due process precedents, including *Griswold*, *Lawrence*, and *Obergefell*."²⁷⁷

States and courts should protect LGBTQ rights because the LGBTQ community encompasses many people who are willing to adopt.²⁷⁸ Studies have found that LGBTQ people are four times more likely to adopt and six times more likely to foster than heterosexual people.²⁷⁹ LGBTQ people are also more likely to adopt older children, children with special needs, children with mental health problems, and minority children.²⁸⁰ But despite the number of children awaiting adoption and the greater likelihood that LGBTQ people will adopt them, less than one fifth of adoption agencies in the United States actively try to recruit LGBTQ parents.²⁸¹ Thus, courts and policymakers should protect LGBTQ rights because a simultaneous increase in the number of children in the adoption systems and a decrease in the rights of the group most likely to adopt will likely be harmful to society and the welfare of children.

Representative Sean Maloney, a Congressman from New York,²⁸² is an advocate for preventing discrimination against LGBTQ people seeking to foster and adopt.²⁸³ In February 2020, Representative Maloney testified before Congress to urge his colleagues to pass the Every Child Deserves a Family Act at a time when the Trump Administration expressly permitted "federally funded foster care

²⁷⁷ *Dobbs*, 597 U.S. at 332 (Thomas, J., concurring) (internal quotation marks omitted).

²⁷⁸ Danielle Taylor, *Same-Sex Couples are More Likely to Adopt or Foster Children*, United States 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>.

²⁷⁹ *Id.*; Gary J. Gates, *LGBT Parenting in the United States*, UCLA SCH. OF L. WILLIAMS INST. (Feb. 2013), <https://williamsinstitute.law.ucla.edu/publications/lgbt-parenting-us/>.

²⁸⁰ David M. Brodzinsky et al., *Expanding Resources for Children III: Research-Based Best Practice in Adoption by Gays and Lesbians*, EVAN B. DONALDSON ADOPTION INST. (Oct. 2011), https://www.researchgate.net/publication/271909962_Expanding_Resources_for_Children_III_Research-based_best_practices_in_adoption_for_gays_and_lesbians.

²⁸¹ Guillaume Bagal, *Adoption: Challenges Remain for the LGBTQ Community*, OPTIONS (Mar. 31, 2021), <https://www.optionsri.org/post/adoption-challenges-remain-for-the-lgbtq-community>.

²⁸² *Representative Sean Patrick Maloney*, CONGRESS.GOV, <https://www.congress.gov/member/sean-maloney/M001185>.

²⁸³ *The Administration's Religious Liberty Assault on LGBTQ Rights*, CONGRESS.GOV, <https://www.congress.gov/event/116th-congress/house-event/110579>; *Rep. Sean Patrick Maloney's Testimony at Administration's Religious Liberty Assault on LGBT Rights*, Oversight Committee Democrats (Feb. 27, 2020), <https://www.youtube.com/watch?v=TmabFzi0wqc&t=7s>.

agencies to deny services to same-sex and non-Christian couples.”²⁸⁴ In support of his position, Representative Maloney shared with Congress his personal experience as an adoptive parent in a same-sex couple.²⁸⁵ He said that he had been with his husband for twenty-eight years but they were only legally allowed to marry five years prior.²⁸⁶ Then he told the story about how the pair came to parent each of their three adopted children.²⁸⁷ They adopted two of their children because “a group called the Adoption Alliance that was licensed in Texas and Nevada” reached out to them.²⁸⁸ He said:

The reason they were calling us in New York was not because we were seeking to adopt; it was because they had learned in the 1990’s that there were certain types of kids who are not going to be adopted; where the circumstances of their birth, through no fault of their own obviously, was difficult or confronting for traditional adoptive parents; where there were issues of HIV or rape or incest sometimes mixed with concerns about interracial adoption. And what these adoption agencies learned, to their credit, was that there were LGBT couples in cities like New York who would say yes to these children, not as an alternative to the straight couple that was going to raise them, as an alternative to never being adopted because no one was going to adopt these kids. And it was that insight that LGBT couples were willing to cross lines of difference, because they had experienced doing so in their own lives that they had less preoccupation or hysteria with things like HIV, that they were more willing to adopt across lines of difference, like race or religion, that there was an opportunity for kids that would not have a home to have a home.²⁸⁹

Representative Maloney’s testimony illustrates that actively recruiting LGBTQ parents to adopt can be an effective means of finding families for children who desperately need homes.²⁹⁰ His story,

²⁸⁴ *The Administration’s Religious Liberty Assault on LGBTQ Rights*, CONGRESS.GOV, <https://www.congress.gov/event/116th-congress/house-event/110579>; *Rep. Sean Patrick Maloney’s Testimony at Administration’s Religious Liberty Assault on LGBTQ Rights*, Oversight Committee Democrats (Feb. 27, 2020), <https://www.youtube.com/watch?v=TmabFzi0wqc&t=7s>.

²⁸⁵ *Rep. Sean Patrick Maloney’s Testimony at Administration’s Religious Liberty Assault on LGBTQ Rights*, Oversight Comm. Democrats (Feb. 27, 2020), <https://www.youtube.com/watch?v=TmabFzi0wqc&t=7s>.

²⁸⁶ *Id.*

²⁸⁷ *Id.*

²⁸⁸ *Id.*

²⁸⁹ *Id.*

²⁹⁰ *See id.*

however, did not move his colleagues to protect the LGBTQ community and pass the Every Child Deserves a Family Act.²⁹¹ The bill was introduced in 2019 and sought to prohibit “discrimination on the basis of sexual orientation, gender identity, marital status, or religion in the provision of child welfare programs and services by entities receiving federal funding.”²⁹² But Congress never passed the bill into law,²⁹³ and, as Maloney stated, those kids controlled by religious organizations are the ones that will suffer because states are permitted to protect religious beliefs in lieu of the best interests of the children.²⁹⁴

CONCLUSION

This Article contains four key takeaways. First, there are too many children in the foster care and adoption system for child welfare agencies to turn away qualified people who wish to foster or adopt those children. Additionally, LGBTQ people are more likely to adopt and foster children than heterosexual people.²⁹⁵ LGBTQ people are also more likely to adopt children with special needs, different ethnic backgrounds, and mental health disorders.²⁹⁶ Second, despite the first point, many states permit state-licensed and taxpayer-funded adoption and foster agencies to discriminate against children and adults based on sexual orientation and gender identity.²⁹⁷ Third, contrary to the *Fulton* decision, courts should find that state laws that prohibit child welfare agencies from refusing to service LGBTQ children and adults do not violate Free Exercise principles because states have compelling interests in enforcing both mandatory and discretionary nondiscrimination

²⁹¹ S.1791 - Every Child Deserves a Family Act, 116th Cong. (2019) (introduced, *see* CONGRESS.GOV, <https://www.congress.gov/bill/116th-congress/senate-bill/1791>).

²⁹² *Id.*

²⁹³ *Id.*

²⁹⁴ *Rep. Sean Patrick Maloney's Testimony at Administration's Religious Liberty Assault on LGBT Rights*, Oversight Comm. Democrats (Feb. 27, 2020), <https://www.youtube.com/watch?v=TmabFzi0wqc&t=7s>.

²⁹⁵ Danielle Taylor, *Same-Sex Couples are More Likely to Adopt or Foster Children*, United States 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>; Gates, *supra* note 279.

²⁹⁶ David M. Brodzinsky et al., *Expanding Resources for Children III: Research-Based Best Practice in Adoption by Gays and Lesbians*, EVAN B. DONALDSON ADOPTION INST. (Oct. 2011), https://www.researchgate.net/publication/271909962_Expanding_Resources_for_Children_III_Research-based_best_practices_in_adoption_for_gays_and_lesbians.

²⁹⁷ *Foster and Adoption Laws*, MOVEMENT ADVANCEMENT PROJECT (Mar. 6, 2023), https://www.lgbtmap.org/equality-maps/foster_and_adoption_laws.

policies.²⁹⁸ Fourth, as argued in *Dumont*, courts should find that states permitting child welfare agencies to discriminate against LGBTQ children and adults violate the Establishment and Equal Protection Clauses by favoring religious practice at the expense of LGBTQ rights and the best interest of the children in the system.

²⁹⁸ *Fulton*, 593 U.S. at 542.