The Language Matters Most: Redrafting 45 C.F.R. §75.300(c) to Protect LGBTQ Prospective Parents from Religious Exemption Laws for Child-Welfare Agencies

by Jake Hertzberg

I. Introduction

Kristy and Dana Dumont were ready to start a family in 2016, after eleven years together and five years of marriage.[1] They had been preparing for years, moving to a suburban neighborhood close to a great school district.[2] The two women knew they wanted to adopt a foster child and had been looking into two tax-funded adoption centers in the area.[3] Despite their excitement, the adoption centers denied the Dumont’s services because they were a same-sex couple, which did not meet the agency’s religious requirements.[4] The Dumont’s experience was unfair and outrageous, but they had the opportunity to use other child-welfare agencies in their surrounding area.[5] Prospective parents in some other states are not as lucky.[6] For example, Michael George and Chad Lord, a same-sex couple in D.C., needed eight years of searching to finally find a child-agency that accepted them and made them feel comfortable.[7] Moreover, in states such as Nebraska and Mississippi, where religious based organizations make up more than half of the public child-welfare organizations in the state, same-sex couples seeking to foster or adopt may find they have limited options.[8]

Several faith-based child-welfare agencies have refused services for years to members of the LGBTQ community.[9] The Dumont’s experience was especially important because it invoked an outcry for change.[10] The Department of Human and Health Services (HHS) in the Obama Administration in December 2016 revised the Code of Federal Regulations, adding language prohibiting discrimination in HHS-funded programs based on sexual orientation, gender identity, or sex.[11] This new regulation, 45 C.F.R. §75.300(c), added much needed protection,[12] and was a positive step forward in ensuring that a situation like the Dumont’s would never happen again.

However, it happened again. Eden Rogers and Brandy Welch faced similar challenges several years later when they tried to foster children from Miracle Mill Ministries, South Carolina’s largest state contracted foster-care agency.[13] Miracle Mill turned away the same-sex couple because they did not meet the agency’s doctrinal statement, that “God’s design for marriage is the legal joining of one man and one woman.”[14] HHS’s regulation, 45 C.F.R. §75.300(c) should have barred Miracle Mill from discriminating against Eden and Brandy. However, HHS granted South Carolina Governor, Henry McMaster, a waiver earlier in the year, exempting South Carolina religious organizations from complying with the HHS regulation.[15] This waiver gave faith-based organizations in the state the power to discriminate against LGBTQ prospective parents.[16] By granting Governor McMaster this waiver,[17] HHS demonstrated that their regulation was not full-proof. The waiver also foreshadowed what was coming: in 2019, the Trump Administration implemented a new amendment to 45 C.F.R. §75.300(c), altogether removing the language that explicitly prohibited discrimination based on sex, gender identity, and sexual orientation.[18] This revision, which went into effect on January 12, 2021, leaves the LGBTQ community with no clear federal protection against discrimination by faith-based child-welfare.
The Trump administration's revision of 45 C.F.R. §75.300(c) was a change long coming, as conservative and religious communities have expressed concerns since the 2015 Supreme Court ruling in Obergefell v. Hodges. In Obergefell, the Supreme Court's holding that states could not deny same-sex couples the access and benefits of marriage triggered strong backlash and fear among religious communities. Conservative lawmakers passed laws intended to diminish LGBTQ rights and to prevent the government from requiring religious organizations from acknowledging same-sex marriages. Businesses like child-welfare agencies with religious exemption laws in place, would not risk losing government support after refusing to provide services to prospective parents who did not meet their religious beliefs. The waiver given to Miracle Hill reinforced the possibility that organizations could still keep their discriminatory beliefs and retain support from the government; ten other states had exemption laws for child-welfare agencies by 2021.

Religious exemption laws that permit child welfare organizations to deny service to the LGBTQ community affect LGBTQ prospective parents, foster youth, and all U.S. taxpayers. In states where faith-based agencies are the main controlling force over the placement of the state's children, prospective LGBTQ parents may find that they have few options. Further, LGBTQ people are seven times more likely to adopt or foster than heterosexual couples. With over 500,000 dependent children in the foster system, turning away capable parents solely based on sexual orientation is contradictory to the system's main goal of providing children with stable homes. LGBTQ youth in these systems face additional challenges, including having difficulty in finding an accepting home and facing a higher risk of abuse and maltreatment as a result of biases and lack of training from child-welfare administrators and case workers. Finally, each child adopted from foster care reduces state and federal spending by almost $29,000 annually. Thus, opening the doors to more prospective parents could help taxpayers save hundreds of millions of dollars.

Scholars argue that laws which allow government-funded child welfare agencies to deny services based on religious beliefs are unconstitutional under the First Amendment's Establishment Clause. They contend religious exemption laws ignore the line between church and state by allowing religious views to dictate who receives certain government services and benefits. This argument has been tested by lawmakers and others in the establishment of religious exemption laws. While the holdings in one of these cases prove that this argument has merit, it has not proven to be effective in bringing about change. One reason behind this is that unconstitutionality of religious exemption laws comes into conflict with the 1st Amendment's Free Exercise Clause. In a recent landmark case, for example, the Supreme Court found that, as a matter of policy and as not to violate the Free Exercise Clause, the city of Philadelphia could not deny a contract with a faith-based foster care agency that refused to provide services to married same-sex couples on religious grounds.

This Note argues that HHS should redraft 45 C.F.R. §75.300(c) to reinclude language prohibiting HHS-funded organizations from discriminating against LGBTQ prospective parents. This Note will focus on exemption laws as they relate to faith-based child-welfare agencies. This Note will suggest that, by revising Rule 45, HHS will curb discriminatory issues LGBTQ prospective parents face when looking to adopt from a faith-based agency. This Note will further explain how this approach is more effective compared to simply arguing that religious exemption laws are unconstitutional. Finally, this Note will discuss what HHS can do to prevent similar religious exemption waivers from reoccurring.

Founded in 1953, the Department of Health and Human Services is an executive branch department of the U.S. Federal Government, established to provide...
health protections and essential human services to all Americans.[37] Programs funded by HHS are critical to family health and well-being, as HHS serves millions of families across the country and awards more than $500 billion in grants each year to provide vital health services.[38] Included in HHS’s programs are child welfare services, aiming to promote the health and safety of the nation’s children.[39] Additionally, as a federal agency, HHS has the power to guide and enact rules and regulations focused on the nation’s health and safety.[40] As demonstrated, HHS can enact regulations that combat discrimination within the organizations it supports.[41]

This Note is composed of six parts, with Part I being the introduction. Part II provides background history on the United States foster and adoption systems, focusing on the growth of religious influence in the systems and other aspects relevant to religious exemption laws. Part III contains a more detailed discussion of the current child welfare religious exemption laws in place. This section will further analyze the motivations behind these laws, as well as their impact and questionable constitutionality. Part IV focuses on a detailed background of HHS and its impact, focusing on how it has prevented discriminatory practices in the past. It argues that HHS should make a regulatory revision offering protection to LGBTQ prospective parents seeking to foster or adopt from a faith-based child agency. Finally, Part V discusses common counterarguments, such as the temporary nature of HHS regulations and the reoccurrence of religious exemptions. This part uses the recent Supreme Court case, Fulton v. Philadelphia, to propose a regulatory revision that adopts language preventing similar religious exemption law from reemerging. Part IV, the conclusion, summarizes this Note in a statement.

II. Background of United States Adoption and Foster Care Systems

(A) Public Adoption and Foster Care Systems in the United States

Foster care and the public adoption system are recent developments.[42] Public adoption began in the mid 1800s and the modern-day public foster system emerged as late as the early 1900s.[43] Before this time, adoption or foster care was handled privately; dependent children were primarily brought up through organizations or private arrangements.[44] During the period before the Revolutionary War, for example, dependent children often became apprentices for others in the community, receiving care and training in exchange for their work.[45] Private orphanages, most of which were religious-based, also started to emerge.[46] At this time, state governments had a minute role in child-welfare, especially compared to the role they play today.[47]

State involvement in foster and adoption services only became prominent around the late nineteenth century.[48] State government started to take direct accountability for their state’s dependent children, opening government-run orphanages and financing private orphanages already in place.[49] However, with no united infrastructure, the child-welfare system was still predominantly run by private institutions.[50] The New Deal sparked the first bout of true state involvement in the child-welfare system; parents began to approach government agencies, requesting foster care or childcare services.[51] The modern foster care system was formalized by the end of the 1930s. Private organizations by 1944 had taken more of a back-seat role, as child welfare had shifted mostly to a centralized, government-led system.[52] However, faith-based religious organizations continued to grow and provide services during this time, albeit mostly in the private sector.[53]

The history of foster care and adoption services in the United States illustrate two important findings: (1) that it is a very recent development and not yet an American staple; and (2) religious organizations have had different levels of involvement in governmentally funded child-welfare services. The novelty of government-based child-welfare services in America is relevant because it gives one reason why flaws remain in the system, such as governmentally funded agencies turning away parents like the Dumonts. As the Dumonts’ experience has proven, the child welfare system has struggled to remedy the conflicts that arise when religious child welfare organizations and state governments start working under the same system.

(B) What the Foster Care Systems Look Like Today

Family law is jurisdictional, but the structure of adoption and foster care systems is very similar state-by-state. In general, there are two primary systems that make up the child-welfare sphere in the United States.[54] First, there is the private system, where parents can voluntarily place their children up for adoption through a private organization or directly with the family of their choice.[55] Second, there is the public system, established to meet the needs of dependent children under the state’s care.[56] This Note focuses on the public system. Unlike the
private system, where children are usually placed voluntarily, children seldom enter the public system by the choice of their parents but are instead removed from their families by State agencies or orphaned without any other close relatives.[57] The number of children in the public adoption and foster care system today is massive. HHS’s most recent survey showed more than 632,000 children had spent time in foster care in 2020, with nearly 407,000 children in foster care daily.[58]

Private organizations can provide services in both the public and private systems.[59] If, however, private organizations choose to operate in a public system, they must work directly with the state government.[60] These relationships are governed by contracts, detailing that the state government will fund the private organization in exchange for their adoption and foster care services.[61] These services include finding and certifying foster parents and establishing congregate care for children under state protection.[62] Private organizations can be religious or non-religious, but private religious organizations are the dominant source in child welfare services in many parts of the country.[63] For example, Catholic Charities USA, deeming their work necessary as part of their religious mission, is known to offer adoption and foster care services to many states throughout the country.[64]

This Note focuses on child-welfare services as they relate to the public system because, as a publicly funded system, the government should not be funding agencies that directly discriminate based on sex or gender identity. Government agencies further have the power to remedy discriminatory practices through rules and regulations. Since this Note focuses on governmentally funded services, it will not discuss whether HHS should permit discrimination by faith-based child-welfare agencies not receiving government funding.


(A) State Religious Exemptions for Child Welfare Organizations

Eleven states to date have passed religious exemption laws that permit state-licensed child-welfare organizations to refuse to provide services to children and families who conflict with their religious beliefs.[65] The laws and measures vary by state, but each paints a narrative that the government is victimizing these religious organizations with unfair state action. The exemption laws accomplish this narrative through anti-discriminatory language.[66] Mississippi’s law, for example, forbids the government from “taking any discriminatory action against a religious organization...on the basis that such organization has provided or declined to provide any adoption or foster care service, or related service” based on religious beliefs.”[67] By using this language, these child-placing organizations ignore the fact that they themselves are discriminating against those who conflict with their religious beliefs. The other side will argue that forbidding agencies to use this kind of language is discriminatory in itself, because it prohibits the agencies from exercising their full religious beliefs. However, engaging in religious discrimination in this case is justifiable, since it would directly protect large communities of people and the religious agencies themselves would suffer no direct harm.

Religious exemption laws for child-welfare agencies vary in the kinds of beliefs they protect and the kinds of child-welfare related activities that they supply. Most religious exemption laws apply to any religious belief an organization may have.[68] However, Mississippi and Texas exemption laws protect specific religious beliefs, of which are written in the statutes.[69] Furthermore, most state religious exemption laws focus only on child placement, protecting organizations that refuse services to prospective parents.[70] Some states cover even more services, including refusal to assist abused or neglected children (Mississippi) and to assist in family reunification services (Texas).[71] The extensive language of religious exemption laws in states like Mississippi and Texas give religious organizations the flexibility to deny a vast number of services—services that individuals and couples may desperately need—to those who conflict with their religious beliefs.[72]

Another important distinction is that religious exemption laws in all states but Alabama cover government-funded agencies. Alabama law ensures that faith-based child welfare organizations can maintain state licenses but does not explicitly require the state to fund organizations denying services based on religious beliefs.[73] In contrast, the ten other states’ exemption laws prohibit the government from denying funding to organizations that discriminate
based on its religious beliefs.\[74\] These laws extend even further, prohibiting the governments from taking legal action against discriminatory faith-based organizations and from preventing these organizations' participation in state contracts and programs.\[75\] These exemption laws require government actors to continue to fund organizations with discriminatory practices.

Congress has not taken a stance in support or opposition to religious exemption laws. Federal lawmakers have been unsuccessful in their attempts to pass bills on both sides of the issue.\[76\] The federal administrative state has taken a more active role, with HHS becoming a dominant player on the issue.\[77\] HHS was the first to deny discrimination based on sexual orientation and gender identity by faith-based child-welfare organizations in 2016.\[78\] The Obama Administration's 2016 regulation proved that HHS had the power to protect the LGBTQ community in organizations for which they provide funding. HHS's ability to make rules is relevant for Parts IV and V of this Note, which discuss how HHS should implement a new anti-discriminatory regulation.

Religious exemption laws for child-welfare agencies are also in response to Project Blitz, or "Freedom for All." Project Blitz is an association of various Christian groups, all with the mission "[t]o protect the free exercise of traditional Judeo-Christian religious values and beliefs in the public square" and "[t]o properly frame the narrative and the language of religious liberty issues."\[86\] Project Blitz views the United States as a "Christian nation" and believes that the country should extend religious freedom to those who practice Christianity.\[87\] Project Blitz has proposed a number of model bills to state legislators. Included in these bills are child welfare-religious exemption laws.\[88\] Within the past few years, Project Blitz has been a dominant force in introducing religious exemption laws and amassing state-legislator support.\[89\] Project Blitz leaders gave enthusiastic support to Mississippi's religious exemption law, calling it the "Mississippi missile." Other religious exemption bills for child-welfare agencies have been either based on Project Blitz or justified by Project Blitz's model bills.\[90\]

(C) Negative Effects of Religious Exemption Laws for Child Welfare Agencies

The most obvious group negatively impacted by religious exemption laws for child-welfare agencies are LGBTQ prospective parents. In some states, including many that have religious exemption laws in place, there are very limited foster care and adoption options.\[91\] In these states, it can be very difficult for LGBTQ prospective parents to find a child-welfare agency that will serve them, especially in areas where faith-based child welfare organizations are the only providers.\[92\] For example, in Nebraska, eight
organizations provide foster care and only three will provide services to same-sex couples.[93] Exemption laws in states like Nebraska have the potential to prevent LGBTQ prospective parents from being parents all together.[94] Even if LGBTQ prospective parents find other agencies to work with, religious exemption laws may still force these individuals to endure the humiliation of being turned away, often under the implication that their lifestyle makes them unfit to be parents.[95]

Religious exemption laws can also have harmful effects on youth in the child-welfare system. The number of children in the foster care system is disproportionately larger than the number of prospective parents willing to foster or adopt.[96] About 20,000 youth age out of the foster system every year without being adopted.[97] Children in foster care may miss out on an opportunity to have a safe and loving home. While the numbers may be small in terms of how many additional children will end up finding homes if the exemption laws were not in place, the individual impact on those who do find homes is significant regardless. Moreover, children of color and LGBTQ youth make up most of the youth in the foster care system, leading these groups to suffer the most if there is limited prospective parent availability.[98] LGBTQ youth already face additional challenges in the foster-care system, such as having difficulty in finding parents willing to adopt, facing greater risk of abuse, and becoming homeless at a higher risk.[99]

Some religious exemption laws go beyond just child placement and extend to other child-related services.[100] For example, a Michigan law provides that a child placement agency “shall not be required to provide any services” that conflict with its religious beliefs.[101] Michigan’s law thereby allows religious child-welfare agencies to discriminate directly against LGBTQ youth.[102] Under the Michigan statute, the organizations could refuse to provide a variety of much needed services, such as aid for abused or neglected LGBTQ children.[103] Similar exemption laws in other states mention directly other services the organizations need not provide. Under Mississippi’s religious exemption law, faith-based child-welfare organizations can refuse to use correct gender pronouns and can knowingly place LGBTQ youth in homophobic or transphobic households.[104] Further, some religious exemption laws extend to family reunification services,[105] adding additional suffering and trauma, as these laws can prevent or delay parents from regaining custody of their children.[106] By providing the legal avenue of preventing separate families from reuniting, these laws may needlessly keep children in an already overcrowded foster system.

(D) Case Law Regarding Religious Exemption Laws for Child Welfare Agencies

State religious exemption laws for child-welfare agencies have not often been challenged in court.[107] However, advocacy groups have begun to take a closer look at these laws and challenges have started to find relevance in the court system.[108] Two lawsuits related to state religious exemption laws for child-welfare organizations have made it to court.

The first suit was a direct challenge to Mississippi’s religious exemption law under the Establishment Clause and the Equal Protection Clause.[109] The case, Barber v. Bryant, challenged religious exemption laws in their entirety rather than focusing specifically on those directed at the child-welfare system.[110] The district court granted the plaintiffs a preliminary injunction, reasoning that the plaintiffs could succeed in establishing unconstitutionality on both the Establishment Clause and Equal Protection Clause claims.[111] Under the Establishment clause claim, the court reasoned that Mississippi law favored certain religious beliefs over others and burdened third parties who are not able to receive the law’s protections.[112] Under the Equal Protection Clause claim, the court held that the law lacked rationality, as the state’s Religious Freedom...

(A) Background on HHS

The United States Department of Health and Human Services, established in 1952, is a cabinet-level executive branch department of the United States Federal government to “enhance the health and well-being of all Americans, by providing for effective health and human services and fostering sound, sustained advances in the sciences underlying medicine, public health, and social services.”[128] HHS’s motto is “to enhance the health and well-being of all Americans.”[129] Across its 11 operating divisions, HHS currently administers 115 programs, including but not limited to social service programs, civil rights and healthcare privacy programs, disaster preparedness programs, and health related research.[130]

The Administration for Children & Families (ACF) is the division of the HHS focused on promoting the economic and social well-being of families, children, and communities.[131] The ACF program aims to “encourage strong, healthy, supportive communities that have a positive impact on quality of life and the development of children.”[132] The Children's Bureau in the ACF is the first federal agency in the U.S. Government to focus exclusively on improving the lives of children and families.[133] The Children’s Bureau partners with federal, state, tribal, and local agencies to improve the well-being and health of children and families.[134] Its annual budget of almost $8 billion provides support and guidance to
programs that focus on: (1) strengthening families; (2) preventing neglect and child abuse; and (3) ensuring that every child has a permanent family or family connection.[135] The Children’s Bureau includes child-welfare services in its funded programs. These services connect to the agency’s basic mission to improve a child’s overall safety and well-being. A recent survey made by the Congressional Research Service (CRS) showed the Children’s Bureau administers most federal child-welfare programs with services that reach over 400,000 children annually.[136] The Children’s Bureau’s wide reach emphasizes its extensive impact over the health and safety of youth in the child-welfare system. Not only does this fact emphasize the power HHS can have over these systems, but it also speaks to the dangers that may arise if the Children’s Bureau is unable to protect its children – the one thing HHS established the Children’s Bureau to do.

(B) Impact of HHS on curbing discriminatory issues

HHS has had a history of curbing discriminatory issues in the organizations it funds and supports. HHS has rule-making powers, providing guidance on federal law, policy, and program regulations. The HHS Office for Civil Rights (OCR) enforces nondiscrimination regulations that apply to all services and programs receiving HHS federal funding.[137] The OCR also enforces nondiscrimination provisions of other laws as they apply to activities and programs receiving HHS financial aid.[138] The OCR has enacted nondiscrimination provisions across various HHS departments, including but not limited to Education,[139] Federally Assisted Health Training Programs,[140] and Homelessness services.[141] For example, HHS has recently proposed a change to section 1557 of the Patient Protection and Affordable Care Act (PPACA) that explicitly prohibits discrimination “on the basis of race, color, national origin, sex, age, or disability.”[142]

HHS has used its rule-making powers to explicitly issue regulations that bar discrimination by child-welfare agencies. The Obama administration in 2016 revised 45 C.F.R. 75.300(c) to read “It is a public policy requirement of HHS that no person otherwise eligible will be excluded from participation in, denied the benefits of, or subjected to discrimination in the administration of HHS programs and services based on non-merit factors such as...gender, identity, or sexual orientation.”[143] The final rule explicitly forbade discrimination based on sexual orientation and gender identity by child-welfare services that receive federal funding.[144] However, the South Carolina governor cited the Free Exercise Clause and received a waiver to this rule.[145] Then, in 2019, the Trump administration rewrote the rule, pulling back all protection based on sexual orientation and gender identity.[146]

HHS is vocal today in its desire to combat discrimination within the organizations it supports. For example, HHS announced on November 2018, 2021, that it was planning to take action to prevent discrimination in its programs.[147] HHS announced through the ACF and OCR actions to further equality “all people, irrespective of their sexual orientation, gender identity, and religion.”[148] These actions were in response to the waivers given to South Carolina, Texas, and Michigan under the prior administration, all of which waived nondiscrimination requirements based on religious objections.[149] HHS said in its release that these waivers were “inappropriate and unnecessary” and that HHS must commit to not condoning “the blanket use of religious exemptions against any person or blank checks to allow discrimination against any persons, importantly including LGBTQ persons in taxpayer-funded programs.”[150] HHS Secretary Xavier Becerra also stated that “with the large number of discrimination claims before us, we owe it to all who come forward to act, whether to review, investigate or take appropriate measures to protect their right. At HHS, we treat any violation of civil rights or religious freedoms seriously.”[151] The Secretary’s statement indicates that HHS will be an active force in combatting discrimination in its programs. However, his statement does come with a wrinkle: HHS still must
take all claims of religious freedom seriously, as dictated under the Religious Freedom and Restoration Act (RFRA).[152] HHS will therefore continue to look to RFRA and will determine on a case-by-case basis if a religious exemption is valid.[153] Becerra’s statement highlights that HHS cannot dispel all religious exemption laws, but suggests that HHS will have a tough time finding the validity in exemption laws that discriminate based on one’s gender or sexuality.

(C) Proposal: HHS should redraft rule 45 C.F.R. §75.300(c) to reinstate anti-discriminatory language toward the LGBTQ community

The Trump Administration’s revision of 45 C.F.R. 75.300(c) illustrates the power that HHS regulations have; the administration would have felt no need to revise the rule if it had no effect. Since these regulations hold such power, it would be in this administration’s best interest to revise 45 C.F.R. § 75.300(c) to include similar language adopted during the Obama administration. In redrafting, the HHS should look to Becerra’s recent statements and the recent Supreme Court decision in Fulton v. Philadelphia for guidance. HHS should then be able to prevent faith-based child-welfare agencies from using the Religious Freedom Restoration Act when arguing for a religious exemption. Revisions should prevent waivers like the one given to Governor McMaster from reemerging. The specific language that should be incorporated in the new rule is discussed in the next section of this Note.

V. New Rule and Counterarguments

(A) New Rule Preventing Religious Exemptions for Child-Welfare Agencies from Reemerging

The first step in revising 45 C.F.R. § 75.300(c) is to add language directly protecting individuals based on sex and gender identity. HHS can pull the same anti-discriminatory language used by the Obama administration in issuing the rule in 2016.[154] HHS should also add language that prevents the reemergence of religious exemption laws. Using Fulton and the Religious Freedom Restoration Act for guidance, HHS can carefully craft language that will frustrate any change of religious exemption laws for child-welfare agencies from reemerging.

The Religious Freedom Restoration Act (RFRA), is a 1993 federal law that was established to ensure that interests in religious freedom are protected.[155] The law mandates that strict scrutiny should be used in determining whether religious freedom has been violated and that the “Government shall not substantially burden a person’s exercise of religion even if the burden results from a rule of general applicability.”[156] However the law provides two exceptions: (1) the burden must be necessary for the “furtherance of a compelling government interest”; and (2) the rule is the least restrictive way in which to further the government interest.[157] Therefore, RFRA allows local governments are allowed to deny religious exemptions so long as there is a compelling government interest[158] and the interest is furthered in the least restrictive way.

Fulton is a case in which a faith-based child welfare agency with discriminatory practices sued the City of Philadelphia for refusing to renew their contract. The City attempted to meet RFRA’s threshold by listing three compelling interests: “Maximizing the number of foster parents, protecting the City from liability, and ensuring equal treatment of prospective foster parents and foster children.”[159] The Court found that these compelling interests did not meet RFRA’s threshold requirement because the City was not specific; rather than explaining interests for enforcing their exemption laws, the city should have focused on compelling interests in denying contracts with that child-welfare agency specifically.[160] If the city had re-focused their argument to explain specifically why the child-agency in question should be denied religious exemptions, then the outcome of Fulton may have been different. Courts have found a compelling interest exists in remedying the present effects of past discrimination in which the government was involved or acted as a “passive participant.”[161] Thus, HHS can show that its practice of permitting religious exemption laws has led to discriminatory practices, the effects of which are still present today.

HHS can use the “compelling interests” language dictated in RFRA and Fulton. The rule should read something like:

“It is a public policy requirement of HHS that no person otherwise eligible will be excluded from participation in, denied the benefits of, or subjected to discrimination in the administration of HHS programs and services based on non-merit factors such as age, disability, sex, race, color, national origin, religion, gender identity, or sexual orientation. Recipients must comply with this public policy requirement in the
administration of programs supported by HHS awards. In addition, it a compelling interest of the government to remedy the present effects of its own past discrimination caused by its permittance of religious exemption laws for child-welfare agencies. For this reason, religious exemption laws for child-welfare agencies are not allowed. Finally, as not to burden the rights granted under the Free Exercise Clause, no other exemptions for any reason are allowed.”

(B) Temporary Nature of HHS regulations

As an executive branch department of the United States Federal Government, leadership within HHS depends on the federal administration.[162] For this reason, organization within HHS will change every time a new president takes office.[163] This leads to a common question: what is the point of making HHS regulatory amendments, if the amendments are just going to end up changing? The legislative back and forth of 45 C.F.R. § 75.300(c) only emphasizes this conundrum; after its enactment in 2014, 45 C.F.R. § 75.300(c) had been amended in both 2016 and 2021, during the Obama and Trump administrations respectively.[164] However, despite the temporary nature of HHS regulations, they still have a great impact during the years they are in place.

HHS anti-discriminatory regulations can be temporary, but federal administrations only change every four to eight years. HHS’s regulations remain in place and can still make a positive impact on the communities it is trying to protect until they are changed. Hundreds of thousands of children are in the public foster care system, of which only about 15% get adopted annually.[165] An estimated two million LGBTQ people are interested in adoption.[166] Opening the doors to a large pool of prospective parents who were once denied access will give more dependent children the opportunity to have loving and stable homes.[167] HHS regulations, albeit temporary, still have the potential to bring foster children and LGBTQ prospective parents together.[168]

Further, HHS anti-discriminatory regulations can change public thought and inspire future anti-discriminatory regulations. Religious exemption laws have indirect implications, as they require state and local government actors to continue to fund organizations with discriminatory practices.[169] By continuing to give financial support and religious exemptions, state and local governments legitimize discrimination. Not only does this response increase discrimination generally in that state, but it also influences other states to make religious exemption laws of their own.[170] Albeit temporary, anti-discriminatory regulations preventing religious exemption laws within the child-welfare system will let the public know that the government does not view LGBTQ discrimination as legitimate but rather as a practice that should be stopped.[171] This has the power to inspire further anti-discriminatory action, as the LGBTQ community and other minority groups will feel more encouraged to continue to fight for their equal rights across the United States.[172] Federal lawmakers can use the legal precedent used in this new HHS anti-discriminatory regulation to prevent religious exemption laws in other publicly funded agencies. Overall, while HHS structure may change, its impact has the potential to extend years into the future.

V. Conclusion

Religious exemption laws for child-welfare agencies have impacted LGBTQ prospective parents, foster children, and social ideology. The Department of Health and Human Services has the power to protect and regulate governmentally funded programs. Therefore, the government should revise 45 C.F.R § 75.300(c) to re-include language that directly prohibits the discrimination of individuals based on sex and gender identity. However, to prevent similar religious exemption laws from happening again, the government should focus on the discriminatory effects of religious exemptions, and how the governments’ past actions of supporting these discriminatory laws has led to present discrimination today. By adding that there is a compelling interest of the government to remedy the present effects of past discrimination, 45 C.F.R § 75.300(c) lays out a fair argument in prohibiting religious exemptions all together, even when Free Exercise claims or Free Speech claims are raised. Overall, one thing is clear when composing anti-discriminatory regulations: The language matters most.


[3]See ACLU, supra note 1; see also Adrianne M. Spoto, 
Fostering Discrimination: Religious Exemption Laws in Child 
Welfare and the LGBTQ Community, 96 N.Y.U. L. REV. 296, 297
(2021).

[4]Id.

Dismiss, 5, Dumont v. Lyon, 341 F. Supp. 3d 706, 714

[6]See e.g., Guthrie Graves-Fitzsimmons and Maggie 
Siddiqi, A Tennessee couple’s Struggle to adopt shows
religious freedom is under siege in America, CNN (Feb.
15, 2022, 1:45 PM)
https://www.cnn.com/2022/02/15/opinions/tennessee-
adoption-struggle-religious-freedom-graves-
fitzsimmons-siddiqi/index.html; See also. Rachel S.
Johnson, A Same-Sex Couple’s Struggle to Adopt, J.H.U.
(https://hub.jhu.edu/magazine/2013/fall/gay-couple-
adoption/) (last visited May 8, 2022).

[7]Id.

[8]A listing of child-welfare agencies in Mississippi
reveals seven offices, within six of those being
Christian affiliated; listing of child-welfare agencies in
Nebraska reveal eight offices, within five of those
being Christian affiliated. National Foster Care &
Adoption Directory Search, CHILD WELFARE INFO.
GATEWAY, https://www.childwelfare.gov/nfcad/ (last
visited Apr. 24, 2022).

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

[10]See ACLU, supra note 1; see also Isabel Dorbin,
ACLU Sues Michigan After Same-Sex Couples Seeking
to Adopt are Rejected, NPR (Sep 23, 2017, 7:46 AM),
https://www.npr.org/2017/09/23/552873416/aclu-
sues-michigan-after-same-sex-couples-seeking-to-
adopt-are-rejected; see also Dumont, 341 F. Supp. 3d at
706.

policy requirement of HHS that no person otherwise
eligible will be excluded from participation in, denied
the benefits of, or subjected to discrimination in the
administration of HHS programs and services based
on non-merit factors such as . . . gender, identity, or
sexual orientation.”).

[12]See Letter from Kyle Rojas Legleiter, Sr. Dir. of
Poly., Col. Health. Found., to Alex Azar, Sec. U.S.
Dept. of Health and Human Serv., (Dec 17, 2019)
(https://coloradohealth.org/sites/default/files/
FINAL_12.17.2020.pdf) (stating that the amendment
adds “comprehensive protections from discrimination
applied to all grants administered by HHS”).

[13]See Lambda Legal, VICTORY: Lesbian Couple to
Have Their Day in Court in Challenge to HHS and
South Carolina Foster Care Policy, LAMBDA LEGAL
(May 8, 2020)
https://www.lambdalegal.org/blog/20200508_victory-
lesbian-couple-have-day-in-court.

[14]Leslie Cooper, Trump’s Anti-LGBTQ Agenda Will
Keep Foster Children From Having a Loving Home,
ACLU (May 30, 2019, 11:30 AM)
https://www.aclu.org/blog/lgbtq-rights/lgbtq-
parenting/trumps-anti-lgbtq-agenda-will-keep-foster-
children-having-loving.

[15]Id.

[16]Id.

[17]Id.

codified at 45 C.F.R. pt. 75) (changing the language of
75.300(c) to prohibit discrimination “to the extent
doing so is prohibited by federal statute” rather than
explicitly listing protected characteristics including
sexual orientation and gender identity); see also
Matthew Fischer, Trump HHS Finalizes Rule Rolling
Back Nondiscrimination Protections for LGBTQ
Individuals, JURIST (Jan. 9, 2021, 7:55 PM)
https://www.jurist.org/news/2021/01/donald-trumps-
hhs-finalizes-rule-rolling-back-nondiscrimination-
protections-for-lgbtq-individuals/.


[20]See, e.g., Michael O’Loughlin, Catholics React to
Supreme Court’s Marriage Decision, CRUX (June 26, 2015),
https://cruxnow.com/life/2015/06/catholics-react-
tosupreme-courts-marriage-decision (expressing a
variety of reactions of Catholics to the Obergefell
decision).


[22]Spoto, supra note 3, at 298.

[23]Id.

[24]ALA. CODE§ 26-10D-5 (2020); KAN.STAT.
ANN. § 60-5322 (2020); MICH. COMP. LAWS ANN.
§ 722.124e (West 2020); MISS. CODE ANN. § 11-62-5
(2020); N.D. CENT. CODE ANN. § 50-12-07.1
(2019); OKLA. STAT. ANN. tit. 10a, § 1-8-112 (West
2020); S.C. Exec. Order No. 2018-12 (Mar. 13, 2018),
https://governor.sc.gov/sites/default/files/Documents/
Executive-Orders/2018-03-13-FILED-Executive-
See e.g. Id. at 71 (“When government agencies contract with faith-based organizations that discriminate in performing a government function, they violate the Establishment Clause, which mandates separation of church and state and bars states from stipulating religious criteria as a prerequisite to receiving services.”).


Barber v. Bryant, 193 F. Supp. 3d 677, 698–702 (S.D. Miss. 2016), rev’d, 860 F.3d 345 (5th Cir. 2017) (holding that a couple turned away from a child-placement agency has standing to sue under the Establishment and Equal Protection Clause).

See Fulton, infra note 36, at 1882; see also Sch. Dist. of Abington Twp., P.a. Schempp, 374 U.S. 203, 222–23 (1963) (“The Free Exercise Clause . . . withdraws from legislative power, state and federal, the exertion of any restraint on the free exercise of religion. Its purpose is to secure religious liberty in the individual by prohibiting any invasions there by civil authority.”).

Fulton v. City of Philadelphia, 141 S. Ct. 1868, 1882(2021) (“The refusal of Philadelphia to contract with CSS for the provision of foster care services unless [CSS] agrees to certify same-sex couples as foster parents cannot survive strict scrutiny, and violates the First Amendment.”).


See Letter from Kyle Rojas Legleiter, supra note 12.


Id.

See 45 C.F.R. 75.300(c)–(d), supra note 11.

See Spoto, supra note 3, at 303

See Brief History of Adoption in the United States, https://adoptionnetwork.com/adoption/history-of-adoption (last visited Apr. 9, 2022); see also RYMPH, infra note 44, at 63–64.

See Spoto, supra note 3, at 303

Id. CATHERINE. RYMPH, RAISING GOVERNMENT CHILDREN: A HISTORY OF FOSTER AND THE AMERICAN WELFARE STATE 18 (Univ. of N. Car. Press Chapel Hill, 2017).

Id. at 19.
[47] See Spoto, supra note 3, at 303

[48] Id.

[49] Id. at 20 (analyzing the shift from the private to the public sphere).

[50] See Spoto, supra note 3, at 303 ("In the 1920s, the child welfare infrastructure was still quite diffuse and predominately private rather than governmental").

[51] Id. at 63-64.

[52] Id. at 64 (summarizing the split between private and government agencies).

[53] See A History of Foster Care in Philadelphia, FREE TO FOSTER

[54] See Public vs. Private Adoption, ADOPT HELP,
https://www.adopthelp.com/public-vs-private-adoption (last visited Sept. 24, 2022) (stating that the private, independent system and the public system are the two primary systems).


[56] Id.

[57] Id. (describing situations which may lead to a child entering foster care).

[58] THE AFCARS REPORT, U.S. DEPT. OF HEALTH AND HUM. SERVS. (2021),

[59] See Spoto, supra note 3, at 305.


[61] See, e.g., Id.

[62] While some private organizations focus only on recruiting and finding potential foster parents, others directly provide forms of group care for children under state custody. See, e.g., Id.

[63] See Spoto, supra note 3, at 305; see also Ariana Eunhung Cha, Administration Seeks to Fund Religious Foster-Care Groups that Reject LGBTQ Parents, (Feb. 8, 2019, 10:30 AM),

[64] Foundational Services,

[65] Equality Maps: Religious Exemption Laws, MOVEMENT ADVANCEMENT PROJECT

[66] See MICH. COMP. LAWS ANN. § 722.124e(3), (7)(a) (defining an “adverse action” to include “discriminating against the child placing agency” and forbidding such action “on the basis that the child placing agency has declined or will decline to provide any service” due to its “sincerely held religious beliefs”); TEX. HUM. RES. CODE ANN. § 45.004(1) (stating that state governments “may not discriminate or take any adverse action against a child welfare services provider” based on a refusal to provide services “that conflict with, or under circumstances that conflict with, the providers’ sincerely held religious beliefs”); ALA. CODE § 26-10D-5(a) (stating that a state cannot “refuse to license or otherwise discriminate or take an adverse action against any child placing agency due to the agency’s sincerely held religious beliefs”); S.D. CODIFIED LAWS § 26-6-39 (prohibiting the state from “discriminating [ing] or tak[ing] any adverse action against a child-placement agency” for refusing to provide a service “that conflicts with, or provide any service under circumstances that conflict with the agency’s written sincerely-held religious belief or moral conviction”).


[68] See, e.g., MICH. COMP. LAWS ANN. § 722.124e(3) (stating that protection is extended based on “sincerely held religious beliefs contained in a written policy, statement of faith, or other document adhered to by the child placing agency”); ALA. CODE 26-10D-5(a) (covering objections based on “sincerely held religious beliefs of the child placing agency”); OKLA. STAT. ANN. Tit. 10A, § 1-8-112 (protection placement refusals that “would violate the agency’s written religious or moral convictions or policies”); S.D. CODIFIED LAWS § 26-6-39 (covering service refusals based on a “conflict with the agency’s written sincerely-held religious belief or moral conviction”).

[69] See MISS. CODE ANN. §111-62-3 (2020) (“The sincerely held religious beliefs or moral convictions protected by this chapter are the belief or conviction that: (a) Marriage is or should be recognized as the union of one man and one woman; (b) sexual relations are properly reserved to such a marriage; and (c) Male (man) or female (woman) refer to an individual’s immutable biological sex as objectively determined by anatomy and genetics at time of birth”); TEX. HUM. RES. CODE. ANN. § 45.004 (West 2019) (specifically protecting religious refusals to “provide, facilitate, or refer a person for” abortion or birth control).
[70] See, e.g., OKLA. STATE ANN. Tit 10a, § 1-8-112(A) (protecting a child welfare agency's refusal to "perform, assist, counsel, recommend, consent to, refer, or participate in placement") (emphasis added); KAN. STATE ANN. § 60-5322(b) (stating that "no child placement agency shall be required to perform, assist, counsel, recommend, consent to, refer or otherwise participate in any placement of a child for foster care or adoption") (emphasis added).

[71] MISS. CODE ANN. § 11-62-17(5) (2020) (including right to refuse services such as "[a]ssisting abused or neglected children" and "[a]ssisting kinship guardianships or kinship caregivers"); TEX. HUM. RES. CODE ANN. § 45.002(3) (West 2019) (including "counseling children or parents" and "serving as a foster parent" in list of services that agency has right of refusal).

[72] Spoto, supra note 3, at 309 ("organizations in Mississippi and Texas [have] greater flexibility to deny service to LGBTQ individuals or others who do not comport with the organization's religious beliefs.")

[73] See ALA. CODE § 26-10D-5.

[74] See MICH. COMP. LAWS ANN. § 722.124e(7)(a) (prohibiting "any action that materially alters the terms or condition of the child placing agency's funding, contract, or license"); 2018 S.C. Acts 361; H. 4950, 2018 Gen. Assemb., 122nd Sess., § 38.29 (S.C. 2018); S.D. CODIFIED LAWS § 26-6-37 (stating that adverse action includes denial of funding and contracts).

[75] See KAN. STAT. ANN. § 60-53-22(d), (e), (h) (forbidding denial of participation in government programs and civil fines or other civil actions); N.D. CENT CODE ANN § 50-12-07.1 (prohibiting government refusal of grants or contracts); OKLA. STATE ANN. tit. 10a, § 1-8-112(C), (D) (prohibiting government refusal of "any grant, contract, or participating in a government program" in addition to civil actions); VA. CODE ANN. § 63.2-1709.3(C), (D) (forbidding denial of "any grant, contract, or participation in a government program").


[78] 45 C.F.R. 75.300(c)–(d) (2019).

[79] See e.g., MICH. COMP. LAWS ANN. § 722.124e(1) (West 2020) (leaving out any specific language relating to LGBTQ-rights).

[80] See, e.g., Hannah Weikel, South Dakota Governor Signs Religious Adoption Protections, ASSOCIATED PRESS (Mar. 10, 2017), https://apnews.com/article/87f07bd2cc0c4607bf00238d8160b119 (describing the concern that "the same thing [would] happen in South Dakota similar to when [r]eligious agencies in Massachusetts, Illinois, California, and Washington D.C. ended adoption services after states passed non-discrimination laws that include sexual orientation").

[81] See Barber v Bryant, 193 F. Supp. 3d 677, 693 (S.D. Miss. 2016) ("Mississippi’s legislators formally responded to Obergefell in the next legislative session.") rev'd on other grounds, 860 F.3d 345 (5th Cir. 2017).

[82] Id. at 691-92.

[83] Id. at 692.

[84] Id.


[87] Derek Beres, What is the Ultimate Goal of ‘Project Blitz,’ the Christian Nationalist Movement, BIGTHINK (Feb. 26, 2020), https://bigthink.com/the-present/project-blitz/ ("To this day, many Americans believe we live in a Christian nation – that such a reality should be as obvious as Judaism in Israel.").


[89] See Katherine Stewart, Opinion, A Christian Nationalist Blitz, N.Y. TIMES (May 26, 2018) https://www.nytimes.com/2018/05/26/opinion/project-blitz-christian-nationalists.html ("[M]ore than 70 bills before state legislatures appear to be based on Project Blitz templates or have similar objectives."); Kristian Hernandez, Pratheek Rebala, Nathaniel Carey & Mike Reicher, Bills Supporting Religion-Based Rejection Turning Parents Away from Adoption Agencies, USA TODAY (June 10, 2019, 6:00 AM), https://www.usatoday.com/story/news/investigations/2019/06/10/adoption-agencies-latest-front-religious-freedom-fight/1359072001 (stating findings that show that, over the past decade, five hundred bills have
been composed in response to Project Blitz’s legislation models; of these bills, more than sixty were passed).


[92]See Evans, supra note 26; see also Spoto, supra note 3, at 305

[93]See National Foster Care & Adoption Directory Search, supra note 6 (listing Adoption Consultants, Inc., Child Saving’s Institute, and Holt International as child-welfare organizations that will provide services).


[95]See Julie Compton, LGBTQ Tennesseans are ‘saddened,’ ‘disappointed’ by new adoption law, NBC NEWS (Feb. 17, 2020) https://www.nbcnews.com/feature/nbc-out/lgbtq-tennesseans-are-saddened-disappointed-new-adoption-law-n1137086 (... “which means these prospective parents will need to do their research, make phone calls, risk the humiliation of rejection…”)(emphasis added).

[96]See The AFCARS Report, supra note 58 (citing that there were over 400,000 children in foster care during 2020, only 25% of which ended up getting adopted).

accompanying message to adherents that they are insiders... "(quoting Mcreary Cnty. v. ACLU of Ky., 545 U.S. 844, 860 (2005)).

[113]Id. at 710 ("Under the guise of providing additional protection for religious exercise, it creates a vehicle for state sanctioned discrimination on the basis of sexual orientation and gender identity. It is not rationally related to a legitimate end.").

[114]Barber v. Bryant, rev’d, 860 F.3d 345, 357 (5th Cir. 2017).

[115]Id. at 357.

[116]Id. at 352.


[118]Id. at 720.

[119]Id. at 722. However, the court held that there were no grounds for taxpayer standing. Id. at 730.

[120]Id. at 736, 741-43.


[122]Id.

[123]Id.

[124]Id. at 455; Stipulation of Voluntary Dismissal with Prejudice at 8, Dumont v. Gordon, No. 17-cv-13080 (E.D. Mich. Mar. 22, 2019), https://www.aclu.org/legal-document/dumont-v-gordon-settlement-stipulation ("Whereas, the Contract and the Subcontracts include a non-discrimination provision mandating that contracted CPAs comply with the Department’s non-discrimination statement prohibiting discrimination ‘against any individual or group because of race, sex... gender identity or expression, sexual orientation...’ In the provisions of services under contract with the Department (the “Non-Discrimination Provision”").

[125]See MICH. COMP. LAWSANN., supra note 24.


[129]Id.


[131]See What We Do, supra note 39.

[132]Id.


[135]Id.


[138]Id.


[142]View Rule, OFFICE OF INFO. AND REG. AFF. (Apr. 1, 2022) https://www.reginfo.gov/public/do/eAgendaViewRule?pubId=202104&RIN=0945-AA17 ("Section 1557 of PPACA prohibits discrimination on the basis of race, color, national origin, sex, age, or disability under any health program or activity, any part of which is receiving Federal financial assistance, including credits, subsides, or contracts of insurance, or under any program or activity that is administered by an Executive Agency or any entity established under title I of the PPACA.").

[143]See 45 C.F.R. 75.300(c)-(d) (2016)

[144]Id.


strenthen-civil-rights.html.

[148]Id.
[149]Id.
[150]Id.
[151]Id.
[152]Id.
[153]Id.

[154]See 45 C.F.R. 75.300(c), supra note 11.
[155]42 U.S.C. §2000bb(b) (“The purposes of this Act are -- (1) to restore the compelling interest test as set forth in Sherbert v. Verner, 374 U.S. 398 (1963) and Wisconsin v. Yoder, 406 U.S. 205 (1972) and to guarantee its application in all cases where free exercise of religion is substantially burdened...”).

[156]Id. (“The purposes of this Act are …. (2) to provide a claim or defense to persons whose religious exercise is substantially burdened by government.”).

[157]Id. (“The Congress finds that …. (2) laws “neutral” toward religion may burden religious exercise as surely as laws intended to interfere with religious exercise; (3) governments should not substantially burden religious exercise without compelling justification...”).

[158]See also Ronald Steiner, Compelling State Interest, FIRST AMEND. ENCYCLOPEDIA https://www.mtsu.edu/first-amendment/article/31/compelling-state-interest (last visited May 1, 2022) (defining “compelling interests” as dictated in the RFRA).


[160]Id. at 1881 (“The question, then, is not whether the City has a compelling interest in enforcing its non-discrimination policies generally, but whether it has such an interest in denying an exception to CSS.”).


[163]Id.


[165]See The AFCARS Report, supra note 58 (citing that in the year 2020, 407,493 children were in the foster system and 57,881 ended up being adopted that year).


[167]See Spoto, supra note 3, at 315 (“By restricting the pool of potential parents, these laws potentially make it more difficult for all children in the foster care system to find homes.”).

[168]See Moreau, supra note 30 (citing reports from Texas and Michigan that show that the number of foster and adoptive homes working with licenses child placement agencies has decreased by nearly 40 and 20 percent respectively after the enactment of religious exemption laws for child-welfare agencies.).


[170]See supra note 20 (The dates of all ten state exemption laws are right after the similar exemption was made in South Carolina).


[172]See Spoto, supra note 3, at 317 (“Religious exemption laws send a message that discrimination by child welfare organizations against LGBTQ individuals is acceptable to, or even encouraged by, the state.”).