The Heritage Foundation

LEGAL MEMORANDUM

No. 370 | JANUARY 23, 2025

EDWIN MEESE III CENTER FOR LEGAL & JUDICIAL STUDIES

Gender Ideology Threatens Religious Freedom and Endangers Children

Thomas Jipping

KEY TAKEAWAYS

State agencies are increasingly using adherence to gender ideology as a condition for otherwise qualified foster parent applicants.

This discrimination is occurring against the backdrop of a foster care crisis that already leaves thousands of children without the care they need.

Supreme Court precedents make clear that such policies violate the fundamental right to exercise religion.

Mike and Kitty Burke, lifelong residents of Springfield, Massachusetts,[1] applied to the Massachusetts Department of Children and Families (DCF) to be foster parents. They successfully completed the required training, extensive interviews, and an evaluation of the home environment in which foster children would live. Objectively, the Burkes looked like ideal foster parents; Kitty even had experience working with special needs children. As it turned out, however, they had one thing that mattered more than all of their positive qualifications combined: the wrong religious beliefs about sexuality and marriage.

During their foster parent training, for example, the Burkes were told that foster parents must affirm same-sex relationships and transgender identities. As faithful Catholics, however, the Burkes could not agree to comply. As a result, the home interviewer

recommended against allowing the Burkes to foster "due to the couple's views."[2] In the end, DCF rejected the Burkes because of their "beliefs."[3]

Not only does such blatant discrimination violate the rights of applicants but, as the Burkes' case shows, can go even further. The Massachusetts DCF's Foster Parents' Bill of Rights explicitly prohibits discrimination against prospective foster parents "on the basis of religion,"[4] and its regulations claim that DCF "does not deny any adult the opportunity to become a foster family on the basis of...religion."[5] In addition, DCF policy prohibits staff from "imposing their personal, cultural, and/or religious beliefs on children and families involved with the department."[6] Yet that is exactly what happened to the Burkes.

This *Legal Memorandum* examines the growing problem of gender ideology being used to reject otherwise qualified foster parent applicants. This discrimination not only occurs against the backdrop of a foster care crisis that already leaves thousands of children without the care they need, but Supreme Court precedents make clear that it violates the fundamental right to exercise religion.

The Foster Care Crisis

Individual states, and the country as a whole, are in the midst of a long-standing foster care crisis. Media reports have been documenting this crisis for years,[7] including that foster parent turnover rates are often between 30 percent and 50 percent.[8] Even before denying the Burkes the opportunity to participate, Massachusetts had acknowledged a serious lack of both foster families and group homes.[9] A September 2024 report from KVC Health Systems noted problems in more than a dozen states including "children staying in hospital ERs, hotels, and even out-of-state places."[10] As a policy matter, this ongoing crisis should create a high burden to justify rejecting foster parent applicants for reasons other than objective qualifications.

The Significance of Religious Liberty. Even if there were no foster care crisis, government should be especially cautious before enacting or implementing regulations that interfere with the right to exercise religion. Far from simply a competing policy consideration, this right is not only explicitly protected by the Constitution, but has a particularly significant status in American history, culture, and law.

The Senate Judiciary Committee report on the Religious Freedom Restoration Act[11] notes that the United States "was founded upon the conviction that the right to observe one's faith, free from Government interference, is

among the most treasured birthrights of every American."[12] The International Religious Freedom Act, passed unanimously by Congress four years later, declares that the "right to freedom of religion undergirds the very origin and existence of the United States."[13]

Stanford Law Professor Michael McConnell explains that, because religious freedom is "based on the inviolability of the conscience,"[14] it is both natural and inalienable. The free exercise of religion, therefore, is a "special case."[15] America's Founders, in fact, argued that the individual's right to exercise religion, "is precedent, both in order of time and in degree of obligation, to the claims of Civil Society."[16] First Amendment freedoms, including the exercise of religion, the Supreme Court held in 1943, "are in a preferred position."[17]

Laws to protect not only religious belief, but religious practice, date from more than a century before the First Amendment was ratified,[18] and the United States has further affirmed the right to exercise religion in international declarations and treaties.[19] Each January, American Presidents issue a proclamation officially marking Religious Freedom Day, the anniversary of the Virginia Statute for Religious Freedom's enactment. Their proclamations have called religious freedom "integral to the preservation and development of the United States," a "fundamental right of all people," a "core principle of our Constitution, and a fundamental human right," "the natural right of all humanity," and "the fundamental freedom underlying our democracy."[20]

The long-standing historical, cultural, and legal significance of religious freedom has kept the United States from the kind of explicit hostility toward religion that is common around the world, even in countries that have formally and repeatedly pledged to prevent it. In the Pew Research Center's latest report on religious freedom around the world, for example, 54 nations received a "very high" or "high" score for government restrictions on religion.[21] Each of these countries signed the 1948 Universal Declaration of Human Rights, which identifies religious freedom as one of the "equal and inalienable rights of all members of the human family."[22] In addition, 45 of those nations have also ratified the International Covenant on Civil and Political Rights, which incorporates the same robust definition of religion as the Universal Declaration.[23] When it comes to religious freedom, the reality in many countries bears little resemblance to the rhetoric.

Challenges to religious freedom in the United States typically take a different form. Most conflicts between religious exercise and government action involve "governmental rules of general applicability which operate to place substantial burdens on individuals' ability to practice their faith."[24]

Nonetheless, the Supreme Court has long held that government action can violate the First Amendment as much by its application or impact as by its terms or intentions. In *Murdock v. Commonwealth of Pennsylvania*,[25] for example, several Jehovah's Witnesses challenged their convictions under a local ordinance that required a license to canvass or solicit orders for merchandise. A license tax need not be "laid specifically on the exercise of" First Amendment freedom, the Court held, but can be unconstitutional because of its effect on those freedoms.[26]

Supreme Court Precedents. Consistent with the special and preferred nature of this inalienable right, the Supreme Court for decades applied a legal standard, often referred to as *strict scrutiny*, in all cases alleging that government action burdened religious exercise. Under this standard, the toughest in American law, government may interfere with the exercise of religion no more than absolutely necessary. In legal terms, such interference must be the least restrictive means of achieving a compelling government purpose.[27] Justice Sandra Day O'Connor summarized the Court's traditional approach in cases involving the Free Exercise Clause this way:

> The compelling interest test effectuates the First Amendment's command that religious liberty is an individual liberty, that it occupies a preferred position, and that the Court will not permit encroachment upon this liberty, whether direct or indirect, unless required by clear and compelling governmental interests "of the highest order."[28]

Employment Division v. Smith. The Supreme Court's 1990 decision in *Employment Division v. Smith*[29] restricted application of strict scrutiny only to the small fraction of cases in which government action is "specifically directed" at religious practice.[30] While appearing to reject the long-standing principle that government action can violate the Free Exercise Clause by its impact as well as its explicit purpose, *Smith* cited *Murdock* in passing only twice—never suggesting that either this decision, or other precedents like it,[31] were no longer valid.

Still, some might argue that, under *Smith*, the Free Exercise Clause does not apply to requiring foster parents to affirm the state's view of gender ideology because the relevant regulations or policies do not explicitly exclude applicants on the basis of their religious beliefs. For multiple reasons, however, *Smith* should not insulate religious discrimination within the foster care system.

Covert Suppression. First, individuals unwilling to promote the state's view of gender ideology will often be motivated by their religious beliefs. In

Blais v. Hunter,[32] for example, a Washington state agency denied a couple's foster parent application because they would not, based on their Christian faith, commit to supporting socially or medically transitioning a minor who might be in their care in the future toward his or her expressed "gender identity." The couple sued, seeking a preliminary injunction against application of this policy.

The U.S. District Judge looked past the fact that the statutes, regulations, and policies appeared to be facially neutral with regard to religion. The question, he concluded, "involves whether these regulations and policies operate to covertly suppress certain religious beliefs."[33] He found that they did. "Closer inspection of the regulations and policies at issue reveals that, in practice, they work to burden potential caregivers with sincere religious beliefs yet almost no other."[34] Despite their supposedly secular purpose, "these laws work to preclude people with certain religious beliefs from participating in foster care."[35]

The court issued a preliminary injunction against the Washington Department of Children, Youth and Families (DCYF) using these regulations and policies against prospective foster parents. "If the only factor weighing against an otherwise qualified applicant has to do with their sincerely held religious beliefs, the Department must not discriminate against a foster care applicant based on their creed."[36]

Administrative Bias. Second, while regulations may not explicitly single out religious belief as a basis for rejecting prospective foster parents, the individuals administering those regulations often do. During the application and interview process, for example, the Burkes were candid that their view of gender ideology was influenced by their Catholic faith. As noted above, agency policy prohibits staff from "imposing their personal, cultural, and/or religious beliefs on children and families involved with the Department."[37] The home interviewer, however, recommended against allowing the Burkes to foster, noting that their "religious views" were "not supportive" of every child's claimed sexual orientation or "gender identity."[38]

In *Masterpiece Cakeshop v. Colorado Human Rights Commission*,[39] the Supreme Court reaffirmed the principle that "the government, if it is to respect the Constitution's guarantee of free exercise [of religion], cannot impose…[and] cannot act in a manner that passes judgment upon or presupposes the illegitimacy of religious beliefs and practices. The Free Exercise Clause bars even 'subtle departures from neutrality' on matters of religion."[40] The Court decided *Masterpiece Cakeshop* in favor of its owner, Jack Phillips, because the record showed "elements of a clear and impermissible hostility toward the sincere religious beliefs that motivated his

objection"[41] to creating custom cakes for same-sex weddings. Admittedly, this is a fact-specific approach, but the Burkes' treatment illustrates how a state agency can, as the court in *Blais* concluded, apply its regulations in a manner that effectively singles out certain religious beliefs for negative treatment.

The judge in *Blais* held that "the Department undeniably grants a privilege and benefit to the foster parents who receive a license. The Department denied the Blaises the privilege and benefit of providing foster care because of their sincerely held religious beliefs."[42] Several Supreme Court precedents regarding religious discrimination in the provision of public benefits point in the same direction.

***Trinity Lutheran Church v. Comer*.** The Missouri Department of Natural Resources offers grants to help public and private schools and nonprofit entities obtain playground surfaces made from recycled tires. Trinity Lutheran Church applied for a grant in 2012 for its preschool and day care center. While the agency awarded 14 grants that year, it denied Trinity Lutheran's application despite its ranking fifth based on program criteria. The agency had a "strict and express policy of denying grants to any applicant owned or controlled by a church, sect, or other religious entity."[43]

The agency cited the state constitution's prohibition on taking money from the public treasury "in aid of any church, sect or denomination of religion."[44] Trinity Lutheran sued, arguing that "categorically disqualifying churches and other religious organizations" violated the First Amendment right to freely exercise religion. The district court dismissed the case, holding that the Free Exercise Clause only prohibits the government from restricting particular religious practices, and the appeals court affirmed.

The Supreme Court reversed. The Court previously held in 1993 that the Free Exercise Clause subjects to a strict legal standard laws that "target the religious for 'special disabilities' based on their 'religious status.'"[45] This means, the Court explained, that "denying a generally available benefit solely on account of religious identity imposes a penalty on the free exercise of religion that can be justified only by a state interest 'of the highest order.'"[46] Applying that principle, the Court concluded that the "Department's policy expressly discriminates against otherwise eligible recipients by disqualifying them from a public benefit solely because of their religious character."[47]

The Court not only reversed the result reached by the lower courts but also rejected their rationale for that result.

The Free Exercise Clause prohibits government from not only criminalizing a church's worship practices or doctrine, but also from indirectly coercing or penalizing its religious exercise.[48] The "express discrimination against religious exercise here is not the denial of a grant, but rather the refusal to allow the Church—solely because it is a church—to compete with secular organizations for a grant."[49] The discriminatory policy, the Court concluded, "violates the Free Exercise Clause."[50]

Espinoza v. Montana Dept. of Revenue. Montana established a program to provide tuition assistance to parents who send their children to private schools. It provides a tax credit to those who donate to organizations that, in turn, award scholarships to students attending "qualified education providers," including private schools that meet certain accreditation, testing, and safety requirements. The Department of Revenue issued a rule categorically excluding the use of scholarships at religious schools, citing the Montana Constitution's prohibition on "payment from any public fund... for any sectarian purpose."[51]

Three mothers whose children attended a Christian school that met the criteria for "qualified education providers" sued in state court when they were unable to use a tuition scholarship at the school. The Montana Supreme Court held that the entire scholarship program, not simply the use of a tuition scholarship at a religious school, violated the state constitution's "no aid" provision.

The U.S. Supreme Court reversed.[52] While *including* religious schools in a tuition assistance program does not violate the First Amendment's prohibition on an establishment of religion, the Court held, *excluding* those schools as had been done in this case violated the Free Exercise Clause.[53] Writing for the majority, Chief Justice John Roberts cited *Trinity Lutheran* for the "unremarkable" proposition that "disqualifying otherwise eligible recipients from a public benefit 'solely because of their religious character' imposes 'a penalty on the free exercise of religion.'"[54]

The "plain text" of the Montana Constitution, Roberts wrote, "singles out schools because of their religious status."[55] This "categorical ban"[56] is "far more sweeping than the policy in *Trinity Lutheran*."[57]

Carson v. Makin. While the Maine Constitution requires local governments to support and maintain public schools, more than half have no public schools. The legislature, therefore, established a program for families in these areas to pay the tuition "at the public school or the approved private school of the parent's choice at which [a] student is accepted."[58] Requirements for private schools cover accreditation, curriculum, and the ratio of students to teachers. The program sets no geographical limitations, and even single-sex schools are eligible.

In 1981, however, Maine began categorically excluding religious schools "in accordance with the First Amendment of the United States Constitution."[59] The legislature continued that discrimination even after the U.S. Supreme Court held that programs under which tuition assistance reaches religious schools "wholly as the result of [private citizens'] genuine and independent private choice" do not violate the Establishment Clause.[60] Maine argued that its focus was not exclusively on the religious status of a school but on what it teaches and how material is presented.

Two Maine families living in areas with no public schools who sent their children to Christian schools that met all relevant standards sued, arguing that the religious exclusion policy violated the Free Exercise Clause. The appeals court acknowledged that its previous decision upholding the religious exclusion policy was inconsistent with *Espinoza* and, therefore, was no longer controlling. The court, however, again upheld the policy, this time emphasizing the distinction between the religious identity or status of a school and the "religious use that they would make of [funding] in instructing children in the tuition assistance program."[61] Applying the "unremarkable principles"[62] in *Trinity Lutheran* and *Espinoza*, the Supreme Court rejected this distinction. Whether phrasing a regulation in terms of a school's status or how it would use scholarship funds, the Court concluded, the "effect is the same: to 'disqualify some private schools' from funding 'solely because they are religious.'"[63]

These precedents stand for the proposition that government may not deny a public benefit to otherwise qualified individuals or institutions because of their religious beliefs. This principle is consistent with the Supreme Court's traditional view that the right to exercise religion is in a "preferred position." While private religious employers may use religion as a criterion for seeking employees who share a common faith, government may not use religion as the basis for excluding otherwise qualified applicants.

***303 Creative LLC v. Elenis*.** Lori Smith ran a graphic design business, 303 Creative LLC, and wanted to ensure that she could include wedding websites among her services without running afoul of the Colorado Anti-Discrimination Act. That law prohibits a "place of public accommodation" such as a business from discriminating on several bases, including sexual orientation.[64] As a Christian, Lori refuses to create "custom graphics and websites" with content that violates her religious beliefs, including that marriage is a union between a man and a woman. The district court, affirmed by the appeals court, denied her request for an injunction against enforcement of the statute which, she argued, would force her to convey a

message that violated her beliefs. The Supreme Court reversed, holding that the First Amendment prohibits Colorado from forcing a website designer to create expressive designs with which she disagrees.[65]

Cases such as *303 Creative* and *Masterpiece Cakeshop* raise the issue whether creative endeavors amount to the kind of expression that the First Amendment protects from government-enforced content. These precedents apply even more easily in the foster care context, where the state is literally requiring foster parents to affirmatively support, promote, and convey a particular message regarding gender ideology. These regulations go far beyond prohibiting discrimination on the basis of "gender identity"; indeed, the Burkes and other religious applicants are committed to treating all children equally. Rather, these regulations require that foster parents embrace the state's view of gender ideology and communicate it, through both speech and action, to the children in their care.

***Fulton v. City of Philadelphia*.** The Catholic Church began serving needy children in Philadelphia in 1798. Like many jurisdictions around the country, Philadelphia contracts with private agencies such as Catholic Social Services (CSS) to place in foster homes children who, for various reasons, have come into the city's temporary custody. As a Catholic Church agency, religious doctrine and principles guide how CSS participates in the foster care system and, therefore, it does not approve same-sex couples who seek certification to receive foster children.

After a newspaper story reported that CSS would not consider those in same-sex marriages for foster placements, the Philadelphia Commission on Human Relations launched an inquiry, and the Department of Human Services terminated CSS' contract with the city. To renew that contract, CSS would have to commit to agree to certify same-sex couples. The Catholic Archdiocese sought a preliminary injunction against applying this policy, but the lower federal courts held that, under *Employment Division v. Smith*, the non-discrimination policy was religion-neutral and, therefore, not subject to strict scrutiny.

The Supreme Court reversed, holding that *Smith* was inapplicable because the city's policies "do not meet the requirement of being neutral and generally applicable."[66] In terms similar to the court in *Blais*, the Supreme Court held that "[g]overnment fails to act neutrally when it proceeds in a manner intolerant of religious beliefs or restricts practices because of their religious nature."[67] Like its decision in *Masterpiece Cakeshop*, the Court took a fact-specific approach in *Fulton*, declining to revisit *Smith* and its underlying interpretation of the Free Exercise Clause. Still, like the other precedents reviewed here, *Fulton* adds force to the principle

that discriminating against otherwise qualified applicants because of their religious beliefs can violate the Constitution.

The Spread of Religious Discrimination

Governments across the country are revising regulations and policies in many different areas to accommodate and promote the gender ideology movement.[68] As a result, couples denied the opportunity to serve as foster parents because of their religious beliefs are seeking to defend their rights in court, making some of the same arguments presented in this analysis. Below are some examples.

***DeGross v. Hunter*.** Shane and Jennifer DeGross were foster parents, licensed by Washington state, from 2013 to 2022. The Washington DCYF discontinued the policy that was successfully challenged in *Blais v. Hunter*.[69] But when the DeGrosses began the process of renewing their foster parent license in 2022, they learned that the state had issued new gender ideology regulations that were changed little in form, and not at all in substance.

The list of services foster parents would be required to provide includes "connect[ing] a foster child with resources that supports and affirms their [sic] needs regarding" sexual orientation and "gender identity"[70] and "support[ing] a foster child's [sexual orientation and gender identity] by using their pronouns and chosen name."[71] Supportive practices also include displaying "Pride flags or other indicators" in the home and having "LGBTQIA+ authors, musicians, and artists in your collections."[72] DCYF personnel further explained that these supportive activities might also include taking a child to a local Pride event.[73]

Significantly, these regulations treat a foster child's cultural or spiritual identity differently than his or her "gender identity." While foster parents, for example, must be "*respectful* of spiritual practices different than their own,"[74] they must "*support* a child's [sexual orientation or gender identity and expression] and LGBTQIA+ identity."[75] They are not required to affirm, by their speech or actions, the validity of a child's creed or religion but are required to so affirm the validity of a child's professed "gender identity."

The DeGrosses made clear that, while they would never force their religious beliefs on a foster child, they were unwilling to affirmatively support or affirm a foster child's "gender identity" through speech or actions that contradicted their religious beliefs. The state rejected their application because the licensing agency could not certify that they would follow all the new regulations "to the letter without any exceptions."[76] The DeGrosses filed their lawsuit in March 2024.

Bates v. Pakseresht. Jessica Bates is a single mother of five children who sought certification to adopt a child from Oregon's foster care system. Oregon Department of Human Services (ODHS) regulations require that all applicants "accept and support the...gender identity [and] gender expression" of a child or young adult in their care.[77] During the application process, Bates learned that "support" includes using a child's preferred pronouns, affirming his or her gender identity, taking the child to "LGBTQ-affirming events like gay-pride parades,"[78] displaying symbols such as a rainbow flag, and avoiding activities, "including religious activities," that are "unsupportive of people with diverse LGBTQ+ identifies."[79] After Bates indicated that her Christian faith would not allow affirmation or active promotion of a child's gender identity, the ODHS rejected her application.

Bates filed suit in April 2023, and the U.S. District Court denied her request for a preliminary injunction. The court concluded that the ODHS gender regulation is "facially neutral, as it makes no reference to any specific religious practice, nor does it implicate religion on its face."[80] This approach to neutrality, however, appears to place form over substance. And it fails to consider, as the court did in *Blais*, that rejecting an applicant for refusing to commit to the state's gender ideology, when the basis for doing so is almost exclusively religious, has the effect of disqualifying an entire category of applicants solely on the basis of their religious beliefs.

While acknowledging that "*Blais* shares similarities with the case before this Court,"[81] however, the court in *Bates* said simply that "the decision of a fellow district court is not binding on this Court."[82] Applying a much more lenient legal standard, the court held that the ODHS regulation "is rationally related to the government's legitimate interest in protecting LGBTQ+ children in ODHS care from harm."[83] This decision is on appeal before the U.S. Court of Appeals for the Ninth Circuit.

Wuoti v. Winters. This case involves two Vermont couples, Brian and Kaitlyn Wuoti and Michael and Rebecca Gantt, who became foster parents in 2014 and 2016, respectively. The Wuotis sought to renew their foster parent license in 2022 and, in 2023, the state Department of Children and Families (DCF) initially asked the Gantts to accept an emergency placement. In both cases, despite a 42 percent statewide decline in licensed foster parents in just the previous three years,[84] DCF revoked the couples' foster parent licenses because they would not agree to abide by its gender ideology policy.

Under that policy, foster parents must agree to "support" a child's gender identity by, among other things, bringing him or her to "LGBTQ organizations and events in the community," using a child's preferred pronouns

and name, and actually to "[b]elieve that youth can have a happy future as an LGBTQ adult."[85] A DCF rule requires foster parents to "support children in wearing hairstyles, clothing, and accessories affirming of the child's...gender identity."[86] In short, DCF requires that every foster family must "fully embrac[e] and holistically affirm" a child's ideas about sexual orientation or gender identity in order to receive a foster care license.[87] The Vermont DCF, therefore, has gone beyond dictating foster parents' speech and actions toward a foster child and requires foster parents themselves to believe, embrace, and affirm what might violate their religious beliefs. The Wuotis and Gantts filed their lawsuit in June 2024.

Conclusion

In the face of a widespread foster care crisis, and despite the long-standing historical, cultural, and legal tradition of religious freedom as a "preferred" and "special" right, governments intent on promoting gender ideology are increasingly denying otherwise qualified foster parent applicants because of their religious beliefs. Supreme Court precedents dating back at least to the 1940s show, in multiple ways, that this religious discrimination violates the First Amendment's Free Exercise Clause. This disturbing trend reveals both that gender ideology is rapidly dominating many aspects of society, culture, and politics, and that the right to exercise religion is, perhaps just as rapidly, losing its distinctive significance. The hope is that lawsuits challenging these gender ideology policies will not only yield good results in individual cases but will also revive the constitutional priority of religious freedom.

Thomas Jipping is Senior Legal Fellow in the Edwin Meese III Center for Legal and Judicial Studies at The Heritage Foundation.

Endnotes

1. *See* Thomas Jipping & Katie Samalis-Aldrich, *Massachusetts' Religious Bigotry Leaves Foster Kids Without Homes*, Daily Signal (Sept. 6, 2023), https://www.dailysignal.com/2023/09/06/massachusetts-pushes-gender-ideology-finding-homes-foster-kids/.
2. Complaint, Burke v. Walsh, No. 1:23–cv–11798 (D. Mass., filed Aug. 8, 2023), at ¶ 127, https://becketnewsite.s3.amazonaws.com/20230808154524/Burke-Complaint-and-Exhibits.pdf.
3. *Id*. at 25.
4. Mass. Gen. Laws ch. 119 § 23C(b).
5. Burke Complaint, *supra* note 2, at ¶ 69.
6. *Id*. at ¶ 88.
7. *See, e.g.*, Hanna Lawrence, *Georgia Foster Care System in Crisis Due to Shortage of Foster Homes*, ABC News (Feb. 21, 2017, 6:13 PM), https://newschannel9.com/news/local/georgia-foster-care-system-in-crisis-due-to-shortage-of-foster-homes; Neena Sajita, *For Troubled Foster Kids in Houston, Sleeping in Offices Is "Rock Bottom,"* Texas Tribune (Apr. 20, 2017, 12:00 AM), https://www.texastribune.org/2017/04/20/texas-foster-care-placement-crisis/; *Indiana Agencies Desperate to Find Foster Parents with Children Entering System at All-Time High*, Associated Press (March 7, 2017, 10:42 AM), https://fox59.com/news/indiana-agencies-desperate-to-find-foster-parents-with-children-entering-system-at-all-time-high/; *The National Foster Care Placement Crisis: Why Are Kids Sleeping in Offices?* KVC Health Systems (Sept. 9, 2024), https://www.kvc.org/blog/the-national-foster-care-placement-crisis-why-are-kids-sleeping-in-offices-video/.
8. John DeGarmo, *Children Being Placed Into Foster Care; A Foster Care System Where There Are Not Enough Homes*, Amn. SPCC, https://americanspcc.org/the-foster-care-crisis-the-shortage-of-foster-parents-in-america/. *See also Foster Parent Retention*, Nat'l Conf. State Legislatures (April 2022), https://archive.legmt.gov/content/Committees/Interim/2021-2022/Children-Families/Studies/HJR-44/may2022-ncsl-paper-foster-parent-retention.pdf.
9. Kathy Curran, *DCF Struggling Without Enough Foster Homes*, WCVB (Jan. 17, 2019, 2:20 PM), https://www.wcvb.com/article/dcf-struggling-without-enough-foster-homes/25921664.
10. *The National Foster Care Placement Crisis*, *supra* note 8.
11. 42 U.S.C. § 2000bb.
12. Religious Freedom Restoration Act of 1993, Report 103–111, 103rd Congress, 1st Session, July 27, 1993, at 4.
13. 22 U.S.C. § 6401.
14. Michael McConnell, *Freedom from Persecution or Protection of the Rights of Conscience? A Critique of Justice Scalia's Historical Arguments in* City of Boerne v. Flores, 39 William & Mary L. Rev. 819, 823 (1997).
15. *Id*.
16. James Madison, *Memorial and Remonstrance Against Religious Assessments*, Nat'l Archives (June 20, 1785), https://founders.archives.gov/documents/Madison/01-08-02-0163#JSMN-01-08-02-0163-fn-0002-ptr.
17. McConnell, *supra* note 14, at 115.
18. *See* Thomas Jipping & Sarah Perry, *The Religious Freedom Restoration Act: History, Status, and Threats* 3–6, Heritage Found. Legal Mem. No. 284, May 4, 2021, https://www.heritage.org/civil-rights/report/the-religious-freedom-restoration-act-history-status-and-threats.
19. *See, e.g.*, G.A. Res. 217 (III) A, Universal Declaration of Human Rights (Dec. 10, 1948) (religious freedom is one of the "equal and inalienable rights of all members of the human family").
20. Presidential proclamations are published in the *Federal Register* and may be found at *Presidential Documents*, Natl' Archives, https://www.federalregister.gov/presidential-documents. *See also* Sarah Parshall Perry & Thomas Jipping, *A Solution in Search of a Problem: The Department of Health and Human Services Proposes to Weaken Conscience Protections for Health Care Workers* 5–6, Heritage Found. Legal Mem. No. 333, June 1, 2023, https://www.heritage.org/sites/default/files/2023-06/LM333.pdf.
21. Samirah Majumdar & Sarah Crawford, *Globally, Government Restrictions on Religion Reached Peak Levels in 2021, While Social Hostilities Went Down*, Pew Rsch. Ctr. (March 5, 2024), at 58–59, https://www.pewresearch.org/wp-content/uploads/sites/20/2024/03/PR_2024.3.5_religious-restrictions_REPORT.pdf.
22. Universal Declaration of Human Rights, *supra* note 19.
23. *Id*., art 18 ("the freedom, either alone or in community with others and in public or private, to manifest his religion or belief in teaching, practice, worship and observance."). *See also* G.A. Res. 2200A, International Covenant on Civil and Political Rights (Dec. 16, 1966).
24. Report 103–111, *supra* note 12, at 4–5.
25. 319 U.S. 105 (1943).

26. *Id*. at 108.
27. *See* Thomas v. Review Board, 450 U.S. 707, 713 (1981); Hobbie v. Unemployment Appeals Commission, 480 U.S. 136, 141 (1987).
28. Emp. Div. v. Smith, 494 U.S. 872, 895 (O'Connor, J., concurring in the judgment), quoting Wisconsin v. Yoder, 406 U.S. 205, 215 (1972).
29. 494 U.S. 872 (1990).
30. *Id*. at 878. See also Church of the Lukumi Bablu Aye, Inc. v. City of Hialeah, 508 U.S. 520, 531–32 (1993) (laws that are not "neutral and of general applicability" must still be justified "by a compelling governmental interest and must be narrowly tailored to advance that interest."). *Smith* quickly became one of the Supreme Court's most controversial precedents. See Jipping & Perry, *supra* note 18, at 12–15.
31. *See, e.g*., *Thomas*, 450 U.S. at 718; *Hobbie*, 480 U.S. at 141.
32. 493 F.Supp.3d 984 (E.D. Wash. 2020).
33. *Id*. at 995.
34. *Id*. at 996.
35. *Id*.
36. *Id*. at 1002.
37. Burke Complaint, *supra* note 2, at ¶ 88.
38. *Id*. at ¶ 8.
39. 584 U.S. 617 (2018).
40. *Id*. at 638, quoting Church of Lukumi Babalu Aye, Inc. v. Hialeah, 508 U.S. 520, 534 (1993).
41. *Id*. at 634.
42. *Id*. at 997.
43. Trinity Lutheran Church v. Comer, 582 U.S. 449, 455 (2017).
44. Mo. Const., art. I, § 7.
45. *Trinity Lutheran*, 582 U.S. at 458, quoting Church of Lukumi Babalu Aye, Inc. v. Hialeah, 508 U.S. 520, 533 (1993).
46. *Id*., quoting McDaniel v. Paty, 435 U.S. 618, 628 (1978) (internal quotation marks omitted).
47. *Id* at 462.
48. *Id*. at 463.
49. *Id.*
50. *Id*. at 466.
51. Mont. Const., art. X, § 6(1).
52. Espinoza v. Montana Dept. of Revenue, 591 U.S. 464 (2020).
53. *Id*., at 474.
54. *Id*. at 475, quoting Trinity Lutheran Church v. Comer, 582 U.S. 449, 462 (2017).
55. *Id*. at 476. Concurring in *Trinity Lutheran*, Justice Neil Gorsuch challenged the argument that the Free Exercise Clause prohibits denial of a government benefit based on religious *status* but not the religious *use* of that benefit. Trinity Lutheran Church v. Comer, 482 U.S. 449, 469–470 (Gorsuch, J., concurring in part). Roberts wrote in *Espinoza* that "[w]e acknowledge the point but need not examine it here. It is enough in this case to conclude that strict scrutiny applies under *Trinity Lutheran* because Montana's no-aid provision discriminates based on religious status." *Espinoza*, 591 U.S. at 479.
56. *Id*. at 485.
57. *Id*. at 486.
58. Carson v. Makin, 596 U.S. 767, 773 (2022).
59. *Id*. at 774–75.
60. *See, e.g*., Zelman v. Simmons-Harris, 536 U.S. 639 (2002).
61. Carson v. Makin, 979 F.3d 21, 40 (1st Cir. 2020).
62. *Id*., at 780.
63. *Id*., quoting Espinoza v. Montana Dept. of Revenue, 591 U.S. 464, 487 (2020).
64. Colo. Rev. Stat. § 24–34–601(2)(a).

65. 303 Creative LLC v. Elenis, 600 U.S. 570 (2023).
66. Fulton v. City of Philadelphia, 593 U.S. 522, 533 (2021).
67. *Id*.
68. *See, e.g.*, Sarah Parshall Perry & Thomas Jipping, *Public School Gender Policies That Exclude Parents Are Unconstitutional*, Heritage Found. Legal Mem. No. 355, June 12, 2024; Thomas Jipping & Sarah Parshall Perry, *Gender Activists Take Aim at Arizona Parents' Rights*, Mesa Tribune (Aug. 25, 2024), https://www.themesatribune.com/opinion/opinion-gender-activists-take-aim-at-arizona-parents-rights/article_d76809fe-619c-11ef-a38c-434de53be4c1.html; Thomas Jipping & Sarah Parshall Perry, *Gender Activists to Pennsylvania Parents: We'll Take It From Here*, MSN (Oct. 2, 2024), https://www.msn.com/en-us/news/us/commentary-gender-activists-to-pennsylvania-parents-we-ll-take-it-from-here/ar-AA1rzsHg?ocid=BingNewsSerp.
69. Complaint, DeGross v. Hunter, No. 3:24–cv–05225 (W.D. Wash, filed March 22, 2024), https://dm1l19z832j5m.cloudfront.net/2024-03/DeGross-v-Hunter-2024-03-22-Complaint.pdf.
70. Wash. Adm. Code § 110–148–1520(7).
71. *Id*. at § 110–148–1520(9).
72. *The Home Study Practice Guide*, Wash. State Dep't Child., Youth & Fams. (Jan. 9, 2023), at 54, https://perma.cc/R5ZQ-YEDG.
73. *Id*.
74. DeGross Complaint, *supra* note 69, at ¶ 178 (emphasis in original).
75. *Id*. at ¶ 186 (emphasis in original).
76. *Id*. at ¶ 230.
77. Bates v. Pakseresht, 2023 WL 7546002 at *2 (D. Oregon 2023).
78. *Id*. at *3.
79. *Id*.
80. *Id*. at *4.
81. *Id*. at *8.
82. *Id*.
83. *Id*. at *14.
84. Wuoti v. Winters, No. 2:24–cv–00614 (Vt., filed June 24, 2024), at ¶ 26, https://dm1l19z832j5m.cloudfront.net/2024-06/Wuoti-v-Winters-2024-06-04-Complaint.pdf.
85. *Id*. at ¶ 144.
86. *Id*. at ¶ 151.
87. *Id*. at ¶165.