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RELIGION, DISCRIMINATION, AND GOVERNMENT FUNDING: ENFORCING CIVIL RIGHTS LAW AFTER *MASTERPIECE CAKESHOP* AND *TRINITY LUTHERAN*

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Recent decisions from the U.S. Supreme Court and federal government have confused rather than clarified the contexts in which religious objectors can be exempt from complying with otherwise applicable antidiscrimination laws. The Court's decisions have sent mixed signals to state and local human rights agencies and commissions about how to robustly enforce antidiscrimination laws while also protecting religious liberty. In addition, the federal administration has adopted policies that diminish the responsibility of faith-based entities receiving public grants and funding to comply with antidiscrimination principles in their programs and activities. This memorandum is designed to provide guidance to state and local governments on the proper balance between civil rights enforcement and constitutional free exercise rights. It will provide an overview of the current legal landscape related to possible conflicts between religion and civil rights law, with a particular focus on government-funded services. It will then briefly outline potential avenues for states and localities to ensure that the civil rights of their community members are robustly protected.

I. THE CURRENT LEGAL LANDSCAPE OF RELIGION, DISCRIMINATION, AND GOVERNMENT FUNDING

The apparent conflict between antidiscrimination law and religious exercise has been front page news over the past several years. Lawsuits have been filed arguing for a constitutional right to fire or deny services to LGBTQ+ people. States have passed bills providing religious exemptions from local civil rights laws. Despite this flurry of activity and attention, many misconceptions remain about the responsibility of private actors, including government-funded social service providers, to abide by civil rights law. This section provides a brief overview of recent constitutional, federal, and state developments related to the intersection of religious freedom, discrimination, and government funding.

a. *Masterpiece Cakeshop v. Colorado Civil Rights Commission*

In 2018, the U.S. Supreme Court issued an opinion in *Masterpiece Cakeshop v. Colorado Civil Rights Commission*, a much-anticipated case regarding if and when private businesses have a constitutional right to violate state antidiscrimination laws that conflict with their religious beliefs. The case involved Colorado bakery owner Jack Phillips, who was sued after he refused to sell a wedding cake to a same-sex couple. Phillips claimed that providing the cake would have violated his religious views about marriage. The Colorado Civil Rights Commission found that Phillips had violated the state's civil rights law, which prohibits discrimination on the basis of sexual orientation by providers of public accommodations. In response, Phillips argued that his First Amendment free speech and free exercise rights should exempt him from compliance with the state civil rights law.[1] The Colorado trial court and Court of Appeals found this argument unpersuasive, and upheld the Commission's finding against Phillips.

Rather than address the substance of Phillips' First Amendment claim, the Supreme Court ruled that the Colorado Civil Rights Commission's order must be set aside because the Commission had not acted neutrally towards Phillips' religious beliefs, and had therefore violated the Free Exercise Clause. In so holding, the Court relied on several statements by members of the Commission that it deemed disparaging towards Phillips' religious beliefs, and which the Commission had not publicly renounced.[2] The Court also claimed that the Commission had applied different legal standards to Phillips' case than it had to other discrimination complaints brought by Christians seeking cakes with anti-LGBTQ+ messages. For example, the Court stated that the Commission had improperly "ruled against Phillips in part on the theory that any message the requested wedding cake would carry would be attributed to the customer, not to the baker" while failing to "address this point in any of the other cases with respect to the cakes depicting anti-gay marriage symbolism."[3] Notably, the Court did *not* rule that the complaints brought by Christians seeking cakes with anti-LGBTQ+ messages need come to the same result as the case against Phillips—the opinion stated only that the Commission must apply legal standards consistently.

Because it focused on circumstances specific to Phillips' case, the Supreme Court's ruling has only limited applicability to future cases of religiously motivated denial of services (or employment/housing). Despite early and misleading reporting to the contrary, the decision in no way provides an exemption from antidiscrimination law for religious objectors. Private institutions, whether for-profit or non-profit, may not rely on *Masterpiece Cakeshop* as justification for the violation of state or local civil right laws and policies.

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[1] For an explanation of how civil rights laws protect rather than conflict with free exercise rights, *see* Brief for 15 Faith and Civil Rights Groups as Amici Curiae Supporting Respondents, Masterpiece Cakeshop v. Colorado Civil Rights Commission, 584 U.S._, 138, S. Ct. 1719 (2018) (No. 16-111), https://www.law.columbia.edu/sites/default/files/microsites/gender-sexuality/prpcp_masterpiece_cakeshop_amicus_brief.pdf.

[2] Most prominently, the Court cited the statement by one Commissioner: "I would also like to reiterate what we said in the hearing or the last meeting. Freedom of religion and religion has been used to justify all kinds of discrimination throughout history, whether it be slavery, whether it be the holocaust, whether it be—I mean, we—we can list hundreds of situations where freedom of religion has been used to justify discrimination. And to me it is one of the most despicable pieces of rhetoric that people can use to—to use their religion to hurt others." Masterpiece Cakeshop v. Colorado Civil Rights Commission, 584 U.S._, 138, S. Ct. 1719, 1729 (2018).

[3] *Id.* at 1730.

What *Masterpiece Cakeshop* does require is that state and local civil rights commissioners and other adjudicators act neutrally towards all religious beliefs, including the belief that same-sex marriage is morally objectionable. Thus, members of state and city civil rights commissions should take care to rule on the substance of religious exemption claims without disparaging any religious beliefs and without condemning any form of discrimination specifically *because* it is undertaken with a religious motive or justification. Furthermore, while a commission may distinguish between impermissible discrimination based on a customer's identity and permissible discrimination based on a particular requested message, it should not take a public stance on what messages it deems offensive, and it must apply legal rules consistently across all cases.

b. *Trinity Lutheran Church of Columbia, Inc. v. Comer*

In addition to the confusion wrought by *Masterpiece Cakeshop* over conflicts between religion and antidiscrimination law, another Supreme Court case from 2017 has created a severe lack of clarity regarding the use of government funds by religious institutions. In *Trinity Lutheran v. Comer*, the Supreme Court ruled that the Missouri Department of Natural Resources had violated the Free Exercise Clause when it denied a competitive grant to a church because of a department policy that made houses of worship categorically ineligible for funds. While the policy was compelled by a clause of the Missouri Constitution providing that "no money shall ever be taken from the public treasury, directly or indirectly, in aid of any church, section or denomination of religion,"[4] the case was not brought as a facial challenge to such "no-aid" provisions,[5] which are included in 39 state constitutions.[6]

The state program at issue provided a limited number of grants for schools and daycares to purchase playground surfaces made from recycled tires. Prospective grantees were selected based on a number of factors, including poverty level of the surrounding area and their willingness to generate media exposure for Missouri. Trinity Lutheran—which owned and operated a day care program—applied for a grant but was denied. Upon learning the reason for the denial, Trinity Lutheran sued, arguing that the policy prohibiting grants to houses of worship violated the institution's religious rights under the First Amendment. The Supreme Court agreed, though the scope of its decision was unclear. Ironically, Missouri had instituted the policy in part to avoid violating the Establishment Clause by inappropriately funding religion, and lower courts had found that Missouri's interest in protecting the separation of church and state was a compelling state interest that justified the ongoing enforcement of the ban on allotting public funds to religious institutions.[7]

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[4] Mo. Const., art I, § 7.

[5] Brief for Petitioner at 7, Trinity Lutheran Church of Columbia, Inc. v. Pauley, 137 S. Ct. 2012 (No. 15-577) ("Trinity Lutheran did not bring a facial challenge to the Missouri Constitution, Article I, § 7").

[6] Liz Hays, *New Jersey Supreme Court Upholds Church-State Separation, Strikes Down Publicly Funded Grants For Churches*, AMERICANS UNITED FOR SEPARATION OF CHURCH AND STATE (Apr. 19, 2018), https://www.au.org/blogs/wall-of-separation/new-jersey-supreme-court-upholds-church-state-separation-strikes-down.

[7] Trinity Lutheran Church of Columbia, Inc. v. Pauley, 788 F.3d 779, 784 (8th Cir. 2015) ("the long established constitutional policy of the State of Missouri, which insists upon a degree of separation of church and state to probably a higher degree than that required by the First Amendment, is indeed a 'compelling state interest") (quoting Luetkemeyer v. Kaufmann, 364 F.Supp. 376, 386 (W.D. Mo. 1973)).

In finding a violation of the Free Exercise Clause, the Supreme Court explained that Missouri's policy "expressly discriminates against otherwise eligible recipients by disqualifying them from a public benefit solely because of their religious character… such a policy imposes a penalty on the free exercise of religion that triggers the most exacting scrutiny."[8] The Court distinguished the Missouri grant program from a Washington scholarship program that had been upheld by the Supreme Court in the 2004 case *Locke v. Davey*, despite the fact that the scholarship prohibited grant recipients from using the funds to study devotional theology. In that case, the Court explained, the claimant "was denied a scholarship because of what he proposed to do—use the funds to prepare for the ministry. Here there is no question that Trinity Lutheran was denied a grant simply because of what it is—a church."[9] The Court minimized Missouri's concern about not violating the Establishment Clause, explaining that while Washington's scholarship program had reasonably refused to provide funds for an "essentially religious endeavor…Here nothing of the sort can be said about a program to use recycled tires to resurface playgrounds."[10] In emphasizing that the grant to Trinity Lutheran would be used for secular ends, the Court clearly did not hold that the government must (or may) provide grant funding to religious institutions *to support religious activities.*

The impact of *Trinity Lutheran* on other government grant programs remains unclear for several reasons. First, as already noted, the attorneys representing Trinity Lutheran repeatedly stated that they were not challenging the "no aid" provision of Missouri's Constitution, which forbids the state from funding religious institutions. The Court's majority declined to explicitly hold such "no aid" provisions unconstitutional. Thus, the decision does not clearly prohibit governments from declining to fund religious institutions in other contexts. Even more confusingly, a footnote in the case seemed to narrow the holding to its specific facts, stating "[t]his case involves express discrimination based on religious identity with respect to playground resurfacing. We do not address religious uses of funding or other forms of discrimination."[11]

Trinity Lutheran stands for the proposition that, at least in some narrow instances, governments may not withhold grant funding from institutions purely on account of their religious identity. It does not challenge the longstanding tenet that the state may not directly fund religious activities.[12] Nor does the opinion allow the recipients of government grants to decline services to those who do not share their religious beliefs; importantly, Trinity Lutheran's preschool program was open to children of all faiths.[13] Thus, state and local governments do not violate the Free

[8] Trinity Lutheran Church of Columbia, Inc. v. Pauley, 582 U.S. _, 137 S. Ct. 2012, 2021 (2017).
[9] *Id.* at 2023.
[10] *Id.* (internal citations omitted).
[11] *Id.* at 2024, fn. 3.
[12] *See, e.g.*, Mitchell v. Helms, 530 U.S. 793, 827 (2000) ("the religious nature of a recipient [of government funds] should not matter to the constitutional analysis, *so long as the recipient adequately furthers the government's secular purpose*") (emphasis added); Trinity Lutheran, 137 S. Ct. at 2018 (Sotomayor, J., dissenting) ("The government may not directly fund religious exercise").
[13] Trinity Lutheran, 137 S. Ct. at 2017 ("The Center admits students of any religion."). In contrast, a U.S. district court judge held on July 13, 2018 that the city of Philadelphia did not violate the free exercise rights of a Catholic social service agency by suspending "its contract with the agency for foster-care services after discovering that the agency would not work with same-sex couples." Julia Terruso, *Judge Denies Catholic Social Services Discrimination Claim in Foster Care Case*, THE PHILADELPHIA INQUIRER (July 13, 2018), http://www2.philly.com/philly/news/foster-care-philadelphia-dhs-same-sex-couples-catholic-social-services-lawsuit-20180713.html/. The case is currently being appealed.

Exercise Clause when they ensure that government funds are not used for religious activities and that grantees do not withhold services (such as reproductive health services or services to LGBTQ+ people) based on their religious beliefs.

c. *Earlier Religion and Civil Rights Cases*

In addition to the recent decisions described above, two earlier Supreme Court cases, *Hosanna-Tabor Evangelical Lutheran Church and School v. Equal Employment Opportunity Commission*, and *Corporation of the Presiding Bishop of the Church of Jesus Christ of Latter-Day Saints v. Amos*, are relevant to the question of when and whether religious organizations may violate antidiscrimination law.

1. Hosanna -Tabor Evangelical Lutheran Church and School v. Equal Employment Opportunity Commission

While *Masterpiece Cakeshop* declined to provide a constitutional exemption from antidiscrimination law to Jack Phillips, an earlier Supreme Court case did provide such an exemption in a far narrower context—for employment decisions related to religious ministers. In *Hosanna-Tabor v. EEOC*, a teacher at a religious school was fired after being treated for narcolepsy, and sued her employer under the Americans with Disabilities Act (ADA).[14] The religious school defended itself by stating that the teacher, who had religious responsibilities, was in fact a "minister," and that the First Amendment protected the school from government regulation regarding its selection of ministers.

The Supreme Court agreed with the school, finding that the religion clauses "bar the government from interfering with the decision of a religious group to fire one of its ministers."[15] This constitutional exemption from antidiscrimination law is narrow, however, applying exclusively to employment decisions regarding ministers.

2. Corporation of the Presiding Bishop of the Church of Jesus Christ of Latter-Day Saints v. Amos

In the 1987 case *Corporation of the Presiding Bishop of the Church of Jesus Christ of Latter-Day Saints v. Amos*,[16] the Supreme Court upheld an exception to federal employment discrimination law in the face of an Establishment Clause challenge. The case involved a provision of Title VII—the federal law prohibiting, *inter alia*, religion-based employment discrimination—that allows religious organizations to discriminate in favor of hiring co-religionists (people who share the organization's religious identity). The Title VII exemption for

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In another federal district court case, a judge refused to dismiss a claim brought by same-sex couples in Michigan which argues that the state's laws and policies that allow it to contract with religiously affiliated child placement agencies that deny services to same-sex couples violates the Establishment Clause. Howard Friedman, *Court Refuses To Dismiss Challenge To Michigan's Protection of Catholic Adoption Agencies*, RELIGIOUS CLAUSE (Sept. 15, 2018), http://religionclause.blogspot.com/2018/09/court-refuses-to-dismiss-challenge-to.html.

[14] Hosanna-Tabor Evangelical Lutheran Church and School v. E.E.O.C., 565 U.S. 171 (2012).

[15] *Id.* at 181.

[16] 483 U.S. 327 (1987).

religious organizations applies even for non-ministerial employees, but permits organizations to discriminate only on the basis of religion—not other prohibited bases such as race or sex.[17]

A group of employees challenging the Title VII exception for religious employers argued that the exemption had the impermissible effect of advancing religion, in part because it singled out religious entities for a special legal benefit.[18] The Supreme Court disagreed, finding that a "law is not unconstitutional simply because it *allows* churches to advance religion, which is their very purpose."[19]

While the Supreme Court's decision to uphold the exemption is significant, it has limited application to state and local antidiscrimination law. Importantly, the Supreme Court limited its holding to *nonprofit* religious organizations, and several concurring opinions suggested that allowing for-profit organizations to violate civil rights law and practice this form of religious discrimination would likely violate the Establishment Clause.[20] Furthermore, it is important to note that the opinion held only that Title VII's exemption for religious organizations was constitutionally *permissible*—it did not hold that such exemptions were mandated by the Free Exercise Clause. Thus, aside from the exception for ministers, states and localities may enforce laws prohibiting employment discrimination—including religious discrimination—on religious institutions without violating the holding of *Amos*. And there is a strong argument that they *must* do so when it comes to for-profit organizations.

d. *Executive Order on Faith-Based Grantees*

While *Masterpiece Cakeshop* and *Trinity Lutheran* addressed possible constitutional constraints on the enforcement of civil rights laws and the terms of government funding, the Trump administration has taken affirmative steps to limit the religious rights of beneficiaries of government grant programs. On May 3, 2018, President Donald Trump issued an executive order (EO)[21] making changes to an existing government office that works with nonprofit organizations that administer government-funded social services.[22] Trump's EO eliminated a provision adopted

[17] *See* Rose Saxe, *The Truth About Religious Employers and Civil Rights Laws*, THE RELIGIOUS INSTITUTE (June 30, 2016) https://www.religiousfreedominstitute.org/cornerstone/2016/6/30/the-truth-about-religious-employers-and-civil-rights-laws ("Title VII does not allow religious organizations to make employment decisions on the basis of race, sex, or national origin—even where religiously motivated").

[18] Corporation of the Presiding Bishops v. Amos at 332-33.

[19] *Id.* at 337.

[20] 483 U.S. at 329-30 ("The question presented is whether applying the § 702 exemption to the secular nonprofit activities of religious organizations violates the Establishment Clause of the First Amendment"); *Id.* at 340 (Brennan, J., concurring in the judgment) ("I write separately to emphasize that my concurrence in the judgment rests on the fact that these cases involve a challenge to the application of § 702's categorical exemption to the activities of a *nonprofit* organization."); *Id.* at 346 (Blackmun, J., concurring in the judgment) ("I fully agree that…the question of the constitutionality of the § 702 exemption as applied to for-profit activities of religious organizations remains open") (internal citations omitted); *Id.* at 348 (O'Connor, J., concurring in the judgment) ("the amended § 702 raises different questions as it is applied to nonprofit and for-profit organizations.").

[21] Exec. Order No. 13,831 83 Fed. Reg. 22,343 (May 3, 2018) *available at* https://www.whitehouse.gov/presidential-actions/executive-order-establishment-white-house-faith-opportunity-initiative/.

[22] The office was called the "White House Office of Faith-Based and Neighborhood Partnerships" under President Obama, and the "White House Office of Faith-Based and Community Initiatives" under President George W. Bush. It was renamed the "White House Faith and Opportunity Initiative" by the Trump administration.

under President Obama that created requirements intended to protect the religious views of beneficiaries of government grants.

The eliminated provision required grantee organizations to give written notice to the beneficiaries of federally funded services of their religious rights—such as the right to be free from proselytizing while receiving services—and to provide a timely referral to any beneficiary who objected to the organization's religious affiliation.[23] It also required federal agencies that administered or awarded grants to social service agencies to "establish policies and procedures designed to ensure that…appropriate and timely referrals are made to an alternative provider"[24] when requested. Nine agencies adopted a final rule implementing the EO and offering additional guidance.[25] For example, the final rule clarified that the written notice provided by grantees must inform beneficiaries of their right to be free from religious discrimination, to decline to participate in religious activities, and to report any violations of these requirements to the relevant federal agency.

While Trump's elimination of protections for the religious rights of grant beneficiaries is troubling and susceptible to legal challenge, it does not prevent states and localities from creating their own policies to ensure that beneficiaries of state and local grant funding do not face religious discrimination or coercion.

e. *Religious Exemption Legislation and State Constitutions*

Finally, some state legislatures have proposed or enacted bills that create explicit religious exemptions from state and local laws.[26] These exemption laws are extremely varied in terms of how and when they apply, but at least a few expressly limit the enforcement of state and local antidiscrimination provisions—even against nonprofit social service agencies that receive state contracts and taxpayer dollars.[27] For example, in 2017, Texas enacted a law that permits faith-based child welfare agencies to deny adoption and other services to same-sex couples and religious minorities, to place children in religious schools, and to refuse to contract with

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[23] Exec. Order No. 13,559, 75 Fed. Reg. 71,317 (2010), *available at* https://www.federalregister.gov/documents/2010/11/22/2010-29579/fundamental-principles-and-policymaking-criteria-for-partnerships-with-faith-based-and-other.

[24] *Id.*

[25] Melissa Rogers, *Agencies Issue Final Rule Extending New Religious Liberty Protections to Beneficiaries*, THE WHITE HOUSE (Mar. 31, 2016), https://obamawhitehouse.archives.gov/blog/2016/03/31/agencies-issue-final-rule-extending-new-religious-liberty-protections-beneficiaries. *See also* USDA CENTER FOR FAITH-BASED & NEIGHBORHOOD PARTNERSHIPS, *Guidance on Nondiscrimination in Matters Pertaining to Faith-Based Organizations* (July 2016), https://www.usda.gov/sites/default/files/documents/usda-faith-based-non-regulatory-guidance.pdf.

[26] PUBLIC RIGHTS/PRIVATE CONSCIENCE PROJECT, *State & Federal Religious Accommodation Bills: Overview of the 2015-2016 Legislative Session* (Sept. 20, 2016), https://www.law.columbia.edu/sites/default/files/microsites/gender-sexuality/prpcp_exemption_overview_-_9.20.16.pdf; HUMAN RIGHTS WATCH, *"All We Want is Equality": Religious Exemptions and Discrimination against LGBT People in the United States* (Feb. 19, 2018), https://www.hrw.org/report/2018/02/19/all-we-want-equality/religious-exemptions-and-discrimination-against-lgbt-people.

[27] *See, e.g.*, TEX. HUM. RES. CODE ANN. § 45.001 *et. seq* (West 2017); VA. CODE. ANN. § 63.2-1709.3 (West 2015); N.D. CENT. CODE. ANN. § 50-12-07.1 (West 2013); Trudy Ring, *Oklahoma Gov. OK's 'License to Discriminate' in Adoption, Foster Care*, THE ADVOCATE (May 18, 2018), https://www.advocate.com/politics/2018/5/11/oklahoma-gov-oks-license-discriminate-adoption-foster-care.

organizations that do not share their beliefs.[28] In some instances, such bills actually limit religious liberty by protecting only specific religious beliefs—such as opposition to same-sex marriage—despite the wide range of beliefs that people of faith hold on this issue.[29] Because of this and other flaws, certain state exemption bills may be challenged as violations of the Establishment Clause.[30] Until they are struck down, however, they may place some limitations on the ability to uniformly enforce antidiscrimination laws. It is imperative to carefully analyze any such religious exemptions to clarify how they interact with state and local civil rights laws, including: 1) what types of organizations are entitled to a religious exemption; 2) what forms of discrimination, if any, they permit and; 3) whether they apply in the context of government-funded services.

Similarly, some state courts have interpreted free exercise provisions of state constitutions to provide a broader right to religious exemptions than currently exists under the religion clauses of the federal constitution. For example, courts interpreting the Washington Constitution's religious liberty provision have not always adopted federal Free Exercise case law, instead construing the clause to provide a wider range of religious exemptions.[31] State and local enforcers of civil rights law should determine whether their relevant state constitutions have provided any rules or guidance relevant to the intersection of free exercise rights, antidiscrimination law, and government funding beyond the federal case law outlined above.

II. STATES AND LOCALITIES CAN AND SHOULD ROBUSTLY ENFORCE ANTIDISCRIMINATION LAW, ESPECIALLY WITHIN GOVERNMENT GRANT PROGRAMS

There are still significant unresolved legal questions regarding the intersection of religion, civil rights law, and government funding. Despite this lack of clarity, governments retain broad authority to enforce civil rights laws, and can—and indeed, must—protect the public, including the beneficiaries of government grants, from discrimination or religious coercion. States and localities that want to protect their communities from discrimination or denial of services have numerous options at their disposal. This section will first address ways to ensure that civil rights laws provide the broadest possible protection for the public to be free from discrimination in employment, housing, and public accommodations. It will then specifically address antidiscrimination protections in the context of government-funded services.

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[28] Marissa Evans, *Abbott OKs Religious Refusal of Adoptions in Texas*, THE TEXAS TRIBUNE (June 15, 2017), https://www.texastribune.org/2017/06/15/abbott-signs-religious-protections-child-welfare-agencies/.

[29] *See, e.g.*, Miss. Code Ann. § 11-62-3 (2017) (protecting only the religious beliefs 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.)".

[30] *See, e.g.*, Barber v. Bryant, 193 F.Supp.3d 677 (S.D. Miss. 2016) (holding that Mississippi religious exemption law violated the Establishment Clause) *rev'd on standing grounds*, 860 F.3d 345 (5th Cir. 2017); Mark Hicks, *Judge Rules Michigan Same-sex Adoption Suit Can Move Forward*, THE DETROIT NEWS (Sept. 14, 2018) https://www.detroitnews.com/story/news/local/michigan/2018/09/14/judge-allows-michigan-same-sex-adoption-suit-move-forward/1312301002/.

[31] Ruthann Robson, *Washington Supreme Court Denies Constitutional Claims of Florist in Same-Sex Wedding Refusal*, CONSTITUTIONAL LAW PROF BLOG (Feb. 16, 2017), https://lawprofessors.typepad.com/conlaw/2017/02/washington-supreme-court-denies-constitutional-claims-of-florist-in-same-sex-wedding-refusal.html ("Washington has not always adopted the [narrow] *Smith* standard when reviewing claims under its state constitution.").

As a preliminary matter, it is worth noting that advocates of very broad religious exemptions have taken the position that every refusal to provide a requested religious exemption or accommodation is tantamount to religion-based discrimination. For instance, in the *Masterpiece Cakeshop* case, the advocates arguing in favor of Jack Phillips' right to refuse service to a same-sex couple took the radical position that any denial of Phillips' demand for an exemption would amount to discrimination against him on the basis of his religion. The Court did not embrace this broad interpretation of the Free Exercise Clause in that case, pointing instead to specific comments made by members of the Colorado Human Rights Commission as evidencing their hostility towards religion. Thus, the Court's holding was much narrower than that articulated by Phillips' advocates, limiting his Free Exercise claim to the circumstance where there was tangible evidence of non-neutrality towards religion.[32]

We raise this issue insofar as public entities charged with enforcing human rights laws—as well as entities regulated by those laws, such as employers or housing providers—should expect that any determination not to grant a religion-based exemption in a particular case is likely to be challenged as a form of discrimination on the basis of religion. There are many legitimate, non-discriminatory reasons to decline to grant a religious exemption. The concern that the accommodation would burden third parties is one of them, as is a concern with the entanglement of a public entity in religion. Perhaps most importantly, there is ample doctrinal support for the notion that enforcing civil rights law is a compelling state/public interest, and that Free Exercise rights are not absolute. While it may be the case in *some* situations that the failure to grant a religious exemption is motivated by animus towards religion (*arguendo* in *Masterpiece Cakeshop*), it is a radical misreading of the law of religious liberty to conclude that any denial of a requested religious accommodation, *ipso facto*, amounts to discrimination. Just as the decision not to hire a member of a protected class *could* have been motivated by discrimination, we would never conclude that every decision not to hire such persons violates the law.

a. Limiting Private Discrimination

1. Clarify or Modify the Scope of Antidiscrimination Law

Nearly every state and many municipalities have some form of antidiscrimination law.[33] Most of these laws prohibit discrimination on the basis of race, sex, national origin, and religion, and a number additionally cover discrimination based on disability, marital status, familial status, sexual orientation, and gender identity. Many state and local civil rights laws prohibiting employment and housing discrimination, however, contain some form of a religious exemption.[34]

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[32] Many commentators and scholars have noted that it is not at all obvious that the Commissioner's remarks were indeed bigoted towards religion. But that factual conclusion will not be debated herein.

[33] NATIONAL CONFERENCE OF STATE LEGISLATURES, *State Laws on Employment-Related Discrimination* (last visited Sept. 14, 2018), http://www.ncsl.org/research/labor-and-employment/discrimination-employment.aspx; NATIONAL CONFERENCE OF STATE LEGISLATURES, *State Public Accommodation Laws* (July 13, 2016), http://www.ncsl.org/research/civil-and-criminal-justice/state-public-accommodation-laws.aspx; THE POLICY SURVEILLANCE PROGRAM, *State Fair Housing Protections* (last updated Aug. 1, 2017), http://lawatlas.org/datasets/state-fair-housing-protections-1498143743.

[34] For a chart of state antidiscrimination laws including religious exemptions, *see* PUBLIC RIGHTS/PRIVATE CONSCIENCE PROJECT, *Unmarried and Unprotected: How Religious Liberty Laws Harm Pregnant People, Families, and Communities of Color* at Appendix (2017), https://www.law.columbia.edu/sites/default/files/microsites/gender-sexuality/PRPCP/unmarried_unprotected_-_prpcp.pdf.

For example, many civil rights laws contain language permitting religious institutions to hire co-religionists, similar to Title VII.[35] Fewer states have adopted religious exemptions related to public accommodations discrimination.

The scope of religious exemptions from state antidiscrimination law is often unclear and infrequently litigated. The result of *Masterpiece Cakeshop* and the national movement to enact sweeping state religious exemption bills may have lead some community members to believe that these exemptions are broader than they actually are—for example, that they exempt even for-profit companies from civil rights obligations. State and local governments should take steps to clarify the limited scope of any existing exemptions in their civil rights laws, and should educate employers, landlords, and public accommodations on their duty to abide by antidiscrimination law. Where existing exemptions are overly-broad, sanctioning forms of discrimination that go far beyond the holdings of *Amos* and *Hosana-Tabor* and potentially violating the Establishment Clause, states and localities should consider passing legislation to narrow such exemptions.

2. Clarify or Modify Existing Religious Exemption Laws and Policies

In addition to religious exemptions contained within state and local civil rights laws, some states have general religious exemption statutes that provide a right to exemptions from nearly any state or local law or policy. For example, twenty-one states have statutes modeled off of the federal Religious Freedom Restoration Act (RFRA),[36] which prohibits the government from imposing a substantial burden on sincere religious exercise unless doing so is the least restrictive means of advancing a compelling government interest.[37]

Civil rights agencies in states that have statutes modeled after RFRA (sometimes called "mini-RFRAs") should consider issuing regulations or guidance documents explaining that preventing discrimination is a compelling government interest, and that civil rights laws must be uniformly enforced in order to be effective. Alternatively, states should consider adopting a version of the proposed federal "Do No Harm Act,"[38] which would create a RFRA carve-out eliminating the law's application to antidiscrimination and certain other laws.

b. Protecting the Rights of Grant Beneficiaries

While the public should be protected from discrimination by private employers, landlords, and businesses, these protections are all the more important in the context of government-funded programs. The stigma of being denied services on account of one's religious identity, sexual orientation, or other protected characteristic is all the more acute when it occurs in programs regulated, funded, and, in some cases, mandated by the government.

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[35] PUBLIC RIGHTS/PRIVATE CONSCIENCE PROJECT, *Unmarried and Unprotected: How Religious Liberty Laws Harm Pregnant People, Families, and Communities of Color* at 6, https://www.law.columbia.edu/sites/default/files/microsites/gender-sexuality/PRPCP/unmarried_unprotected_-_prpcp.pdf ("Most of these [state] exemptions, like the Title VII religious exemption, are narrow and only allow religious organizations or educational institutions to give employment preferences to co-religionists").

[36] 42 U.S.C. § 2000bb *et. seq.*

[37] NATIONAL CONFERENCE OF STATE LEGISLATURES, *State Religious Freedom Restoration Acts* (May 4, 2017), http://www.ncsl.org/research/civil-and-criminal-justice/state-rfra-statutes.aspx.

[38] Do No Harm Act, H.R. 3222, 115th Cong. (2018), https://www.congress.gov/bill/115th-congress/house-bill/3222.

Furthermore, the religiously motivated denial of services by faith-based organizations within state-financed programs creates the perception that the government has endorsed the organization's religious beliefs, and may therefore violate the Establishment Clause. Of course, in *Trinity Lutheran* and several other cases, the Supreme Court has held that grants given to a religious organization or group may be constitutional. The Court has typically upheld grant programs where funding for secular services is provided to both religious and secular institutions on a neutral basis.[39] Permitting religious grant recipients to discriminate, however, is *not* a matter of merely providing funds for the same services in a neutral way. Rather, by permitting grant recipients to refuse to provide funded services to certain populations based on a religious belief, the government allows the grant recipients to redefine state programs in religious terms, to the benefit of religion, and to the detriment of non-adherents and program recipients.

For example, awarding a grant to an organization that, for religious reasons, refuses to provide services to same-sex couples and unmarried parents could cause a reasonable observer to believe that the government supports the religious judgment that these populations are immoral or unworthy of assistance. This violates the Establishment Clause, which forbids the government from supporting organizations that "impose religiously based restrictions on the expenditure of taxpayer funds, and thereby impliedly endors[ing] the religious beliefs of" that organization.[40]

Trinity Lutheran did not address the context where a grant seeker is denied government funding not because of its religious affiliation, but because it does not, or will not, comply with grant terms, such as a requirement that grantees administer public funds in a nondiscriminatory manner. For instance: consider a religious entity that seeks public funding for a homeless shelter, but has a policy of housing residents in sex-segregated facilities, determining a person's sex by the sex on their birth certificate. *Trinity Lutheran* would not prohibit a legislature or government agency from disqualifying the religious entity from receiving a grant because of its refusal to comply with a requirement proscribing grantees from discriminating against beneficiaries on the basis of their gender identity.

1. Clarify, Modify, and/or Enforce Legislation on Grantees

States and localities that want to ensure that organizations administering government-funded services do not violate antidiscrimination law should create, strengthen, interpret, and/or enforce laws that require grantees to provide all funded services on a full and equal basis. Such

[39] *See, e.g.*, Mitchell v. Helms, 530 U.S. 793, 816 (2000) ("if aid to schools, even direct aid, is neutrally available and, before reaching or benefiting any religious school, first passes through the hands (literally or figuratively) of numerous private citizens who are free to direct the aid elsewhere, the government has not provided any support of religion") (internal citations omitted); Agostini v. Felton, 521 U.S. 203, 234-35 (1997) ("We therefore hold that a federally funded program providing supplemental, remedial instruction to disadvantaged children on a neutral basis is not invalid under the Establishment Clause…pursuant to a program containing safeguards such as those present here.").

[40] Am. Civil Liberties Union of Mass. v. Sebelius, 821 F. Supp. 2d 474, 488 (2012) (finding that it violated the Establishment Clause for a nonprofit to place religious conditions on the use of federal funds). *See also Dodge v. Salvation Army*, 1989 WL 53857 (S.D. Miss. 1989) ("The [government] grants constituted direct financial support in the form of a substantial subsidy, and therefore to allow the Salvation Army to discriminate on the basis of religion…would violate the Establishment Clause of the First Amendment in that it has a primary effect of advancing religion and creating excessive government entanglement.").

laws may take the form of separate nondiscrimination laws that apply to government and government-sponsored entities, provisions within the state or city contract law or social services law, conditions on certain nonprofits within the tax law, licensing requirements, or provisions within specific laws that create government-funded programs (for example, within health or education codes).

2. Clarify, Modify, and/or Enforce Administrative Policies on Grantees

In addition, government agencies that administer civil rights laws, or select or oversee government grants, should issue regulations, guidance policies, and/or beneficiary bills of rights to clarify grantees' obligation to provide full and equal services to all eligible beneficiaries. For example, a beneficiary bill of rights could inform the intended beneficiaries of state and local grants of their right to receive funded services regardless of their religious, racial, or gender identity, as well as their right to be free from unwanted proselytizing while receiving government-funded services (essentially promulgating the Obama-era Executive Order language into state and local contracting practices).

3. Beneficiary Selection, Contracts, and Oversight

Finally, government bodies responsible for selecting, contracting with, and overseeing government grantees should take an active role in ensuring that grantees are not discriminating or withholding funded services, such as contraceptive care, based on their religious beliefs. These bodies should screen grant applications for compliance with civil rights laws and policies, if necessary requesting written information or data from potential grantees or holding hearings on their willingness and ability to provide comprehensive, culturally competent services to all beneficiaries. Contracts should include provisions requiring grantees to provide all funded services, and prohibiting discrimination and proselytizing. And agencies should conduct regular and thorough oversight to ensure that taxpayer funds are not being misused by organizations that withhold services or pressure beneficiaries to conform to the organization's religious tenets.

III. Conclusion

While religious liberty law is complex, and recent Supreme Court decisions have only added to the lack of clarity surrounding the relationship between free exercise doctrine and antidiscrimination law, state and local agencies nevertheless have ample room to assert their commitment to the robust enforcement of antidiscrimination law, particularly in the context of government-funded services. In the wake of *Masterpiece Cakeshop* and *Trinity Lutheran*, human rights commissions and agencies should consider providing public guidance on civil rights law requirements, with a focus on how such laws protect everyone—including people of faith—from discrimination.