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Is a Religious Organization, Funded by the Government to Provide a Government Service, Entitled to Exemptions from Laws the Organization Opposes?

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If a city grants a religious agency public funding to provide a government service, such as public health care or foster care, is the city establishing religion?[1] Does your answer change if the religious agency uses public funding to provide a public service and, in addition, asks to be exempted from the city's laws that do not align with its religious convictions? Imagine that the religious agency, a city-funded food bank, is exempted from abiding by city meat-sanitary laws because, pursuant to religious beliefs, the agency does not collect meat. Perhaps that is a rationally acceptable exemption, regardless of the ties between church and state. Let's say that instead of a food bank, a religious hospital receives state funding to provide free health care to women. Should the hospital be exempted from a state law requiring all publicly funded hospitals to provide contraception to women, such that women cannot receive government-mandated contraception at the religious hospital?

These questions stem from circumstances involving a confusing intermingling between church and state. The answers to which, however, have been vehemently avoided each time they are before the Supreme Court. A recent case decided by the Court, *Fulton v. City of Philadelphia,*[2] exemplified such a scenario, but did not inquire into the constitutionality of pairing money with exemptions because the Court decided the case on other grounds. Philadelphia's Department of Human Services controls and facilitates the city's foster care service by contracting with foster agencies—public and private, secular and nonsecular.[3] Catholic Social Services ("CSS") is an agency that Philadelphia contracts with and funds to provide the city's foster care service.[4] CSS opposed the city's public accommodation law, which

[1] U.S. CONST. amend. I.
[2] 141 S. Ct. 1868 (2021).
[3] *Id.* at 1875.
[4] *Id.* ("The Philadelphia foster care system depends on cooperation between the City and private foster agencies like CSS. When children cannot remain in their homes, the City's Department of Human Services assumes custody of them. The Department enters standard annual contracts with private foster agencies to place some of those children with foster families. The placement process begins with review of prospective foster families… The agency must

forbids discrimination on the basis of sexual orientation when providing services.[5] Despite the government's funding relationship with CSS, the Supreme Court required the City to grant CSS an exemption from the antidiscrimination law, so that it may deny foster care service to gay couples according to its religious beliefs, without fear of civil liability.[6] The Court found in favor of CSS because the city's public accommodation law included a provision that allowed the city to grant exemptions, and the city's compelling interests in antidiscrimination were insufficient to deny CSS an exemption if one is available.[7] The Court never addressed whether the close government relationship created by the funding and exemption is permissible under the Establishment Clause and Free Exercise Clause.

The Establishment Clause is not automatically violated when religious agencies receive government funding or benefits. The Supreme Court has routinely upheld the rights of religious agencies to participate in funding programs that are generally available to eligible applicants.[8] Similarly, so long as strict scrutiny is applied, the Free Exercise Clause often exempts religious agencies from laws, such as the public accommodations law in *Fulton*, that do not align with their religious beliefs.[9] Consequently, the question naturally arises whether a religious agency can contract with the government to provide a *government service* and, in addition, be exempted

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decide whether to 'approve, disapprove or provisionally approve the foster family.' § 3700.69…The religious views of CSS inform its work in this system. CSS believes that 'marriage is a sacred bond between a man and a woman.' App. 171. Because the agency understands the certification of prospective foster families is to be an endorsement of their relationships, it will not certify unmarried couples—regardless of their sexual orientation—or same-sex married couples."

[5] *Fulton v. City of Philadelphia*, 141 S. Ct. 1868, 1880 (2021).

[6] *Id.* at 1882.

[7] *Id.* at 1882 (citing *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 542 (1993).

[8] *See Bowen v. Kendrick*, 487 U.S. 589, 621 (1988) ("[I]t is not enough to show that the recipient of a challenged grant is affiliated with a religious institution or that it is 'religiously inspired.'").

[9] *See Sherbert v. Verner*, 374 U.S. 398, 410 (1963) ("Our holding today is only that South Carolina may not constitutionally apply the eligibility provisions [of unemployment benefits] so as to constrain a worker to abandon his religious convictions respecting the day of rest.").

from following the law; in other words, can a religious organization have its cake (receive city funding and services) and eat it, too (provide the public service while breaking city law)?

This note will argue that, for the sake of religious agencies publicly funded to provide social services, the government is not required or permitted to grant them an exemption from following public accommodation laws or other laws that protect the rights of third parties; this combination of public funding, government contracting for social work, and the granting of a religious exemption will be referred to as a "*Fulton* scenario." Part I lays out the legal framework and historical background of the First Amendment Religion clauses, and Part II explains why and how the Religion Clauses conflict with one another. Part III illustrates how Establishment Clause jurisprudence addresses government funding issues when religious groups are in receipt of the aid, and Part IV describes the free exercise exemptions granted to religious agencies pursuant to the Free Exercise Clause. Lastly, Part V will address and recognize that the two ideas together—religious exemptions from complying with the law while the group is publicly funded—would most likely be unconstitutional according to the Court's jurisprudence.

I. First Amendment Religion Clauses

The Religion Clauses of the First Amendment prohibit the government from making laws "respecting an *establishment* of religion or prohibiting the *free exercise* thereof."[10] The Establishment and Free Exercises Clauses disseminate principles of religious liberty whilst having separation between church and state, for which many European colonists settled to America. Persecution in Europe was not uncommon against nonconformists who had beliefs contrary to the majority religious groups, or the "one true religion."[11] Disobeying the established

[10] U.S. CONST. amend. I. (*emphasis added*).
[11] James H. Hutson, *Religion and the Founding of the American Republic*, *America as a Religious Refuse: The Seventeenth Century*, LIBR. OF CONG., https://www.loc.gov/exhibits/religion/rel01.html (last visited Dec. 20, 2022).

church in a given European country meant citizens faced resentment, or "in other places, refusing to conform to the local religion meant death."[12] Ironically, religious persecution followed suit in America from colonies instigating either state-established religion or some aspect of religious establishment.[13] For example, the state of Rhode Island was founded because Roger Williams was banished from Massachusetts for not supporting the government's establishment of Puritan views.[14]

The Establishment Clause aimed to protect the church from government involvement and ensure United States citizens that there would be "a wall of separation between church and state."[15] The Establishment Clause forbids the government from establishing a church, preferring one religion over another, and from favoring religion over non-religion or non-religion over religion.[16] Establishment Clause conflicts often stem from the unavoidable intermingling between church and state, leaving no line in the sand that determines how much involvement is too much. An intricate relationship between church and state is inevitable and necessary at times:[17] if a church were to catch fire, the city fire department, funded by taxpayer dollars, is the first responder; religious churches and organizations are often exempt from paying federal income and real estate taxes;[18] in a school program where state taxpayer dollars are used to pay

[12] *Destination America*, PBS, https://www.pbs.org/destinationamerica/usim_wy_01.html (last visited Dec. 20, 2022) (citing Charles A. Wills, *DESTINATION AMERICA* (2005)).
[13] *Roger Williams*, HISTORY (Sept. 27, 2021), https://www.history.com/topics/reformation/roger-williams.
[14] *Id.*
[15] *Everson v. Bd. of Ed. of Ewing Twp.*, 330 U.S. 1, 16 (1947) (quoting *Reynolds v. United States*, 98 U.S. 145, 164 (1878)).
[16] *Establishment Clause*, LEGAL INFORMATION INSTITUTE, CORNELL U. (Nov. 2022), https://www.law.cornell.edu/wex/establishment_clause.
[17] *See Walz v. Tax Comm'n. of City of New York*, 397 U.S. 664, 670 (1970) ("No perfect or absolute separation is really possible; the very existence of the Religion Clauses is an involvement of sorts—one that seeks to mark boundaries to avoid excessive entanglement.").
[18] *Id.* at 666.

for student busing, the money can be used on students traveling to religious and non-religious schools alike.[19]

The second of the two Religion Clauses—the Free Exercise Clause—protects the right to freely practice religion.[20] Still, certain laws will inherently make religious practices difficult or, in some instances, impossible. If a law criminalizes a hallucinogenic drug that a religious group uses for rituals, should the law be overruled, or should the religious individuals be immune from its restrictions?[21] Alternatively, consider a law that criminalizes polygamy despite one's religious belief in practicing polygamy.[22] Should polygamy become legalized? Should the government allow only a small percentage of religious families to legally practice polygamy? Or should the government ignore the religious claims and criminalize any instance of polygamy?

The Supreme Court originally tackled free exercise conflicts by permitting laws to limit religious activity *only* where the government had a compelling enough interest and no other alternative existed to realize this interest.[23] Today, the Court permits incidental burdens on religious activity so long as the law is neutral and generally applicable to all.[24] As with most American jurisprudence, though, exceptions certainly endure. In some circumstances, protecting the religious activity will supersede a general and neutral law, even though the law was not enacted with the purpose of hindering religious practice.[25] Strict scrutiny may provide religious activities an exemption, much like immunity, from abiding by laws with which others must comply.

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[19] *Everson*, 330 U.S. at 18.
[20] *What Does "Free Exercise" of Religion Mean Under the First Amendment?*, Freedom Forum Institute, https://www.freedomforuminstitute.org/about/faq/what-does-free-exercise-of-religion-mean-under-the-first-amendment/ (last visited Dec. 20, 2022).
[21] *Employment Div., Dept. of Human Resources of Oregon v. Smith*, 494 U.S. 872 (1990).
[22] *Reynolds v. United States*, 98 U.S. 145 (1879).
[23] *See Sherbert v. Verner*, 374 U.S. 398, 406 (1963).
[24] *See Employment Div.*, 494 U.S. at 881.
[25] *See Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. 682 (2014).

This note exclusively concerns granting religious agencies exemptions from general and neutral laws, with the additional layer of when the government contracts with and funds those religious agencies to provide a public service.

II. The Religion Clauses at Odds

Naturally, the two Religion Clauses are no stranger to conflict because they protect opposite interests; where the Establishment Clause ensures that the government will not privilege religion, the Free Exercise Clause states that the government must not enact laws that frustrate freedom of religious activity.[26] The Supreme Court even commented that the clauses "are not the most precisely drawn portions of the Constitution…. but the purpose was to state an objective, not write a statute."[27] Acknowledging these divergences, the Court held that while religious freedom of belief is absolute, the freedom to act "remains subject to regulation for the protection of society."[28] In other words, in the context of government laws aiming to protect society—like the antidiscrimination laws present in *Fulton* scenarios—certain religious actions must yield to the government law. For the purposes of this note, the difference between religious belief and actions is imperative when religious exemptions apply to publicly funded religious groups providing a social service, and exempted law is one enacted to protect society and individual rights.

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[26] Rodney J. Blackman, *Article: Showing the Fly the Way Out of the Fly-Bottle: Making Sense of the First Amendment Religion Clauses*, 42 U. KANSAS L. REV. 285, 288 (1994) ("Unless one of the two Religion Clauses is given a narrow interpretation, or unless government is allowed to do whatever it wants with regard to religion, then the Court's responding to a plaintiff's complaint by focusing on only one of the Religion Clauses obscures the fact that often no matter what the government does it arguably would violate one of the Religion Clauses.").

[27] *Walz*, 397 U.S. at 668.

[28] *Cantwell v. State of Connecticut*, 310 U.S. 296, 304 (1940).

The two Religion Clauses conflict because they historically have not always held equal weight against one another and are compromised depending on the circumstance.[29] This type of "head-on collision" [30] between the Religion Clauses is exemplified in *Sherbert v. Verner*, where a woman's religious belief forbade working on Saturday and was consequently denied unemployment benefit eligibility.[31] The South Carolina government disqualified Mrs. Sherbert's unemployment application because her Sabbath forced her to decline available suitable work, which was a condition enforced upon anyone's receipt of unemployment benefits.[32] The Free Exercise Clause provided her with an exemption from the law's requirement because the Court found that she was excluded solely for practicing her religion.[33] However, by yielding to the Free Exercise Clause, the Court's holding demanded the precise government oversight and favoritism barred by the Establishment Clause. Not only would the exemption force the government to examine the genuineness of one's religious belief in unemployment applications, but the religious individuals exempted from the law are "single[d] out" over others.[34] Individuals with secular preferences or practices—such as watching Saturday football or committing one day each week to family time—are not similarly excused due to the fact that they are personal, and not religious, preferences.[35] More importantly, though, the Court approved of this religious-preferencing despite the fact that the exemption results in "direct financial assistance to religion."[36]

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[29] Karl Schock, *Comment: Permissive Discrimination and the Decline of Religion Clause Jurisprudence: The Wearing Out of the Joints*, 77 U. COLO. L. REV. 229, 232 (2006) ("Since Everson, the Court has struggled to apply the strict separation standard of that case, especially when "separation of church and state" results in incidental discrimination against particular religious groups or against religion in general.")
[30] *Sherbert*, 374 U.S. at 414 (Stewart, J., concurring).
[31] *Id.* at 399.
[32] *Id.* at 401.
[33] *Id.* at 404.
[34] *Id.* at 422 (Harlan, J., dissenting).
[35] *Sherbert*, 347 U.S. at 422 (Harlan, J., dissenting).
[36] *Id.* at 423 (Harlan, J., dissenting).

Although the exemption in *Sherbert* was paired with government funding, it differs significantly from a *Fulton* scenario. The religious individuals exempted from unemployment benefit requirements received direct government funding, however, they were *individuals* using that money for their own day-to-day livelihood, as opposed to religious organizations using government funds to provide a public service in accordance with their religious views, whose exemption from city antidiscrimination law effects the rights of other individuals attempting to access those public services. Had the *Sherbert* court been faced with such an intertwining relationship between church and state, the result would have likely differed.

There are clashing objectives between the Religion Clauses, because while *Sherbert* held the Free Exercise Clause warranted a religious exemption from unemployment benefit conditions, it did so in direct violation of *Everson*, which stated that the Establishment Clause forbids "every form of public aid or support for religion."[37] Language from *Everson* is imperative to understanding the history and tradition[38] of the Establishment Clause, for *Everson* was the first case used to interpret and incorporate the Establishment Clause upon the states.[39] *Everson* cited to the history of the First Amendment and emphasized that religious freedom "could be achieved best under a government which was stripped of all power to tax, to support, or otherwise to assist any or all religions."[40] Similar cases involving unemployment benefit conditions like that in *Sherbert* may understandably be resolved by a religious exemption, notwithstanding what *Everson* held regarding the Establishment Clause. Greater difficulties arise

[37] *Everson*, 330 U.S. at 32 (Rutledge, J., dissenting).
[38] *Kennedy v. Bremerton Sch. Dist.*, 142 S. Ct. 2407, 2428 (2022) ("An [Establishment Clause] analysis focused on original meaning and history, this Court has stressed, has long represented the rule.").
[39] *Everson*, 330 U.S. at 29 (Rutledge, J., dissenting).
[40] *Id*, at 11.

when the relationship between church and state overlaps more, and a religious exemption comes at a bigger social cost.[41]

Everson provided courts with a clear and succinct, but unforgiving rule to follow: it is unconstitutional for the government to fund or aid religion in any way.[42] However, even the *Everson* court could not hold itself to such a rigid, merciless standard.[43] Chief Justice Burger recognized this need to soften the edges of *Everson*'s strict Establishment Clause rule, and coined this conflicting interplay between the Religion Clauses as finding "room for play in the joints."[44] In other words, while public funding going to religious agencies may be permissible by the Establishment Clause, the Free Exercise Clause may not always require the funding. The Court stipulated that this "value judgment" must depend on whether the laws at issue were "intended to establish or interfere with religious beliefs and practices or have the effect of doing so."[45]

A play in the joints existed in the case *Locke v. Davey*, in which Washington created a college scholarship program for eligible students, but disallowed the scholarship to be used to pursue a devotional theology degree.[46] The program permitted the scholarship students to attend religious schools or take theology courses, so long as the degree pursued was not theology.[47] Both the majority and dissent agreed that it would be permissible under the Establishment Clause

[41] *See Fulton*, 141 S. Ct. at 1868 (The relationship between government funding of CSS to provide foster care, with CSS additionally receiving an exemption to the antidiscrimination law, results in a deprivation of third-party rights, namely same-sex couples who are entitled not to be discriminated against based on their sexual orientation.).
[42] *Everson*, 330 U.S. at 29 (Rutledge, J., dissenting).
[43] *Everson*, 330 U.S. at 18 (holding, "[i]t appears that these parochial schools meet New Jersey's requirements. The State contributes no money to the schools. It does not support them. Its legislation, as applied, does no more than provide a general program to help parents get their children, regardless of their religion, safely and expeditiously to and from accredited schools.").
[44] *Walz*, 397 U.S. at 669.
[45] *Id.* at 669.
[46] *Locke v. Davey*, 540 U.S. 712, 712 (2004).
[47] *Id.* at 713.

to *authorize* scholarship students to pursue theology degrees, but the Free Exercise Clause did not *require* the inclusion of theology degrees, because neither the state nor the scholarship program acted with hostility toward religion.[48] This note proposes that a *Fulton* scenario is not one in which there is room for play in the joints. The Establishment Clause does not *permit* government funding of a religious agency in conjunction with a religious exemption while that agency provides a public service, similarly to how the Free Exercise Clause does not *require* the government to exempt it from its laws while contemporaneously funding it to provide a social service.

The Religion Clause conflict central to this note is the separation of church and state, and how much separation is required when religious agencies provide public services on behalf of the government, such as foster care, homeless housing, nutrition assistance programs, and disability programs. This note does not question the legitimacy or lawfulness of religious agencies' partnership with the government to provide social services.[49] Religious agencies have historically partnered with the government to fulfill their convictions of public volunteerism or community acts of service.[50] Religious individuals or groups are eligible to apply for, or participate in, neutral public funding programs without the government fearing liability or Establishment Clause violations. The Department of Justice reiterated that while the "government does not set aside a separate funding stream specifically for faith-based groups … they are eligible to apply for government grants on an equal footing" with secular groups.[51]

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[48] *Id.* at 719, 727 (Scalia, J., dissenting).
[49] *Bowen*, 487 U.S. at 608-609 ("In other cases involving indirect grants of state aid to religious institutions, we have found it important that the aid is made available regardless of whether it will ultimately flow to a secular or sectarian institution.").
[50] Timothy J. O'Neill, *Faith-based Organizations and Government*, THE FIRST AMENDMENT ENCYCLOPEDIA, https://www.mtsu.edu/first-amendment/article/915/faith-based-organizations-and-government (last visited Dec. 20, 2022).
[51] *Frequently Asked Questions*, UNITED STATES DEPARTMENT OF JUSTICE ARCHIVE, https://www.justice.gov/archive/fbci/faq.html (last visited Dec. 20, 2022).

Clearly *some* relationship between religious agencies and government benefits is permissible and well-established, the crux of the conflict within a *Fulton* scenario exists when those religious agencies wish to not abide by government law and simultaneously receive government aid and oversight. By asking for exemptions in *Fulton* scenarios where religious agencies receive government funding to provide a public service, religious agencies are simultaneously asking for both the unification and separation between church and state. The religious groups want to be intertwined with the government by applying for and receiving public funding, support, and contracting, yet wish to have separation and immunity from the government's rule of law so that they may provide services in accordance with their convictions. In this scenario, it may be a violation of both Religion Clauses for the Supreme Court to require that the government grant religious agencies exemptions from following public law.

Something must give: should the religious agencies be allowed to continue receiving government assistance, while the government closes its eyes to the agency breaking laws, or should the government require religious agencies to abide by its laws if they want to have the government's funding and contracting? A *Fulton* scenario involves more than the well-established right of a religious agency to receive neutral government funding to provide a government service. The additional layer—immunity from government law—cannot and should not be constitutionally permitted, given the history and tradition of Religion Clause analysis.

III. The Establishment Clause and Funding of Religious Social Services

While the Court held that any form government funding to religion violates the Establishment Clause,[52] religious institutions receive federal funding in certain instances to ensure neutrality. The Court's early interpretation of "establishment" meant "sponsorship,

[52] *Everson*, 330 U.S. at 32 (Rutledge, J., dissenting).

financial support, and active involvement of the sovereign in religious activity."[53] As Supreme Court jurisprudence evolved, "accommodations" were granted to religious groups at times, proving that funding and sponsorship are not *per se* violations of the Establishment Clause. Most commonly, government aid may flow to religious agencies providing public social services as part of neutral government programs.[54] As exemplified in a *Fulton* scenario, Establishment Clause conflicts exist when the government-funded religious agencies tailor their secular services to the church's faith and convictions.

Establishment Clause jurisprudence evolved overtime to accommodate for changes in society and constitutional interpretation by definitively permitting religious agencies to receive government funding. As stated above, *Everson* established that government partnership and involvement with religion is likely unconstitutional.[55] However, *Everson* also noted that the Establishment Clause does not necessarily prohibit states from providing general benefits to religious agencies and even held that the state must be "neutral in its relations with groups of religious believers and non-believers."[56] The funding program at issue in *Everson* permitted bus fare reimbursement for parents sending their children to school, even if the children were using the buses to go to religious schools.[57] In other words, the Establishment Clause does not require state governments to exclude religious agencies from "general government services."[58] *Everson*'s standard loosely held that in the course of generally applicable public funding programs, religious groups may be on the receiving end of the neutral aid. The Establishment

[53] *Walz*, 397 U.S. at 668.
[54] *See Fulton*, 141 S. Ct. at 1882.
[55] *Everson,* 330 U.S. at 16 (quoting *Reynolds v. United States,* 98 U.S. 145, 164 (1878)).
[56] *Id.* at 18.
[57] *Id.* at 18.
[58] *Id.* at 18.

Clause standard expanded after *Everson*, to address the constitutionality of future incidences of government-funded aid towards religious groups.

The Court in *Lemon v. Kurtzman*[59] announced a clear, three-part test to analyze Establishment Clause claims, which included three factors derived from earlier cases *Abington v. Schempp*[60] and *Walz v. Tax Commission*.[61] The *Lemon* test evaluates Establishment Clause challenges through three inquiries: (1) whether the law's purpose is secular, (2) whether the law's principal or primary effect advances or inhibits religion, and (3) whether the law fosters "an excessive government entanglement with religion."[62] In *Lemon*, two state funding programs violated the Establishment Clause because of the government's requisite excessive entanglement with religion.[63] The first program provided additional salary payments to religious schoolteachers, but the Court held that it would be too difficult to ensure that the funded teachers taught about secular topics without implanting an impermissible state "fostering of religion."[64] The "state surveillance" needed to safeguard against religious instruction would result in an "excessive and enduring entanglement between state and church."[65] The second funding program allowed religious schools to be reimbursed for secular services or textbooks.[66] The Court disapproved of this program for a multitude of reasons, including the strong likelihood of government "control and surveillance," and the "further defect of providing state financial aid directly to the church-related school."[67]

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[59] *Lemon v. Kurtzman*, 411 U.S. 192 (1973).
[60] *Sch. Dist. of Abington Tp., Pa. v. Schempp*, 374 U.S. 203, 222 (1963) ("The test may be stated as follows: what are the purpose and the primary effect of the enactment?").
[61] *Walz*, 397 U.S. at 668.
[62] *Lemon*, 403 U.S. at 612-613 (quoting *Walz v. Tax Comm'n of City of New York*, 397 U.S. 664, 668 (1970)).
[63] *Id.* at 613-14.
[64] *Id.* at 619.
[65] *Id.* at 619.
[66] *Id.* at 607.
[67] *Lemon*, 403 U.S. at 621.

Lemon is especially relevant to this note, not only for introducing the transformation in Establishment Clause jurisprudence, but mainly because of the Court's emphasized disapproval of state programs that directly aid religious groups without any assurance of maintaining separation between religious beliefs and state funding. The *Lemon* court would likely be concerned with a *Fulton* scenario, where a city government funds and contracts with a church agency to provide a public service, because government surveillance is realistically inevitable. Keep in mind, the danger in a *Fulton* scenario is not that a religious agency receives funding and contracting opportunities from the government, but rather that those government benefits are being used to provide a social service in accordance with religious convictions that break the law.[68] Compare that relationship with the Establishment Clause issue in *Lemon*, in which the court found a violation when public funding flowed to religious schools, because the government oversight necessary to ensure that the funding would be used *only* on secular books was an excessive government entanglement.[69] If *Lemon* were the only controlling authority today, the court would undoubtedly find an excessive entanglement when public funding flows to a religious agency to provide a government service in accordance with their religious beliefs.

Then came *Bowen v. Kendrick.*[70] There, a federal Act granted funding to public and private agencies that provided counseling and educational services relating to adolescent premarital sexual relations.[71] Among the many recipients were religiously-affiliated organizations; however the Court said the funding was permissible under *Lemon* because the Act's purpose was entirely secular and the government was merely neutrally including any public or private agency that

[68] *Fulton*, 141 S. Ct. at 1880.
[69] *Lemon*, 403 U.S. at 621.
[70] *Bowen*, 487 U.S. at 608-609.
[71] *Id.* at 589.

could provide the specific services.[72] Although *Bowen* falls short, it closely mimics a *Fulton* scenario in that it involves a religious agency, publicly funded to perform a government service. Nevertheless, in a *Fulton* scenario, the religious agency is doing all the above while providing that service in accordance with religious convictions that violate government rule.[73]

Finally, in 2022 the Court said it had "long ago abandoned *Lemon* and its endorsement test offshoot" in favor of a less predictable standard for courts to use in the future.[74] The *Bremerton* Court held that Establishment Clause violations must be assessed by asking whether the government coerced religious actions or inactions, resulting in an Establishment Clause violation.[75] Alternatively, in a scenario without religious coercion, the Court stated these issues "must be interpreted by 'reference to historical practices and understandings.'"[76] *Bremerton* assessed whether a public high school football coach could pray on the public high school's field and involve football players, or if this act constituted religious coercion by expecting student athletes to cooperate in the ritual.[77] Applying its new test, the Court looked to "history and tradition" and found that traditionally, in public school prayer cases, Establishment Clause claims were rejected if coaches did not "broadcast or recite [any prayers] to a captive audience."[78] The Court found that the coach, and thereby the public school, did not seek out students or direct them to pray, or expect players to participate.[79] But even under *Bremerton*'s new coercion standard, the *Fulton* scenario still violates the Establishment Clause because

[72] *Id.* at 590 ("Moreover, to the extent that religious institutions, along with other types of organizations, are allowed to participate as recipients of federal funds, nothing on the Act's face suggests that it is anything but neutral with respect to the grantee's status as a sectarian or purely secular institution.").
[73] *Fulton*, 141 S. Ct. at 1880.
[74] *Kennedy*, 142 S. Ct. at 2427.
[75] *Id.* at 2428.
[76] *Id.* at 2428 (quoting *town of Greece v. Galloway*, 572 U.S. 565, 576 (2014)).
[77] *Id.* at 2411.
[78] *Id.* at 2432.
[79] *Id.* at 2432.

requiring taxpayer funds to go toward a religious group that uses the funds in accordance with their faith could be seen as coercive.

IV. Free Exercise Exemption Jurisprudence

The right to practice religion freely and openly in the United States is embedded within the country's historical practices and safeguarded by the Free Exercise Clause. However, we know that, at times, free exercise may frustrate government interests and goals to which laws are carefully legislated to achieve. On the other hand, it is well established that government law often impedes religious practices through restrictions on individual actions. Given the Supreme Court and legislative history in establishing how much protection will be given to religious freedom, religious exemptions may be granted on different bases, depending on the standard of review.

A heightened standard of review of strict scrutiny was articulated in the *Sherbert v. Verner* case, where the Court required a state to prove a compelling interest if its law infringed on religious practices.[80] The Court reiterated its heightened standard of review in a later case, *Wisconsin v. Yoder*.[81] Wisconsin's compulsory-education law frustrated the practice of Amish parents whose religious beliefs opposed sending children to high school.[82] Though education constituted a undeniable governmental interest, it was not compelling enough to interfere with the "traditional interest of parents with respect to the religious upbringing of their children."[83] Seeing as Amish parents continued educating using alternative schooling, the state's law—which would require compulsory education for Amish children for only two more years than their

[80] *Sherbert*, 374 U.S. at 406.
[81] *Wisconsin v. Yoder*, 406 U.S. 205 (1972).
[82] *Id.* at 207.
[83] *Id.* at 221.

religion allows—did not justify the severe religious interference.[84] Note, the state law in *Yoder* interfered with the day-to-day practice of religion for Amish families and deeply affected their private education practices, and as such, granting a religious exemption to the education law would impact *only* the Amish individuals who choose to attended Amish high schools. Furthermore, while Wisconsin could have been accused of singling out or giving a preference to religion, the Amish families receiving the exemption were not in partnership with the government through funding or contracting.

Viewing a *Fulton* scenario from the free exercise lens in *Yoder*, an exemption from antidiscrimination laws while providing a public service would not have the same isolated impact as did the religious exemption from compulsory education in *Yoder*. The scope of the exemption in *Yoder* allowed Amish families to take their children out of public schooling when they reached a certain age and continue their schooling in a religious setting, meaning that no outside individuals were impacted or deprived of anything as a direct result of this exemption.[85] In a *Fulton* scenario, however, not only does the exemption raise Establishment Clause issues from the government funding and contracting relationship, but the exemptions from antidiscrimination laws affect the lawful right of other individuals not to be discriminated against, in favor of religious convictions that the public being subjected to them may not follow or choose to live by.

The strict scrutiny test took a drastic turn in favor of the more lenient standard deployed by the landmark case, *Employment Division v. Smith*.[86] There, the Court held that most nondiscriminatory and generally applicable laws that impose a burden on religion are subject to

[84] *Id.* at 227.
[85] *Yoder*, 406 U.S. at 205.
[86] *Employment Div.*, 494 U.S. at 872.

the rational basis standard.[87] Specifically, Oregon made it unlawful for an individual, under any circumstance, to ingest peyote, a hallucinogenic drug.[88] This prevented the Native American plaintiffs from legally using peyote as part of their religious ritual.[89] The Court denied the plaintiffs a religious exemption from Oregon's drug law, finding that the state had a rational basis in creating the law, which itself did not single out or discriminate against religious individuals; it applied neutrally to everyone who used peyote for religious or secular purposes.[90]

In doing so, the Court recognized that a generally applicable, facially neutral law need not further a compelling governmental interest to be constitutional, rather, it must merely further some rational or legitimate interest.[91] Justice Scalia went so far as to suggest that individuals who are incidentally burdened by general and neutral laws should turn to the political arena for redress, as this "unavoidable consequence of democratic government must be preferred to a system in which each conscience is a law unto itself."[92] In exchanging the strict scrutiny test for a more lenient rational basis review, the Court focused the analysis on the notable distinction between religion belief and religious action.[93] Namely, the court emphasized that a religious individual or group can never be penalized for what they believe, regardless of whether it opposes authority or government law. For example, a state that legalizes abortion can neither penalize a religious group for believing that abortion is wrong or immoral, nor punish a church's teachings that oppose the right to abortion. Religious *action*, on the other hand, "may be subject to regulation if it implicates or threatens society or public safety."[94]

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[87] *Id.* at 883.
[88] *Id.* at 874.
[89] *Id.* at 872.
[90] *Employment Div.*, 494 U.S. at 879.
[91] *Id.* at 890.
[92] *Id.* at 890.
[93] *Id.* at 899 (O'Connor, J., concurrence).
[94] *Id.*

While this departure to rational basis review seemingly placed religious practices on the back burner, the Court continued to use strict scrutiny with laws that are not neutral and applicable to everyone through its purpose or effect.[95] A law specifically tailored with the "purpose or effect" of preventing a religious practice might just be carefully disguised as just a general law protecting public health and safety.[96] A city in Florida outlawed *only* sacrificial and ritualistic killing and burning of animals, but allowed hunting or animal killings for any other reason.[97] The only individual or group that practiced the ritualistic killing of animals and would be affected by this law was part of the Church of Lukumi Babalu.[98] While the law did not explicitly discriminate against the religious group through its text, it was subject to strict scrutiny because the purpose and effect of the law was to specifically impede the religious practice of sacrificial animal killing.[99]

If a law requires a religious agency to become *complicit* in sin or violating a conviction, should that be a greater reason to grant them a religious exemption from the law? Laws cannot require anyone to believe something; however, they might require action or inaction that goes against religious belief. In *Thomas v. Review Board*,[100] an employee chose to quit his steel factory job when his employer transferred him to a department that used the steel to produce weaponry.[101] The employee's religious beliefs prevented his complicity and participation in the production of weaponry, requiring him to quit his job.[102] The state denied Thomas's unemployment compensation claim for voluntarily terminating himself, in violation of the

[95] *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 533 (1993).
[96] *Id.* at 547.
[97] *Id.* at 537.
[98] *Id.* at 535.
[99] *Id.* at 535.
[100] 450 U.S. 707 (1981).
[101] *Id.* at 707.
[102] *Id.*

government's unemployment conditions.[103] The Supreme Court held that the employee quit for religious reasons and therefore could not be denied public benefits for refusing to violate his religious beliefs.[104] The state's interest in preventing widespread unemployment claims due to voluntary termination for "personal" reasons was not compelling enough to prevent Thomas's free exercise.[105] Furthermore, *Thomas* emphasized that the Supreme Court may not evaluate the validity of one's religious belief and the action it requires, but the Court *may* inquire into whether an individual sincerely and honestly holds that belief.[106] Note, though, the federal funds here are flowing to a religious individual receiving public funds, not to a religious individual providing a public service and asking to be exemption from a law that inherently deprives other people of theirs.[107]

Thomas served as a basis for an important case that arose under the federal Religious Freedom Restoration Act (RFRA) which was passed to reinstate strict scrutiny after the *Smith* decision.[108] The Hobby Lobby stores were granted a similar exemption, when a federal employment mandate caused employers to feel complicit in a sin due to their religious beliefs.[109] In the case *Burwell v. Hobby Lobby,* the private for-profit employer objected to providing employees with health insurance plans that included contraception, required under the Affordable Care Act.[110] The employers, a religious family, argued that being the providers of their employees' access to birth control violated their religious beliefs against abortion.[111] Hobby

[103] *Id.*
[104] *Id.* at 720.
[105] *Thomas*, 450 U.S. at 719.
[106] *Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. 682, 725 (2014).
[107] *See Fulton,* 141 S. Ct. at 1868.
[108] 42 U.S.C.S. § 2000bb (RFRA applies only to federal laws, however, many states have created their own state RFRA statutes).
[109] *Burwell*, 573 U.S. at 683.
[110] *Id.* at 731.
[111] *Id.* at 682.

Lobby's religious exemption prevented the government from forcing the group to be complicit in something abhorrent to their religion: being the possible facilitator of abortifacient contraception.[112] This situation is analogous to *Fulton's*, namely that CSS is exempted from the city's antidiscrimination law because it is their belief that they would be complicit in supporting gay marriage if they were required to foster children to gay couples.

Based on Hobby Lobby's exemption from providing employees with the Affordable Care Act's mandatory contraception benefits, it might rationally follow that the religious group in *Fulton* should similarly receive an exemption from antidiscrimination laws, if servicing a same-sex couple makes the group complicit in a sin. Just like the exemptions granted in *Hobby Lobby* and *Thomas* despite the government's compelling interests in public health care[113] and fraudulent unemployment claims,[114] one would assume that strict scrutiny may permit an exemption in a *Fulton* scenario, as well, despite the compelling interest in antidiscrimination. The gaping hole between the two scenarios, however, is that in a *Fulton* scenario, the exemption is coupled with government funding. While Hobby Lobby is a for-profit corporation primarily in the service of selling craft goods, the religious agency in a *Fulton* scenario is funded by the city, in a contracting partnership with the government, providing a public service.

In a *Fulton* scenario, the religious organization or group is claiming that they are entitled to a free exercise exemption from certain government laws that frustrate their ability to provide the social service in harmony with their religious beliefs.[115] The Supreme Court's Free Exercise Clause exemption standards have evidently evolved overtime but, regardless, religious exemptions granted therefrom differ contextually from the one granted in *Fulton*.

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[112] *Id.* at 686.
[113] *Burwell*, 573 U.S. at 729.
[114] *Thomas*, 450 U.S. at 707.
[115] *Fulton*, 141 S. Ct. at 1880.

General antidiscrimination laws at issue in a *Fulton* scenario are distinguishable from these circumstances that give rise to strict scrutiny review, which involve religious exemptions for individuals or closely held corporations. Unlike the exemption from compulsory education in *Yoder, which* impacted only those Amish families who take their children out of public schools,[116] exempting CSS from public accommodation laws on a religious basis fundamentally affects the rights of third-parties not to be discriminated against on account of sexual orientation.[117] This idea of harming other third-party rights through an exemption has been held to be an important consideration, especially in the contraception mandate exemption in *Hobby Lobby*.[118] The Court underscored the fact that, even though the Hobby Lobby employers were exempted from facilitating contraception insurance, the insurers themselves would provide the healthcare to any employee who did not otherwise receive it from their employer and in essence, are not impacted in terms of their medical rights.[119] There is no similar assurance in a *Fulton* scenario that same-sex couples—or any other affected third-party—are promised foster care service, especially if other religious groups may too receive an exemption from the law and legally deny service to those couples. Moreover, immunizing a religious group from the illegality of denying service to same-sex couples will likely open the door to all sorts of free exercise claims against antidiscrimination laws, causing irreparable harm to society and human rights. The Supreme Court repetitively found that people's religious actions differ from opinions in that some actions may violate "important social duties or [be] subversive of good order, even when

[116] *Yoder*, 406 U.S. at 205.
[117] *Fulton*, 141 S. Ct. at 1880.
[118] *Burwell*, 573 U.S. at 682.
[119] *Id.* at 727.

the actions are demanded by one's religion."[120] "[T]he freedom to act, even when the action is in accord with one's religious convictions, is not totally free from legislative restrictions."[121]

V. Asking for Both: Funding and an Exemption from the Law

A complete and total separation between church and state is unrealistic and society as we know it would struggle to function without certain necessary overlap. Many social services and civic governmental functions are facilitated and provided by non-profit charities and religious organizations. It is well-established that the Free Exercise Clause may exempt religious agencies from laws that impose burdens on religious practices. Alternatively, we know that the Establishment Clause allows the government to fund or otherwise aid religious agencies who participate in generally available government funding programs. But together, the two cannot peacefully coexist: a contracting and funding relationship between the government and a religious agency that provides a public service becomes unconstitutional when that relationship is coupled with an exemption that permits funding to be spent tailored to the rules of that faith.

Justice Blackmun's dissenting opinion in *Bowen* practically could have been drafted to specifically foreshadow the government relationship at issue in *Fulton* scenarios. In *Bowen*, the Court upheld a government aid program and allowed the funding to flow to religious agencies that provide counseling and education services to adolescents struggling with issues from premarital sexual relationships.[122] The dissenters conceded that the Constitution allows the government to support a religious agency in providing secular social services, but stresses that the public funds cannot be "used to endorse the religious message."[123] This emphasizes the thesis of this note, which is that the Constitution is violated when a religious agency participates in a

[120] *Braunfeld v. Brown*, 366 U.S. 599, 603-603 (1961).
[121] *Id.* at 603 (citing *Cantwell v. State of Connecticut*, 310 U.S. 296, 303 (1940)).
[122] *Bowen,* 487 U.S. at 621.
[123] *Id.* at 642.

government program to receive funding to provide a social service, *while also* deeming itself exempt from laws that it morally opposes. Performing public services with government money, specifically tailored to the beliefs of that faith, leaves room for the government's message to express an endorsement or favoring of religion over nonreligion, in that it forces individuals to abide by a faith they may not choose to follow, and, in turn, deprives them of a right to which the law legally entitles them.

One case never made it to the Supreme Court, but closely exemplified a *Fulton* scenario.[124] In *ACLU v. Sebelius*, the U.S. Department of Health and Human Services ("HHS") selected the United States Conference of Catholic Bishops (USCCB) as the general contract to administer funding to organizations to provide a federal social service.[125] The government contracted with USCCB, providing them with millions of dollars to distribute grants to subcontractor organizations that provide services for human trafficking victims.[126] In selecting subcontractors, though, USCCB prohibited grantees from providing trafficking victims with abortion services or contraception, or referring them to such services.[127] ACLU sued HHS for "violat[ing] the Establishment Clause of the First Amendment by permitting [the] USCCB to impose a religiously based restriction on the use of taxpayer funds."[128]

The ACLU argued that the contractual relationship between HHS and USCCB violates the Establishment Clause under three principles.[129] First, the government relationship purportedly fails the *Lemon* test, because the government's authorization of the religious restriction on

[124] *ACLU v. Sebelius*, 821 F. Supp. 2d 474 (D. Mass. 2012), vacated sub nom *ACLU v. U.S. Conf. of Catholic Bishops*, 705 F.3d 44 (1st Cir. 2013).
[125] *Sebelius*, 821 F. Supp. 2d at 478 ("During the first four years of the contract, the government defendants awarded the USCCB over $13 million.").
[126] *Sebelius*, 821 F. Supp. 2d at 478.
[127] *Id.* at 478.
[128] *Id.* at 478.
[129] *Id.* at 482.

abortion and contraception advances a certain religion and fosters excessive government entanglement, in violation *Lemon*'s second and third prongs.[130] In other words, the government, in permitting this restriction, endorsed USCCB's religious convictions and relayed "a message that religion or a particular religious belief is *favored* or *preferred*."[131]

ACLU's second Establishment Clause argument asserts that the federal government is endorsing USCCB's abortion and contraception religious restriction.[132] ACLU urged that the government cannot make an accommodation for publicly funded religious agencies, providing government services, to impose restrictions "motivated by deeply held religious beliefs."[133] Specifically, ACLU reasoned that this is unlike a case where the government's societal interests happen to coincide with a religious agency's values, because HHS's contract with USCCB never prohibited subcontractors from providing abortion or contraception services.[134] Instead, USCCB explicitly stated that, "as we are a Catholic organization," abortion and contraception services "would be contrary to our moral convictions and religious beliefs."[135]

ACLU identified a third Establishment Clause violation due to "impermissibl[e] delegating discretion" given to USCCB.[136] USCCB has the authority to "exclude certain services from government funding," and the government's authorization of this exclusion was not "customary nor neutral."[137] The government contract with USCCB expired, which eventually

[130] *Id.* at 482.
[131] *Sebelius*, 821 F. Supp. 2d at 484.
[132] *Id.* at 484.
[133] *Id.* at 485.
[134] *Sebelius*, 821 F. Supp. 2d at 477 ("Therefore, we would explain to potential subcontractors our disclaimer of the parameters within which we work. Specifically, subcontractors could not provide or refer for abortion services or contraceptive materials for our clients pursuant to this contract.").
[135] *Id.* at 477.
[136] *Id.* at 484.
[137] *Id.* at 488 ("A proper respect for both the Free Exercise and the Establishment Clauses compels the State to pursue a course of neutrality toward religion, favoring neither one religion over others nor religious adherents collectively *over non adherents*.")

rendered the lawsuit against HHS moot.[138] Ironically, HHS refused to renew the contract with USCCB and instead expressed that it would contract with multiple agencies and will give a "strong preference to organizations that will make referrals for the full range of legally permissible obstetrical and gynecological services, *including abortion and contraception*."[139] Before the Court of Appeals dismissed the case for mootness, the District Court held that the government violated the Establishment Clause in authorizing a religious agency to enforce "religiously based restrictions on the expenditure of taxpayer funds, and thereby impliedly endorsed the religious beliefs of the USCCB and the Catholic Church."[140]

A similar argument, if applied to *Fulton*,[141] determines that when a government funds a religious agency to provide its public social services according to their religious beliefs, it creates an unconstitutional relationship for two reasons: first, the Establishment Clause is violated under the three-prong *Lemon* test due to excessive entanglement and, secondly, even if *Lemon* is truly abandoned, the Establishment Clause is still violated because the exemption constitutes religious coercion. While the Court in *Bremerton*[142] recently explicitly abandoned *Lemon*'s excessive entanglement test, it did not overrule *Abington v. Schempp*,[143] which provided *Lemon* with the first two purpose and effect prongs of the test: "[t]hat is to say that, to withstand the strictures of the Establishment Clause, there must be a secular legislative purpose and a primary effect that neither advances nor inhibits religion."[144] Similar to the argument in *ACLU v. Sebelius*, when the Court in *Fulton* required Philadelphia to authorize CSS to disobey the city's antidiscrimination law and refuse servicing foster care to gay couples, it had the purpose and effect of advancing CSS's

[138] *ACLU of Mass. v. U.S. Conf. of Catholic Bishops*, 705 F.3d 44, 48 (1st Cir. 2013).
[139] *Sebelius*, 821 F. Supp. 2d at 477.
[140] *Id.* at 488.
[141] *Fulton*, 141 S. Ct. at 1880.
[142] *Bremerton*, 142 S. Ct. at 2427.
[143] *Sch. Dist. of Abington Tp., Pa. v. Schempp*, 374 U.S. 203, 222 (1963)
[144] *Id.* at 222.

religious beliefs and practices.[145] CSS's religious opposition against gay marriage is advanced by the government through the receipt of funding and contracting services *while* receiving a religious exemption to the city's laws;[146] this violates the first two prongs of *Lemon* and *Schempp*.

Alternatively, should we assume that all prongs that *Lemon* adopted are unavailable for review, the replacement test created by *Bremerton* would still find that the *Fulton* scenario violates the Establishment Clause through religious coercion of taxpayer dollars. Because the public-school football coach in *Bremerton* prayed without inviting anyone else to participate or requiring others to abide by his religious views, the coach's post-game prayer on the field was not considered coercive under the Establishment Clause. The same could not be said in a *Fulton* scenario, because if the government is *required* to provide religious agencies both money and an exemption from following its laws, *Bremerton*'s coercion test is not satisfied. Taxpayer funds are mandatorily used to fund religious agencies to be immune from antidiscrimination laws while providing a public service. In *Fulton*, this meant that a Catholic agency, paid by Philadelphia to provide the city's foster care service, could legally deny adoption services to gay couples solely by way of the religious agency's contracting relationship with the government.[147] This relationship, the effect on third parties, and the delegation of power to a religious group is impermissible under the First Amendment Religion Clauses, and should this issue finally arise at the Supreme Court, it would likely rule the same.

[145] *Fulton*, 141 S. Ct. at 1880.
[146] *Id.* at 1882.
[147] *Id.* at 1880.