FORIS Policy Report

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Western Societies Need Proactive Policies to Protect Institutional Religious Freedom

Freedom of Religious Institutions in Society Project

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RELIGIOUS FREEDOM INSTITUTE

Introduction

The Religious Freedom Institute's (RFI) Freedom of Religious Institutions in Society (FORIS) Project is a three-year initiative funded by the John Templeton Foundation that aims to clarify the meaning and value of institutional religious freedom, examine how it is faring globally, and explore why it is worthy of public concern.

FORIS seeks to advance scholarship, inform policymakers, and influence cultural understandings on institutional religious freedom in the United States and around the world. Religious liberty is not an individual right alone, but rather includes the right of religious communities to gather in synagogues, churches, mosques, temples, and other houses of worship. Freedom of religion also includes the right of faith communities to establish religious institutions such as schools, hospitals, ministries to the poor, universities, and countless others that seek to embody the teachings of their respective religious traditions. Institutional religious freedom encompasses this full range of congregational and organizational expressions of religious faith. FORIS critically engages with both the proper meaning and scope of that freedom as well as its contributions to a society's common good.

About the Religious Freedom Institute

A non-profit organization based in Washington, D.C., RFI is committed to achieving broad acceptance of religious liberty as a fundamental human right, a source of individual and social flourishing, the cornerstone of a successful society, and a driver of national and international security. RFI seeks to advance religious freedom for everyone, everywhere.

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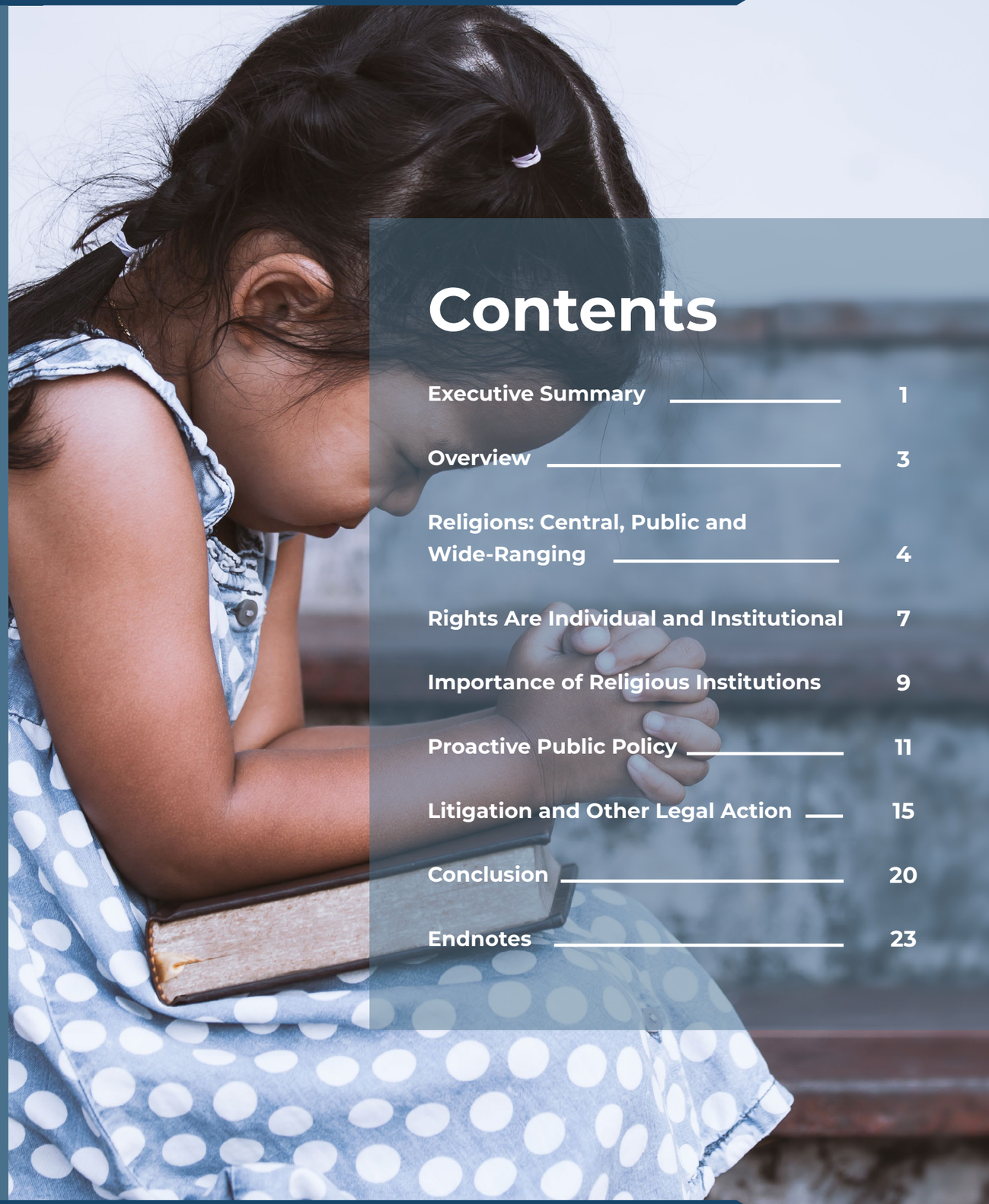
FORIS
Freedom of Religious Institutions in Society



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1

Executive Summary

This policy report sets forth a framework for policymakers—primarily in the United States, Canada, and other Western countries—to protect institutional religious freedom in their societies.

Religion: Central, Public, and Wide-ranging

Sound institutional religious freedom policy should reflect a broad conception of what counts as religion and, therefore, as a religious institution. Religious freedom protections must extend to organizations that operate according to their religious beliefs and principles, which often encourage and even mandate these religious organizations to provide goods and services not only to their own members but also to society more broadly.

Rights Are Individual and Institutional

Religious freedom does not attach only to persons' individual rights but applies also to the institutions they form to serve and advance the basic human good of religion. Any assertion of human rights as belonging only to human persons qua individuals fails to account for the inherently communal and relational nature of human beings. It also ignores history and the long-held, deeply rooted understanding that various rights also attach to associations, corporations, and other institutions—both religious and non-religious.

Importance of Religious Institutions

Policymaking efforts must attend to the crucial contributions religious institutions make to society at large and not only to their own members. Religious institutions represent and undertake a significant portion of a society's charitable and educational activities. They also contribute to the good of the people within them. Thus, denying the freedom of a religious institution denies the dignity of those associated with it.

Proactive Public Policy

Institutional religious freedom requires proactive public policy, which respects and promotes the existence in society of a plurality of organizations acting in accordance with their fundamental convictions. The government should avoid mandating the practice of secularism or of any one belief system to the detriment of others. It should also protect groups with unpopular beliefs. The government's overarching policy objective in this area should be to minimize conflict and harm while maximizing the ability of persons

and organizations to live consistently with their respective religions and philosophies. Advocates for religious freedom must undertake the practical tasks of lobbying for the passage of legislation and urging executive action at the national, state/provincial, and municipal levels that give due attention to institutional religious freedom.

Litigation and Other Legal Action

In the United States, following developments in Canada and elsewhere, recent government rules embracing new understandings on family and sexuality have placed direct and indirect pressures on religious institutions to violate longstanding religious doctrines in their programs and ministries. This unsettling trend contributes to the proliferation of litigation in U.S. courts. At stake in these cases is the freedom of religious institutions to order their internal affairs (e.g., doctrines, mission, employment standards, leadership) as well as their external affairs (e.g., expressing their faith through ministries designed to provide health care, education, and/or care for the poor and vulnerable).

Conclusion

As Western governments continue to expand in their regulation of society, purportedly neutral, generally applicable rules will impose increasing burdens on religious institutions that dissent from the prevailing beliefs undergirding these rules. Proactive pluralistic policies, therefore, will be more important than ever in Western societies going forward. A firm commitment to institutional religious freedom should be a centerpiece of those policies.

2 Overview

> ***"In order to combat current trends vitiating religious freedom, sound policy proposals must include concerted intellectual efforts that raise foundational matters in political debate, popular media, and secondary and higher education.***

Every public policy dispute can be traced to, *inter alia*, differing views of the world. This is especially so with disputes over institutional religious freedom. Hence, good policy in this area depends on developing rigorous background arguments that foster recognition of these differing worldviews. However, crafting policy to protect the freedom of religious institutions must also be informed by immediate and pragmatic concerns. Such concerns are particularly urgent today, though for paradoxical reasons. In recent years, the understanding of institutional religious freedom has evolved and become the subject of intense controversy, even while the occasions for protecting it have become more numerous.

In order to combat current trends vitiating religious freedom, sound policy proposals must include concerted intellectual efforts that raise foundational matters in political debate, popular media, and secondary and higher education. First, proponents of religious freedom must address the nature of religion itself, including its wide-ranging expressions in public life. Second, they need to clarify the importance of corporate as well as individual rights. Third, they must explain the distinct nature and significance of public policy formulation and litigation for securing religious liberty in general, and institutional religious freedom in particular. And a fourth, proponents of freedom of religion should provide insight into the internal and external aspects of religious institutions in terms of the religious beliefs upon which they are organized and the ways they serve the broader community.

3 Religions: Central, Public and Wide-Ranging

The notion of religion is often truncated in the modern age, but there are good grounds for holding a capacious view of what counts as religion and, therefore, as a religious institution. We suggest a reworking of Daniel Philpott's definition as follows: "Religion is an interconnected set of beliefs and practices through which people answer the grand questions of life by seeking to live in relationship to the ultimate power or powers that grounds reality and is present to them in the real circumstances of their lives. They do this most characteristically through worship and similar practices seeking a connection with the divine. Religion typically involves related rituals, a community, a clerical professional, and a moral code grounded in the sacred realm."[1] This definition is not tight. Definitions of religion can usually be either accurate or precise, but not both. However, it does capture what most scholars and ordinary people think of as religion, while also including a range of fundamental beliefs that function "like religion."

Turning now to the category of religious institutions, it includes far more than churches, temples, or seminaries. It also encompasses those bodies that are shaped by, *inter alia*, religious beliefs. With this understanding of religion in mind, a shorthand description of a religious institution—whether a worship congregation, faith-based university, religious hospital, or foster care ministry—is an association that is shaped by a particular set of beliefs and practices oriented to ultimate questions of reality.

With recent understandings of secularization, there is increased pressure to exclude religious influences and convictions in society. Religion is said to be private, or else (according to secularism) should be required to be private—not merely in the sense that we might refer to a company, university, school, or charity as private, that is, non-governmental, rather than public, but as something more akin to "intimate," something that does not impinge on or make legitimate contributions to public life. Hence, contemporary calls for religious toleration often imply restricting the scope of religion. Adopting one of John Locke's arguments for toleration, these voices believe that religion may be tolerated because it is understood to be personal and largely irrelevant to our common life in society.

And yet, both America's and Canada's founding documents, and those of many other countries, reference the *public* significance of religion. The first paragraph of the American Declaration of Independence refers to the "Laws of Nature and of Nature's God" and holds that "all men are created equal, that they are endowed by their Creator with certain unalienable Rights...." The Declaration does not simply state that all humans "are equal" but sets forth the proposition that they "are *created* equal." Equality is held to stem from the fact that God made us. More recently, the Preamble to Canada's 1982 Constitution Act states that "Canada is founded upon principles that recognize the supremacy of God and the rule of law."

The idea that religion should be excluded from public life leads to what Charles Taylor described as a public arena "allegedly emptied of God, or of any reference to ultimate reality."[2] Taylor further observed:

> [A]s we [who are denizens of the modern Western world] function within various spheres of activity—economic, political, cultural, educational, professional, recreational—the norms and principles we follow, the deliberations we engage in, generally don't refer us to God or to any religious beliefs; the considerations we act on are internal to the "rationality" of each sphere—maximum gain within the economy, the greatest benefit to the greatest number in the political area, and so on. This is in striking contrast to earlier periods....[3]

The exclusion of religion from public life, in turn, undercuts the belief that churches, synagogues, mosques, temples, or other religious institutions are independent sources of authority and action in society, the freedom of which must be zealously guarded.

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And yet, religions normally have within them laws, practices, and ethical demands, usually including humanitarian concerns, which might even be given priority over prayers or sacrifices or doctrinal learning.[4] Religion can never be totally relegated to a private existence. Religious practices inexorably reach outward to the broader world. One of the most famous examples of this attribute of religion can be found in the first chapter of Isaiah, where worship is rejected unless the people: "Learn to do right; seek justice. Defend the oppressed. Take up the cause of the fatherless; plead the case of the widow." (Isaiah 1:17) Also, as the letter from the Apostle James puts it: "Religion that is pure and undefiled before God the Father is this: to visit orphans and widows in their affliction…" (James 1:27). Furthermore, one of the five Pillars of Islam is the duty to pay *Zakat*, or charitable contribution. *Zakat* is sometimes ranked as next after *Salat*, or prayer, in importance. In sum, the practice of charity is simultaneously both a humanitarian act and a religious act.

Similarly, the Christian Democratic parties of Europe and Latin American claim both religious inspiration and political aspiration and hold religiously shaped but genuinely public policy agendas. The Centrist Democrat International, formerly known as the Christian Democrat International, is the largest grouping of political parties in the world. Its membership consists of 94 parties from 73 countries. All of this is to say that religions do not live in a corner, in a private realm, confined to a Sunday or Sabbath, to be enacted only at Yom Kippur or Ramadan. They have the potential to permeate and shape human life in its entirety. They are, for good and evil, at the core of human life.

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4 Rights Are Individual and Institutional

A diminished understanding of religion and its role in society, coupled with strong convictions about the dignity and agency of human beings as *imago dei*—convictions that, paradoxically, derive from a Christian anthropology[5]—leads to an increasing emphasis on human autonomy. Many current policy debates are predicated on the notion of a sensate, autonomous, and expressive "self." Consequently, Christian and other religious beliefs that would restrict certain areas of human autonomy are often treated as repressive and harmful. This negative view of religious beliefs often comes to the fore with respect to Christian social service agencies in matters relating to sexual and medical issues. This change is most apparent in elite sentiment toward traditional religious norms, which in the United States has fueled attacks on the Religious Freedom Restoration Act (RFRA) in recent years. In the space of 30 years, RFRA has gone from being passed unanimously in the U.S. House of Representatives as an uncontroversial and essential defense of religious freedom to being regarded as so problematic that the Equality Act,[6] which the House passed in February 2021, stipulates that "[RFRA] shall not provide a legal basis for a claim" against a charge of discrimination on the basis of sexual orientation and gender identity (SOGI).

In the United States, this emphasis on individual rights has resulted in what Mary Ann Glendon has described as an "excessive homage to individual independence and self-sufficiency" and a focus on the "individual and the state at the expense of the intermediate groups of civil society."[7] This misguided focus, in turn, makes it "extremely difficult for us to develop an adequate conceptual apparatus for taking into account the sorts of groups within which human character, competence, and capacity for citizenship are formed…."[8] Further, Glendon argued, "individual freedom

and the general welfare alike depend on the condition of the fine texture of civil society—on a fragile ecology for which we have no name."[9] Even Michael Ignatieff, who holds that all rights are finally individual, nevertheless cautions that an exclusive focus on individual human rights as the source of political norms can become idolatry.[10]

In contrast to this exclusive individual rights focus, institutions in the West have held analogous rights for millennia. Some of these institutions, of course, have been subordinate political entities, such as cities, towns, villages, and colonies that were granted charters to exercise rights and powers or else were founded on a covenant and oath.[11] However, such rights have been and are held by more than governmental entities. The Roman Catholic Church had the right to own land, carry out ecclesiastical trials, choose or appoint leaders, determine doctrine, grant academic credentials, run hospitals and schools, and perform multifarious functions related to the lives of its members or constituents and even to those outside its own membership. As noted legal historian Howard Berman wrote: "The competition between the ecclesiastical and the secular court had a lasting effect on the Western legal tradition. Plural jurisdiction and plural legal systems became a hallmark of Western legality.... Underlying the competition [between church and state] ... was the limitation of the jurisdiction of each."[12]

Other organizations, such as guilds and professional societies, also had rights to determine the training, qualifications, and character needed to hold membership and perform particular lines of work. Such organizations were understood as much more than merely protectors of work and income. The term "profession" itself partly derives from the profession of faith and commitment—one analogous to entering a monastic order—that a candidate made on entry into the guild.[13] Accordingly, often there was no sharp distinction between a religious body and an economic one. While this sense of meaning has been weakened in the modern era, aspects of it remain. For example, entering into professions such as medicine and law often requires formal commitments to certain rules and standards, including ethical ones. These fields also maintain their own governing bodies, which have the authority to take disciplinary action in response to violations of their rules and standards. Trade unions have exercised some similar functions. Hence, it is evident that legal rights have long been held by institutions in the United States and elsewhere.[14]

5 Importance of Religious Institutions

There are at least four reasons for recognizing the importance and validity of institutional religious freedom. First, religious institutions do a vast amount of good work. As Lester Salamon has observed, "Religious institutions are near the epicenter of American philanthropy: they absorb well over half of all private charitable contributions, and account for a disproportionate share of the private voluntary effort...."[15]

To get a sense of the magnitude of the work of religious organizations, here are some statistics describing *only* Catholic educational and humanitarian activities in 2018:

> *Catholic Schools and Education*: In the field of education, the Catholic Church runs 72,826 kindergartens with 7,313,370 pupils; 96,573 primary schools with 35,125,124 pupils; 47,862 secondary schools with 19,956,347 pupils. The Church also cares for 2,509,457 high school pupils, and 3,049,548 university students.[16]
>
> *Catholic Charity and Healthcare Centers*: The Church also operates charity and healthcare centers on a massive scale globally: 5,287 hospitals, most of them in America (1,530) and Africa (1,321); 15,937 dispensaries, mainly in Africa (5,177); America (4,430) and Asia (3,300); 610 Care Homes for people with leprosy, mainly in Asia (352) and Africa (192); 15,722 Homes for the elderly, or the chronically ill or people with a disability, mainly in Europe (8,127) and America (3,763); 9,552 orphanages, mainly in Asia (3,660); 11,758 creches, mainly in Asia (3,295) and America (3,191); 13,897 marriage counselling centers, mainly in Europe (5,664) and America (4,984); 3,506 social rehabilitation centers and 35,746 other kinds of institutions.[17]

Second, these organizations contribute to the good of their own leaders, staff, volunteers, and supporters. While the institution may have rights and

freedoms, it is not the institution that feels happy or sad, empowered or distraught—it is its living members and supporters who do so, and they are the ones who will suffer if the organization is denied its religious freedom. Unnecessarily restricting a religious institution is a crushing blow to the lives of the people who are within it and amounts to a denial of their dignity.

Third, institutional religious freedom helps maintain a network of robust, varied organizations that are essential to the wider aim of maintaining a healthy civil society. Apart from the economic and humanitarian benefits noted above, they provide a range of opportunities for many kinds of civic participation and enable the pursuit of social purposes that would not exist if most activities were simply administered by the state. They can also help to mitigate pervasive social alienation and keep society varied and vibrant.

Similar observations can apply to for-profit institutions that operate based on faith commitments. As Monsma and Carlson-Thies point out, "the nonprofit vs for-profit distinction is a less real distinction than is commonly assumed. It is one made by the Internal Revenue Service to determine an organization's tax status. It does not rest on a fundamental difference in the nature of entities."[18] The brief filed by Hobby Lobby before the Supreme Court states:

> The government agrees that a Jewish *individual* could exercise religion while operating a kosher butcher shop as a sole proprietor. Presumably, he could continue to exercise religion if he formed a general partnership with his brother. But the government says the ability of this religiously observant butcher to exercise his faith abruptly ends … at the moment of incorporation, even though he engages in the exact same activities as before.[19]

In its *Burwell v. Hobby Lobby* decision, the Supreme Court went against the government's view. The Court held that by protecting a religion-based decision of the Hobby Lobby company it was protecting the religious exercise of the company's owners.[20]

A fourth reason stems from the aforementioned description of religion. In religion, people are seeking to order their lives according to what they believe to be true and good. Ultimately, people are religious beings and religion is, thus, an integral part of human life. Denying religious freedom denies many people's deepest sense of identity and existential judgement on how best to live in the world. Similarly, denying religious freedom to a religious institution denies its nature as a faith-shaped enterprise, thereby subverting its work and its ability to follow its religious mission. By their nature, religious institutions are tied to a purpose, a calling, a vocation. If that calling is denied or undermined, the institution loses its raison d'être.[21] As Cécile Laborde notes, "A religious association that is unable to insist on adherence to its own religious tenets as a condition of membership is unable to be a religious association."[22]

6 Proactive Policy

As Stanley Carlson-Thies has argued, institutional religious freedom is *contextual* and in a diverse society requires more than legal protection for unpopular acts of institutional religious exercise, such as an exemption from a statutory requirement. It requires creative acts of pluralistic public policy through which the government affirmatively protects multiple rights and freedoms. Such efforts make it possible for organizations and people with different, even conflicting, convictions to live side-by-side.

If institutional religious freedom is fully to protect the religious exercise of organizations in our day, it must enable an Islamic school not only to reject the teaching candidate who does not sufficiently understand Islamic doctrine but also the candidate whose sexuality is inconsistent with that doctrine; an evangelical Protestant college not only to require all students to attend its weekly chapel services but also to abide by the college's policy that males and females shall live in separate residence halls; and a Catholic hospital not only to display crucifixes but also to refuse to offer elective abortions. Creative, pluralistic public policies, rather than a winner-takes-all approach of enforcing the deep convictions of one side while suppressing the other side, are necessary to safeguard the religious freedom of faith-based institutions in a diverse society.

There are two aspects of these pluralist policies. First, as in classical religious freedom policy, the government should refuse to make secularism or any religion obligatory throughout society. Instead, it should protect the freedom of people and organizations to follow their respective religions while placing such limits on religious exercise as are needed to protect others (e.g., no child sacrifice; no loud bell ringing at all hours in a neighborhood). People

and organizations must be free, within broad limits, to observe and teach what they are sure is true, but they may not enforce their convictions on their fellow citizens who do not share them. The same approach with respect to our contemporary disagreements about sexuality, marriage, and life would require the government to refrain from making new progressive, majoritarian views obligatory for everyone. Not only is there no agreement on these views, but there are major issues at stake that are matters of fundamental religious significance for many faith communities. Government mandates will not be able to overcome this fact simply by legislative enactment or judicial decree.

By not requiring all private organizations to follow the values and practices of just one among many religious and moral communities (or by taking over the area of service and thus requiring "secularism"—itself just a single option among many), the government enacts a "negative" pluralist policy, a policy of restraint for the government and freedom for the organizations. Although it is "negative," it is never a purely hands-off policy: the government may need to act to protect the operations of some unpopular organization from the ire of powerful social forces or to adjudicate between competing interests.

Second, a pluralist approach requires governmental action to protect views and practices that are unpopular. This approach also requires "positive" action—boundary setting—to forestall disputes and conflicts as far as possible and to prevent harms by restricting the scope of freedom in particular spheres. The goal is not to enforce one set of views and practices and to suppress the others in these disputed moral and ethical areas. Rather, it is to allow people and organizations of opposing moral communities the freedom they need to live according to their deep convictions without denying to others the same freedom.

This more active, positive policy is likely to be necessary because of the many interests involved and the many places where differences and conflicts can occur. Carefully designed pluralist policy, encompassing these negative and positive elements, is needed in our diverse and complex society in order to minimize conflict and harm while maximizing the ability of persons and organizations to live consistently with their respective religions and philosophies. Federally funded child care for low-income families is a good example. The Child Care and Development Block Grant Act of 1990 was specifically designed so that parents who desire child care that includes religious activities can select such care while parents looking for non-religious care can find those options as well.

In the disputed area of sexual orientation and gender identity (SOGI) policies and religious freedom, one matter of contention has been the freedom of religious organizations to place foster and adoptive children in homes that are representative of their faith's teachings on marriage and family when those teachings preclude placements with same-sex couples. In recent years, some jurisdictions, such as Michigan[23] and the City of Philadelphia,[24] have tried to drive these faith-based organizations out of the adoption and foster care sector entirely. In contrast, a positive-pluralist policy would aim to uphold

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a thriving marketplace of faith-based and secular agencies. Since many child welfare services already involve some federal government support (e.g., through grants, training, and technical assistance programs),[25] instituting a voucher system, like that of the federally funded child care program mentioned above, could enhance federal child welfare policy by allowing funds to follow the choice of provider made by those seeking to adopt or foster children. In such an approach, the federal government is operating as a facilitator of the well-being of children but without intervening unnecessarily in the important decisions of the families and providers working on the ground. In sum, a positive-pluralist policy seeks actively to respect the rights and obligations of all parties—public and private, religious and secular—involved in foster care and adoption while maintaining as its top priority the securing of healthy and safe homes for vulnerable children.

Proactive action by the government also requires proactive analysis and lobbying by religious freedom advocates. As Carlson-Thies has observed, there is often among religious groups much discussion of court decisions, litigation strategies, and constitutional interpretive frameworks, which are, of course, vitally important. However, there is comparatively less discussion about what legislators are doing, and think they are doing, in their lawmaking, and how they can be helped to understand the impact of their decisions and be influenced to be more friendly to religious freedom. Often, legislative restrictions on religious freedom can stem not from antipathy but from ignorance of a law's likely effects.

Similarly, there is also comparatively less attention to what government executives at national, state or provincial, and municipal levels do in their implementation of laws, and how these government officials can be influenced. Carlson-Thies notes that "to focus on the law and litigation, as much as I respect the law and lawyers, is to leave religious freedom bound to precedent, confining options to the existing framework, and neglecting how the law and interpretive frameworks ought to be challenged and changed to create more favorable circumstances for religion in personal lives and institutional life, and more favorable circumstances for litigation to defend religious freedom."[26]

Carlson-Thies adds, "For example, does the [Canadian] Trinity Western law school fight indicate the need for and possibility of changes to how Canadian higher education institutions are chartered, regulated, accredited? Don't other disappointing labor relations cases suggest that a major, if very long term and seemingly impossible, task should be to revise federal and provincial labor law to be much more friendly to religious organizations?"[27]

7 Litigation and Other Legal Action

To argue that religious liberty proponents must seek to shape policy in the legislative and regulatory domains, and thus avoid undue preoccupation with the courts, is certainly not to suggest that litigation is unimportant. Litigation, which has long been a common strategy in the United States (where it sometimes appears to be a national pastime), is also increasing elsewhere in the Western world. Take, for example, the Canadian case just alluded to in the previous paragraph involving Trinity Western University (TWU). In 2015, TWU sought to secure accreditation by bar associations for its law school graduates. TWU litigated this matter, facing four lawsuits in three jurisdictions simultaneously.[28] Canada is by no means alone in joining the United States in this regard. Religious freedom litigation is now also relatively common in Sweden and the United Kingdom.

In some other European countries, however, it remains less common. One reason, Thomas Schirrmacher suggests, is that "in several European countries, such as Germany, accommodation is part of the legal system itself." Hence the types of problems that occur in the United Kingdom or United States can be avoided. When people have a moral problem with something that, for example, offends their religious beliefs in their employment, the "government or an employer first is obliged to find an internal solution, e.g. offer an officer, who does not want to do same-sex weddings, another job in the government. Christians are used to it and take part in it. This is true in most European countries." He adds: "those countries where accommodation is not something that the courts expect first, also tend to have a Christian community that is much quicker in going to court, as, for example, Sweden and UK."[29]

However, in the English-speaking world, especially in the United States, legal disputes over institutional religious

freedom are becoming more frequent. One major area of contention is whether religious organizations forfeit certain rights and freedoms when they seek to hire from, or serve, the larger community and run ministries that extend into areas of government activity and concern. These disputes have proliferated as a result of recent government rules embracing new doctrines on family and sexuality, which have placed direct and indirect pressures on religious institutions to violate longstanding religious doctrines in their programs and ministries. For example, religious institutions have challenged government requirements mandating foster care agencies to certify same-sex couples as foster parents,[30] the inclusion of contraception and abortion in employee health care plans,[31] and the provision of medical services that violate core religious doctrines.[32] Two key areas of policy dispute can thus be characterized as the freedom of religious institutions to: (1) govern their internal affairs and (2) serve the larger community in accord with their faith tenets.

7.1 *Internal Institutional Governance*

Even in countries with a strong commitment to the freedom of religious groups to govern their internal affairs, litigation often arises over the boundaries of the private and public aspects of institutional life. For example, in July 2020 in *Our Lady of Guadalupe School v. Morrissey-Berru*, the United States Supreme Court addressed whether a ministerial exception to employment discrimination laws extends to lay teachers of religion in religious schools, even when most of their time is spent teaching "secular" subjects.[33] The Court supported a broad understanding of institutional autonomy based on whether government interference would endanger the ability of the group to define its beliefs and mission.

U.S. federal and state laws prohibit religious discrimination in employment but allow religious groups to favor their own co-religionists when making employment decisions.[34] However, there is disagreement over whether this exemption also permits religious organizations to require employees to adhere to specific doctrinal and moral tenets, particularly if doing so would violate prohibitions against discrimination based on sexual orientation or gender identity.[35] By emphasizing the fundamental freedom of religious groups to define and develop their own faith and mission, the Court's decision in *Guadalupe* lays the groundwork for broad constitutional protections for such decision making. Without the ability to shape employment relationships and other activities according to their religious doctrine, religious organizations would not be free to define and preserve their own beliefs. Their freedom, subsequently, would be illusory. While courts may properly evaluate the sincerity of religious claims, they should defer to religious institutions about what their own beliefs are and the community standards that are necessary to model and sustain them.

The global response to the COVID-19 pandemic highlights these issues, particularly in public policies governing the opening of facilities. Governments should certainly take steps to protect public health in cases where crowded services without adequate safety precautions would put at risk the lives of those inside and outside the congregation. However, in some cases, government restrictions have favored some faiths over others or have become opportunities for religious suppression. In the United States, most litigation has focused not on securing religious exemptions for congregations that seek to avoid pandemic-related restrictions but on whether governments, in the course of establishing and enforcing those restrictions, have subjected religious institutions to more onerous rules than similarly situated secular activities. However, the willingness of most Supreme Court justices to find religious discrimination in recent COVID-19 cases suggests that the Court is also concerned about the restrictions themselves.[36]

7.2 *External Religious Activity*

Another area of contentious legal dispute involves situations in which religious institutions extend their activities into the larger community, both to share and express their faith through ministries designed to provide health care, education, and care for the poor and vulnerable, which are fundamental aspects of institutional religious practice for many faith communities. At the same time, governments have an interest in ensuring that social needs are met and often regulate, and sometimes fund, the work of religious institutions in the fields of education, medicine, and other charitable ventures. However, with deepening moral divisions over family and sexuality, new government rules have led to intense controversies that pit religious groups with traditional views against government regulations.

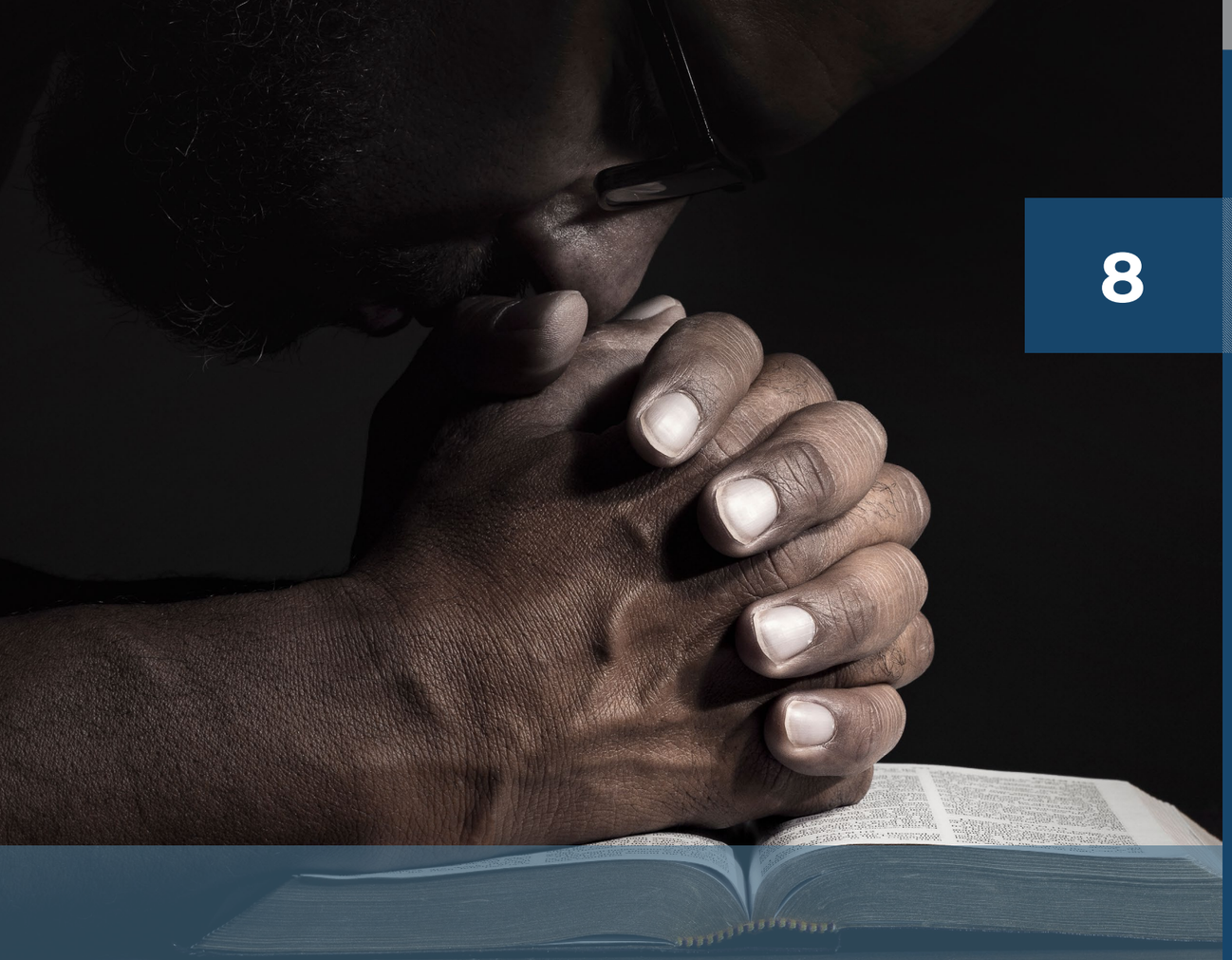
These controversies have led to legislative and administrative battles as well as litigation over government regulations. Included among these disputes are those emerging from the creation of new conditions for receiving government funding that are designed to exert pressure on religious groups to change or abandon some of their religious beliefs.[37] As mentioned previously, religious adoption and foster care agencies with traditional beliefs about marriage have sought exemptions from licensing and contracting rules that prohibit discrimination on the basis of sexual orientation. Religious hospitals have

fought the possible loss of government funding for refusing to offer gender-transition procedures,[38] and they have defended themselves in private lawsuits brought under antidiscrimination laws by people who identify as transgender.[39] Moral divisions over marriage, sexuality, contraception, and abortion have also generated controversy over employment benefits, especially where religious organizations employ those from outside their faith.

While religious litigants have naturally focused on statutory law and constitutional doctrine, the future development of religious liberty protections should also address the full range of principles at stake. When religious institutions and governments fight over the regulation of social ministries, they both have important, though not necessarily equally important, interests at stake. When governments work with religious organizations, they do so to achieve public ends, and the criteria for their grants and contracts naturally reflect their own priorities and values. On the other hand, the social ministries of religious organizations are essential expressions of their faith. Religious participation in the provision of social services also predates the expansion of government involvement in these areas of social need. Further, religious hospitals cannot survive—and, as importantly, cannot serve the elderly and the poor to the same degree—without Medicare and Medicaid reimbursements. In the future, governments may also threaten religious groups with the loss of tax-exempt status. In sum, restrictions that pressure faith-based organizations to conform to government positions on contested moral issues can detract from the common good. Religious programs play a vital and distinctive role in the provision of social services, and their exclusion deprives the larger community of their indispensable contributions, including the diversity of perspectives they offer.[40]

Since, inevitably, the field of social services constitutes a broad area of overlapping concern for both religious groups and governments, statutory and constitutional law should accommodate the interests and roles of both to the greatest extent possible. In most cases, policymakers with appreciation for the concerns of religious groups and governments can craft compromises that address the most pressing needs of each side (even if neither side gets everything they want). For example, if there are insufficient providers willing to work with same-sex couples, the government could take steps to generate additional avenues for fostering, such as operating a public program, incentivizing private providers, or both. Where religious groups object to covering specific benefits in their health plans on religious grounds, governments could arrange for coverage through public programs, or incentivize or otherwise coordinate with private actors to fill in the gaps.

“In sum, restrictions that pressure faith-based organizations to conform to government positions on contested moral issues can detract from the common good. Religious programs play a vital and distinctive role in the provision of social services, and their exclusion deprives the larger community of their indispensable contributions, including the diversity of perspectives they offer.



Conclusion

> *Failure to recognize the central, public, and wide-ranging nature of religion contributes to many of the most charged disputes over religious freedom in the United States, Canada, and other Western countries today.*

8

Conclusion

A public-legal arrangement that protects religious freedom and serves the common good must be informed by an understanding of religion as involving both beliefs *and* practices. Such an arrangement must also reflect a conception of religion as having aspects that are individual *and* institutional, private *and* public, as well as immediate *and* ultimate. Failure to recognize the central, public, and wide-ranging nature of religion contributes to many of the most charged disputes over religious freedom in the United States, Canada, and other Western countries today.

Deepening these challenges, there is a widely held view of human beings as principally autonomous selves who must be left largely unconstrained by external moral limits. When coupled with confusion about the ways in which institutions, and not only individuals, have been proper possessors of rights, one can begin to see some of the ways our present moment has become increasingly inhospitable to institutional religious freedom.

These moral and anthropological misconceptions and legal errors are deeply troubling, but they are only part of the picture. One must consider the costs that curtailing institutional religious freedom would impose by hindering the vast contributions religious institutions make to society. Institutional religious freedom, thus, merits proactive and sustained policy efforts that seek to achieve more than mere legal protection for unpopular acts of institutional religious exercise. Rather, it requires pluralistic public policies through which the government affirmatively protects multiple rights and freedoms simultaneously. Such an approach makes it possible for organizations and people with different, even conflicting, convictions to live side-by-side peaceably.

Ultimately, the policy disputes in this area can be separated into two categories: (1) those dealing with the extent of the freedom religious institutions have to govern their internal affairs and (2) those dealing with the extent of their freedom to serve the larger community in accord with their faith tenets. Contemporary religious freedom cases abound in which both categories are challenged.

To encourage positive policy solutions in disputes over the nature and scope of institutional religious freedom, which will often involve compromise, governments should accommodate sincere religious beliefs and practices whenever possible. For

example, religious hospitals opposed to abortion or gender transition procedures should not be compelled to facilitate or allow them on their premises—in other words, a society's law and policy should secure their freedom to promote and pursue modes of care that align with their deepest faith commitments. Even if a government identifies a legal right (via legislative, regulatory, or judicial processes) for its citizens to pursue such procedures, it is a different matter altogether whether that same government has a corresponding duty to compel non-governmental organizations, especially religious ones, to participate in the fulfillment of that right. Indeed, in the vast majority of circumstances, government has no such duty and would be committing a grievous error in ignoring the distinct nature, purposes, and dignity of those non-state institutions it aims to co-opt for its own ends.

Notwithstanding existing legal protections for religious freedom in the United States, Canada, and other Western countries, litigation remains a vital arena in which institutional religious freedom must be defended. Current legal disputes have proliferated for many reasons. Foremost among them is the expansion of government rules advancing new doctrines regarding human life, family, and sexuality, which continue to place direct and indirect pressures on religious institutions to violate longstanding religious doctrines in their programs and ministries. This development is likely to continue.

The legal foundation of any rightly ordered political community carries a presumption in favor of religious freedom. Should an extraordinary circumstance arise in which there is no way for the government to accommodate an individual's or institution's religious convictions without undermining its own core purposes, the government bears the burden of proving it. Recognition of this burden firmly grounds legal protections for religious liberty while also accounting for other legitimate public aims. And it encourages government officials to engage with religious groups to find mutually acceptable compromises for resolving conflicts whenever possible.

On the other side, many religious institutions are not sufficiently aware of the government's full range of rules and responsibilities in particular spheres and circumstances. It is, therefore, important that they educate their members to find ways, whenever possible, to avoid conflicts with government rules without compromising their core religious tenets.

As Western governments continue to expand their regulation of society, purportedly neutral, generally applicable rules can be expected to impose increasing burdens on religious institutions that dissent from the prevailing beliefs that undergird these rules. Proactive pluralistic policies, therefore, will be more important than ever in Western societies going forward. A firm commitment to institutional religious freedom should be a centerpiece of those policies.

Endnotes

1 Daniel Philpott's original formulation defines religion as: "an interconnected set of beliefs and practices through which people answer the grand questions of life by seeking to live in harmony with a superhuman power that intervenes in real circumstances in their life. They do this most characteristically through worship." Daniel Philpott, *Religious Freedom in Islam* (New York: Oxford University Press, 2019), 22.

2 Charles Taylor, *A Secular Age* (Cambridge, MA: Belknap Press of Harvard University Press, 2007), 2.

3 Ibid., 2.

4 For examples, see Stephen V. Monsma and Stanley W. Carlson-Thies, *Free to Serve: Protecting the Religious Freedom of Faith-Based Organizations* (Grand Rapids: Brazos Press, 2015), ch. 4. See also Francis Beckwith, "Gotta Serve Somebody? Religious Liberty, Freedom of Conscience, and Religion as Comprehensive Doctrine," *Studies in Christian Ethics* 33, no. 2 (May 2020): 168-178, doi:10.1177/0953946819896418.

5 Cf. Larry Siedentop, *Inventing the Individual: The Origins of Western Liberalism* (Cambridge, MA: Belknap Press of Harvard University Press, 2014); Tom Holland, *Dominion: How the Christian Revolution Remade the World* (New York: Basic Books, 2019).

6 H.R. 5 ("Equality Act") was introduced in the 117th Congress and would expand federal civil rights categories to include sexual orientation and gender identity, https://www.congress.gov/bill/117th-congress/house-bill/5.

7 Mary Ann Glendon, *Rights Talk: The Impoverishment of Political Discourse* (New York: Basic Books, 1991), x-xi, 14. See also Bruce Frohnen and Kenneth L. Grasso, eds., *Rethinking Rights: Historical, Political, and Philosophical Perspectives* (Columbia: University of Missouri Press, 2009). More recently David Little developed an overview of rights based on the foundational notion of self-defense. See "Reflecting on Self-Defense as a Human Right: A Canopy Forum Thematic Series," Summer 2020, https://canopyforum.org/self-defense-and-human-rights/.

8 Glendon, *Rights Talk*, 109. Of course, not all organizations in civil society exist to form human character and civic virtue. Similar individualistic themes have occurred in attempts to import the notion of rights into environmental discussions, where they can be in tension with ecological concerns: see Paul Marshall, "Do Animals Have Rights?" *Studies in Christian Ethics* 6, no. 2 (August 1993): 31-49, doi:10.1177/095394689300600203.

9 Ibid., 110.

10 Michael Ignatieff, et al., *Human Rights as Politics & Idolatry* (Princeton, NJ: Princeton University Press, 2003).

11 Harold Berman, *Law and Revolution: The Formation of the Western Legal Tradition* (Cambridge: Harvard University Press, 1983), 393.

12 Ibid., 268-269. For expositions of this idea, see also Steven D. Smith, "The Jurisdictional Conception of Church Autonomy," and Richard W. Garnett, "The Freedom of the Church: (Toward an) Exposition, Translation, and Defense," in Chad Flanders, Micah Schwartzman, and Zöe Robinson, eds., *The Rise of Corporate Religious Liberty* (New York: Oxford University Press, 2016), 19-37, 39-62.

13 From the Old French p*rofession*: a twelfth century word deriving from the Latin *professionem* (nominative *professio*), which means a "public declaration."

14 See Micah Schwartzman, Chad Flanders, and Zoë Robinson, eds., *The Rise of Corporate Religious Liberty* (New York: Oxford University Press, 2016); Victor M. Muñis-Fraticelli, *The Structure of Pluralism: On the Authority of Associations* (New York: Oxford University Press, 2014); and the overall writings of Richard Garnett and Steven D. Smith.

15 Quoted in Monsma and Carlson-Thies, *Free to Serve*, 8.

16 "Catholic Church Statistics," *Agenzia Fides*, October 21, 2018, 4, http://www.fides.org/de/attachments/view/file/Dossier_Statistiche2018_FIDES_ENG.pdf.

17 Ibid., 4. See also Brian J. Grim, "The Earthly Good of Being Heavenly Minded: The Economic Value of US Religion," *University of St. Thomas Law Journal* 15, no. 3 (June 2019): 607-641, https://ir.stthomas.edu/ustlj/vol15/iss3/5/.

18 Monsma and Carlson-Thies, *Free to Serve*, 61.

19 Ibid., 62-63.

20 *Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. 682 (2014), majority opinion, 18, https://www.supremecourt.gov/opinions/13pdf/13-354_olp1.pdf.

21 As Victor M. Muñis-Fraticelli states: "To put it in crude and oversimplified terms, to be a Roman Catholic involves, at a constitutive level, submission to the Magisterium, the teaching function of the Church carried out by the Pope and the bishops. To deny this authority is not to be a bad Catholic; it is to be a Protestant. Likewise, to deny the binding authority of halakha (and of the battei din who interpret it) and assert the primacy of the individual conscience on matters of Jewish law is not to be a bad Orthodox Jew, but to be a Reformed Jew." Muñis-Fraticelli, *The Structure of Pluralism: On the Authority of Associations*, 54.

22 Cécile Laborde, *Liberalism's Religion* (Cambridge, MA: Harvard University Press, 2017), 179.

23 See, for example, efforts in 2019 by the Michigan state attorney general to bar certain religious organizations in the state from providing adoption and foster care services due to their faith convictions about marriage and family. Vanessa Romo, "State-Funded Adoption Agencies in Michigan Barred From Refusing LGBTQ Parents," *NPR*, March 22, 2019, https://www.npr.org/2019/03/22/706049119/state-funded-adoption-agencies-in-michigan-barred-from-refusing-lgbtq-parents; "Foster families win big in Michigan court," The Becket Fund for Religious Liberty (Press Release), September 26, 2019, https://www.becketlaw.org/media/foster-families-win-big-michigan-court/.

24 See, for example, restrictions the City of Philadelphia put in place, which prompted litigation that culminated in the U.S. Supreme Court case, *Fulton v. Philadelphia*, 593 U. S. ___ (2021), https://www.supremecourt.gov/opinions/20pdf/19-123_g3bi.pdf. The *Fulton* decision addressed a city policy that was antithetical to the pluralist policy framework put forth in this report. In March 2018, the City of Philadelphia suspended the foster care program of Catholic Social Services of Philadelphia (CSS). The ministries of CSS and its predecessors run by the Archdiocese of Philadelphia had successfully served vulnerable children in the city for more than a century. Notwithstanding this good work, the city maintained that CSS's religious beliefs about marriage and subsequent unwillingness to certify same-sex couples for foster homes was a violation of its SOGI nondiscrimination policy. The Court ruled unanimously in June 2021 in favor of CSS and the families it serves. Notwithstanding the unanimous decision in favor of the appellants, appraisals of the decision have varied significantly, given the narrow and local grounds on which it was decided. FORIS scholars responded to the *Fulton* decision as follows: Thomas Farr, "High Court Favors Plaintiffs in Fulton … But Fails to Affirm Religious Freedom for All Americans," *Religious Freedom Institute Blog*, June 22, 2021, https://www.religiousfreedominstitute.org/blog/high-court-favors-plaintiffs-in-fulton; Richard W. Garnett, "After Fulton, Religious Foster Care Agencies Still Vulnerable," *First Things*, June 22, 2021, https://www.firstthings.com/web-exclusives/2021/06/after-fulton-religious-foster-care-agencies-still-vulnerable; Mark Rienzi, "The Supreme Court Unanimously Protects Religious Foster Agencies," *RealClearReligion*, June 28, 2021, https://www.realclearreligion.org/articles/2021/06/28/the_supreme_court_unanimously_protects_religious_foster_agencies_783049.html; and Stanley Carlson-Thies, "Fulton v. City of Philadelphia: Supreme Court Upholds Civic Pluralism for Our Diverse Society," *IRFA eNews for Faith-based Organizations*, June 29, 2021, https://irfalliance.org/fulton-v-city-of-philadelphia-supreme-court-upholds-civic-pluralism-for-our-diverse-society/.

25 Congressional Research Services, "Child Welfare: An Overview of Federal Programs and Their Current Funding," R43458 (January 18, 2018), https://www.everycrsreport.com/files/20180102_R43458_9a7c2ce137b54096617803ba8c171c543c4575b0.pdf.

26 Stanley Carlson-Thies, personal communication with Paul Marshall (February 2, 2015).

27 Ibid.

28 Robert Kuhn, personal communication with Paul Marshall (January 28, 2015).

29 Thomas Schirrmacher, personal communication with Paul Marshall (May 30, 2015).

30 *Buck v. Gordon*, 429 F. Supp. 3d 447 (W.D. Mich. 2019); *Fulton v. Philadelphia*, 593 U. S. ___ (2021).

31 *Skyline Wesleyan Church v. California Department of Managed Health Care* (9th Circuit, May 13, 2020, amended July 21, 2020), https://cdn.ca9.uscourts.gov/datastore/opinions/2020/07/21/18-55451.pdf; *Roman Catholic Diocese of Albany v. Vullo* (N.Y. App. Div., July 2, 2020), http://nycourts.gov/reporter/3dseries/2020/2020_03707.htm.

32 *Religious Sisters of Mercy v. Azar*, No. 3:16-CV-00386, 2021 WL 191009, at *1 (D.N.D. Jan. 19, 2021); *Franciscan All.*, Inc. v. Azar, 414 F. Supp. 3d 928 (N.D. Tex. 2019).

33 *Our Lady of Guadalupe v. Morrisey-Berru*, 591 U.S. ___ (2020), https://www.supremecourt.gov/opinions/19pdf/19-267_1an2.pdf.

34 Carl H. Esbeck, Stanley W. Carlson-Thies, and Ronald J. Sider, *The Freedom of Faith-Based Organizations to Staff on a Religious Basis* (Washington, D.C.: Center for Public Justice, 2004), http://www.irfalliance.org/resources/religiousstaffing.pdf.

35 Esbeck, "Federal Contractors, Title VII, and LGBT Employment Discrimination: Can Religious Organizations Continue to Staff on a Religious Basis?" *Oxford Journal of Law and Religion* 4, no. 3 (October 2015): 368-97, https://doi.org/10.1093/ojlr/rwv046.

36 See *Roman Catholic Diocese of Brooklyn v. Cuomo*, 592 U.S. ___ (2020), per curiam, https://www.supremecourt.gov/opinions/20pdf/20a87_4g15.pdf; *Tandon v. Newsom*, 593 U. S. ___ (2021), per curiam, https://www.supremecourt.gov/opinions/20pdf/20a151_4g15.pdf. See also Jim Oleske, "Tandon steals Fulton's thunder: The most important free exercise decision since 1990," *SCOTUSblog*, April 15, 2021, https://www.scotusblog.com/2021/04/tandon-steals-fultons-thunder-the-most-important-free-exercise-decision-since-1990/.

37 On the so-called faith-based or partnership initiative, a policy endeavor aimed at ensuring the equal eligibility of religious organizations for federal funding to provide services, see Carlson-Thies, "The Biden Partnerships Plan Is Faith-Based Initiative 5.0," *HistPhil*, March 9, 2021, https://histphil.org/2021/03/09/the-biden-partnerships-plan-is-faith-based-initiative-5-0/. For some historical background, see Carlson-Thies, "Charitable Choice: Bringing Religion Back into American Welfare," in Hugh Heclo and Wilfred McClay, eds., *Religion Returns to the Public Square: Faith and Policy in America* (Washington, D.C.: Woodrow Wilson Center Press; Baltimore: Johns Hopkins University Press: 2003), 269-97.

38 *Franciscan All., Inc. v. Azar; Religious Sisters of Mercy v. Azar* (challenging rules under ACA).

39 *Minton v. Dignity Health*, 252 Cal. Rptr. 3d 616 (Ct. App. 2019).

40 See "Religious Freedom and the Common Good," *University of St. Thomas Law Journal* 15, no. 3 (Spring 2019), https://ir.stthomas.edu/ustlj/vol15/iss3/. This symposium featured Thomas Berg, a FORIS scholar and leading expert on religious freedom issues.

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