

5-1-2021

Covenants to Discriminate: How the Anti-LGBT Policies of Participating Voucher Schools Might Violate the State Action Doctrine

Preston C. Green III

Julie F. Mead

Suzanne E. Eckes

Follow this and additional works at: https://scholars.unh.edu/unh_lr



Part of the [Law Commons](#)

Repository Citation

Preston C. III, Julie F. & Suzanne E., *Covenants to Discriminate: How the Anti-LGBT Policies of Participating Voucher Schools Might Violate the State Action Doctrine*, 19 U.N.H. L. Rev. (2021). available at: https://scholars.unh.edu/unh_lr/vol19/iss2/1

This Article is brought to you for free and open access by the University of New Hampshire – Franklin Pierce School of Law at University of New Hampshire Scholars' Repository. It has been accepted for inclusion in The University of New Hampshire Law Review by an authorized editor of University of New Hampshire Scholars' Repository. For more information, please contact sue.zago@law.unh.edu.



Preston C. Green III, Julie F. Mead, & Suzanne E. Eckes

Covenants to Discriminate: How the Anti-LGBT Policies of Participating Voucher Schools Might Violate the State Action Doctrine

19 U.N.H. L. REV. 163 (2021)

ABSTRACT. This article analyzes the legal arguments that students might make to compel states that subsidize private education through voucher, tax credit scholarship, and ESA programs to offer these programs on an equal basis, regardless of the sexual orientation or gender identity of the student or members of the student’s family. The first section provides an overview of voucher programs and discusses the prevalence of participating schools with anti-LGBT admissions policies. The second section evaluates constitutional challenges that students could make to invalidate the anti-LGBT admissions policies of participating voucher schools under the state action doctrine. Specifically, we explain the possibilities and limitations of various approaches that may be used to challenge the anti-LGBT enrollment policies of participating private schools under the Equal Protection Clause of the Fourteenth Amendment.

AUTHOR.

Preston C. Green – John and Maria Neag Professor of Urban Education, Professor of Educational Leadership and Law, University of Connecticut. The authors thank Bruce Baker, Derek Black, Idun Green, and Steven Nelson for their input and advice on this project.

Julie F. Mead – Professor of Educational Leadership and Policy Analysis, University of Wisconsin-Madison.

Suzanne E. Eckes – Professor of Educational Leadership and Policy Studies, Indiana University.

I. INTRODUCTION.....165

II. OVERVIEW OF SCHOOL VOUCHERS167

III. STATE ACTION CHALLENGES.....172

 A. *Equal Protection* 173

 B. *State Action* 175

IV. CONCLUSION.....192

I. INTRODUCTION

The headlines are troubling:

- “Choice for most: In nation’s largest voucher program, \$16 million went to schools with anti-LGBT policies”¹
- “Anti-LGBT Florida schools getting school vouchers”²
- “Backed by State Money, Georgia Scholarships Go to Schools Barring Gays”³

All tell the same story. Some private schools participating in state programs that provide them with public funding apply admissions policies that prohibit the enrollment of LGBT students or students whose parents are engaged in same-sex relationships.⁴ On at least one occasion, a participating private school has refused to admit a student on account of an anti-LGBT admission policy.⁵ The state-operated programs in question involve types of private school choice programs that provide funding to families that they can use to attend private schools.⁶ These programs include educational vouchers, tuition tax credit scholarships, and educational savings accounts (ESAs).⁷

To date, however, it appears that no student has challenged the legality of an anti-LGBT admission policy,⁸ which begs the question: Why not? The answer may

¹ Julia Donheiser, *Choice for Most: In Nation’s Largest Voucher Program, \$16 Million Went to Schools with Anti-LGBT Policies*, CHALKBEAT (Aug. 10, 2017, 6:30 AM), <https://www.chalkbeat.org/2017/8/10/21107318/choice-for-most-in-nation-s-largest-voucher-program-16-million-went-to-schools-with-anti-lgbt-polic> [https://perma.cc/GD8F-T88E].

² Leslie Postal & Annie Martin, *Anti-LGBT Florida Schools Getting School Vouchers*, ORLANDO SENTINEL (Jan. 23, 2020, 11:24 AM), <https://www.orlandosentinel.com/news/education/os-ne-voucher-schools-lgbtq-discriminate-20200123-s5ue4nvqybgrbrxov5hcb46a4-htmlstory.html> [https://perma.cc/G3KX-Y6AM].

³ Kim Severson, *Backed by State Money, Georgia Scholarships Go to Schools Barring Gays*, N.Y. TIMES (Jan. 20, 2013), <https://www.nytimes.com/2013/01/21/education/georgia-backed-scholarships-benefit-schools-barring-gays.html> [https://perma.cc/XN2C-Y256].

⁴ Postal & Martin, *supra* note 2.

⁵ *Id.* This article provides an example in Section I.

⁶ *Types of Private School Choice Programs*, AM. FED’N FOR CHILD., <https://www.federationforchildren.org/school-choice-america/programs-qualifications/> [https://perma.cc/P46L-67KY]. Although there are several types of private-school-choice programs, this article will use the term “voucher” to encompass all of them.

⁷ *Id.*

⁸ *See, e.g.*, Kate Santich & Annie Martin, *Florida Voucher Critics: Spend Money on Public Schools Instead*, ORLANDO SENTINEL (Feb. 21, 2020, 1:22 PM), <https://www.orlandosentinel.com/news/education/os-ne-black-pastors-school-vouchers-lgbtq-20200221-el5he7pdjvufjmbwau6kcfj5y->

lie in the ways in which these programs blend state actions with private decisions. State actors clearly may not discriminate against LGBT individuals,⁹ but the same is not true of private individuals. This distinction complicates a potential litigant's ability to challenge incidents such as those memorialized in the headlines. Yet, it is likely that at some point students and their families will go to court to challenge their exclusion from one of these schools and the state program that funds it.¹⁰ They will undoubtedly claim that the private schools' admissions policies, when part of a public program, violate the Constitution.¹¹ As such, they will have to prove that the private schools' conduct occurs as a result of state action.¹² The state action doctrine provides that the Constitution only applies to the government and those who act on behalf of a governmental entity.¹³ However, there are exceptions to this rule in which private conduct must comply with the Constitution.¹⁴

This article analyzes the legal arguments that students might make to compel states that subsidize private education through voucher, tax credit scholarship, and ESA programs to offer these programs on an equal basis, regardless of the sexual orientation or gender identity of the student or members of the student's family. The first section provides an overview of voucher programs. Among other things, we identify the differences among vouchers, tuition tax credit scholarships, and ESAs. We also discuss the prevalence of participating schools with anti-LGBT admissions policies. The second section evaluates constitutional challenges that students could make to invalidate the anti-LGBT admissions policies of participating voucher schools under the state action doctrine. Specifically, we explain the possibilities and limitations of various approaches that may be used to

story.html [https://perma.cc/8GQP-S4PD] ("there are no complaints on record from LGBTQ students about discrimination under the voucher program.").

⁹ See *Whitaker ex rel. Whitaker v. Kenosha Unified Sch. Dist. No. 1 Bd. of Educ.*, 858 F.3d 1034, 1050–54 (7th Cir. 2017).

¹⁰ See, e.g., Florida House of Representatives Session Video, THE FLORIDA CHANNEL (Mar. 6, 2020), at 3:33:31 <https://thefloridachannel.org/videos/3-6-20-house-session-part-1/> [https://perma.cc/Q6YB-VD3X] (discussing the educational programming of Trinity Academy in Orlando, Florida).

¹¹ Adam Mengler, Note, *Public Dollars, Private Discrimination: Protecting LGBT Students from School Voucher Discrimination*, 87 FORDHAM L. REV. 1251, 1263, 1267 (2018).

¹² *Id.* at 1273–74; ERWIN CHEREMINSKY, CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES 665 (5th ed. 2015).

¹³ CHEREMINSKY, *supra* note 12, at 664; Martha Minow, Alternatives to the State Action Doctrine in the Era of Privatization, Mandatory Arbitration, and the Internet: Directing Law to Serve Human Needs, 52 HARV. C.R.-C.L. L. REV. 145.

¹⁴ CHEREMINSKY, *supra* note 12, at 665.

challenge the anti-LGBT enrollment policies of participating private schools under the Equal Protection Clause of the Fourteenth Amendment.

II. OVERVIEW OF SCHOOL VOUCHERS

School voucher programs have a lengthy history of discrimination.¹⁵ Indeed, the first instances of publicly funded school choice were specifically designed to discriminate by closing public schools and providing tax-supported vouchers to private schools that enrolled only white students.¹⁶ These private schools, which were often called “choice’ academies” or “segregation academies,” were created in several southern states to circumvent desegregation orders after the *Brown v. Board of Education*¹⁷ decision.¹⁸ However, in 1964, the Supreme Court rejected this strategy for avoiding segregation orders in *Griffin v. County School Board of Prince Edward County*.¹⁹

Interestingly, Milton Friedman, who is generally considered the architect of voucher programs, predicted that vouchers would result in schools categorized by race and other status characteristics.²⁰ As he wrote in his 1962 treatise, *Capitalism and Freedom*:

If a [voucher] proposal like that of the preceding chapter were adopted, it would permit a variety of schools to develop, some all white, some all Negro, some mixed. . . . It would in this special area, as the market does in general, permit co-operation without conformity.²¹

In a note to this passage, Friedman explained that “[t]o avoid

¹⁵ Julie F. Mead, *How Legislation and Litigation Shape School Choice*, in *EXPLORING THE SCHOOL CHOICE UNIVERSE: EVIDENCE AND RECOMMENDATIONS* 39, 41–42 (Gary Miron et al eds., 2012); Mark A. Gooden et al., *Race and School Vouchers: Legal, Historical, and Political Contexts*, 91 *PEABODY J. OF EDUC.* 522, 524 (2016); Julie F. Mead & Suzanne E. Eckes, *How School Privatization Opens the Door for Discrimination* (Nat’l Educ. Pol’y Ctr. Pol’y Brief) Dec. 6, 2018, at 6–7 (see this source for our earlier discussion on the discriminatory practices in school voucher programs); Kevin G. Welner & Preston C. Green, *Private School Vouchers: Legal Challenges and Civils Rights Protections* 1–2 (Mar. 5, 2018) (working paper for the UCLA Civil Rights Project, on file with author); Eckes, Mead, & Ulm, *infra* note 29.

¹⁶ Gooden et al., *supra* note 15, at 524; Welner & Green, *supra* note 15, at 1.

¹⁷ 347 U.S. 483 (1954).

¹⁸ JOSEPH P. VITERITTI, *CHOOSING EQUALITY: SCHOOL CHOICE, THE CONSTITUTION, AND CIVIL SOCIETY* 29 (Brookings Inst. Press, 1999).

¹⁹ 377 U.S. 218, 233–34 (1964).

²⁰ MILTON FRIEDMAN, *CAPITALISM AND FREEDOM* 117 (3rd ed. 2002).

²¹ *Id.* at 117–18.

misunderstanding, . . . I am taking it for granted that the minimum requirements imposed on schools in order that vouchers be usable do not include whether the school is segregated or not.”²² As voucher programs began to be seriously discussed as educational policy initiatives in the 1990s, major voucher theorists Chubb and Moe posited that voucher systems should accept whatever sorting of students resulted from parental choices, as long as no overt racial discrimination occurred.²³

Considering the history of vouchers, it was unsurprising that researchers warned that a full embrace of publicly funding parental choices in private schools would result in the demise of the common school.²⁴ The first contemporary voucher programs were developed in the early 1990s. These programs gave eligible families public funds to attend private schools, and they were upheld on the grounds that they served the legitimate purpose of addressing persistent concerns about poor public school performance.²⁵ The amount of the voucher, like the program eligibility requirements, is set by state statute.²⁶

After the Supreme Court concluded in 2002 that the Establishment Clause permitted states to include religious schools in their voucher programs, those programs began to spread.²⁷ A voucher is a government-funded coupon given to a parent or guardian that is redeemable for tuition fees at a non-public school. There are sixteen states and the District of Columbia that have at least one voucher program.²⁸

In addition to voucher programs, some other choice options include education savings accounts (ESAs) and tax credit scholarships. Tax credit scholarships and ESAs are voucher-like programs because all three provide public subsidies to private

²² *Id.* at 118 n.2.

²³ JOHN E. CHUBB & TERRY M. MOE, *POLITICS, MARKETS, & AMERICA'S SCHOOLS* 221–22 (1990).

²⁴ Ann Bastian, *School Choice: Unwrapping the Package*, in *CHOICE IN EDUCATION: POTENTIAL AND PROBLEMS* 177–186 (William L. Boyd & Herbert J. Walberg eds., 1990); Albert Shanker & Bella Rosenberg, *Politics, Markets, and America's Schools: A Rejoinder*, in *INDEPENDENT SCHOOLS, INDEPENDENT THINKERS* 335–57 (Pearl Rock Kane ed., 1992); Julie Underwood, *Choice is Not a Panacea*, 71 *EDUC. L. REP.* 599, 607–08 (1992).

²⁵ *Davis ex rel. Davis v. Grover*, 480 N.W.2d 460, 546 (Wis. 1992).

²⁶ *See, e.g.*, WIS. STAT. § 119.23(4)(bg) (2013).

²⁷ *Zelman v. Simmons-Harris*, 536 U.S. 639, 662–63 (2002).

²⁸ *School Choice in America Dashboard*, EDCHOICE, <https://www.edchoice.org/school-choice/school-choice-in-america/#map-overlay> [<https://perma.cc/9FH5-4M5C>]. *See also* Welner & Green, *supra* note 15.

education.²⁹ An ESA is a tax-deferred trust account created by the government that assists families in funding educational expenses for children who are eighteen-years-old or younger.³⁰ The parent is also permitted, depending on the state, to use the funds for a wide variety of purposes, including homeschooling expenses or private tutoring.³¹ Typically, the parent receives a statutorily defined amount of funds, often an amount linked to the amount of state aid a child would have received if enrolled in a public school.³² There are five states that offer ESAs.³³ *Tax credit scholarships* allow taxpayers to receive full or partial *tax* credits when they donate to nonprofits that provide private school *scholarships*.³⁴ Nineteen states offer one or more forms of tax credit scholarship programs.³⁵ While any of the three forms of subsidy may be the subject of a challenge, most of the discussion in this article focuses on voucher programs.

All three types of programs share some commonalities. All set eligibility requirements for children and families to participate. Some programs may set income limits,³⁶ while others may be targeted for children with disabilities.³⁷ All programs also set requirements for private school participation and require the schools to register with the state as program participants.³⁸ For example, requirements may mandate that schools disclose information to prospective students and their families or may require schools to submit to program audits.³⁹ Programs may also set minimum standards for teacher and administrator education.⁴⁰ While it is common for states to require that schools avoid racial

²⁹ See Suzanne E. Eckes, Julie F. Mead, & Jessica Ulm, *Dollars to Discriminate: The (Un)intended Consequences of School Vouchers*, 91 PEABODY J. OF EDUC. 537, 538 (2016). There are also tax credit/deduction programs that are not discussed. A tax credit/deduction program reduces the amount of income tax that must be paid in order to help families pay for private education. There are eight states that have at least one tax credit/deduction programs.

³⁰ *Id.* at 544.

³¹ See *Types of Private School Choice Programs*, *supra* note 6.

³² *Id.*

³³ *School Choice in America Dashboard*, *supra* note 28.

³⁴ *Types of School Choice*, EDCHOICE, <https://www.edchoice.org/school-choice/types-of-school-choice/> [<https://perma.cc/3ST5-S5B2>].

³⁵ *School Choice in America Dashboard*, *supra* note 28.

³⁶ See *id.*

³⁷ *Types of School Choice*, *supra* note 34.

³⁸ See *Types of Private School Choice Programs*, *supra* note 6.

³⁹ See *Types of School Choice*, *supra* note 34.

⁴⁰ *Id.*

discrimination,⁴¹ only one state, Maryland, has set a specific non-discriminatory standard with regard to sexual orientation and gender identity.⁴²

In fact, as states created new forms of publicly funded educational options in the form of voucher programs, tax credit scholarships, and ESAs, issues of discrimination have indeed surfaced.⁴³ The question of whether and to what degree schools should be available to all children without regard to race, national origin, religion, immigration status, first language, sex, sexual orientation, gender identity, and disability has a long litigious history.⁴⁴ It is now routine to observe that public schools must enroll all students. This has not been the case with voucher programs.

Private schools that participate in voucher programs are sometimes racially and socioeconomically concentrated and typically enroll fewer children with disabilities and English language learners.⁴⁵ Traditional public schools and charter schools are prohibited from engaging in this type of discrimination through U.S. constitutional law (e.g., the Equal Protection Clause) and a series of federal statutes (e.g., Title VI of the Civil Rights Act, Title IX of the Education Amendments, the Americans with Disabilities Act, and Section 504 of the Rehabilitation Act of 1973). Although these laws may not apply to private schools, states could make non-discriminatory access and operation a condition that private schools must meet in order to participate in a voucher program.⁴⁶ But so far, legislators have generally elected not to do so.⁴⁷ In

⁴¹ Eckes, Mead, & Ulm, *supra* note 29, at 546.

⁴² Suzanne E. Eckes & Julie F. Mead, *Discriminatory Practices in Voucher Programs*, PHI DELTA KAPPAN (Feb. 24, 2020), <https://kappanonline.org/discriminatory-practices-school-voucher-programs-eckes-mead/> [<https://perma.cc/25H9-Q2XA>]. North Carolina's voucher program was recently challenged for allegedly discriminating against students based on religion and sexuality. See Complaint at ¶¶ 47, 47.a, 86, *Walker v. State of North Carolina*, No. 20CVS8346 (N.C. Sup. Ct. July 27, 2020).

⁴³ Eckes, Mead, & Ulm, *supra* note 29; Valerie Strauss, *Problems with Charter Schools that You Won't Hear Betsy DeVos Talk About*, WASH. POST (June 22, 2017, 10:05 AM), https://www.washingtonpost.com/news/answer-sheet/wp/2017/06/22/problems-with-charter-schools-that-you-wont-hear-betsy-devos-talk-about/?utm_term=.0630221d571f [<https://perma.cc/2LCG-BWQA>].

⁴⁴ See MARTHA MINOW, *IN BROWN'S WAKE* 33–51 (2010).

⁴⁵ Cory Turner, *The Promise and Peril of School Vouchers*, NAT'L PUB. RADIO (May 12, 2017, 6:00 AM), <https://www.npr.org/sections/ed/2017/05/12/520111511/the-promise-and-peril-of-school-vouchers> [<https://perma.cc/5C8F-EL8U>].

⁴⁶ See Eckes, Mead, & Ulm, *supra* note 29, at 555.

⁴⁷ Maryland is the only state that specifically includes sexual orientation and gender identity in its anti-discrimination provisions that apply to voucher recipients. See Eckes & Mead, *supra* note 29.

fact, most state voucher laws provide protection against discrimination based on race and ethnicity; no state laws provide explicit protections for *all* historically marginalized populations (those discriminated against on grounds minimally including religion, race, national origin/ethnicity, disability, sex, and sexual orientation).⁴⁸

Moreover, although the voucher program upheld by the Supreme Court in 2002 included provisions to guard against religious discrimination,⁴⁹ some religious schools participating in voucher programs enacted since 2002 exclude students and families from other religions, and/or exclude LGBT employees and students, as well as students from LGBT families.⁵⁰ This topic is especially timely as states continue to create and expand voucher programs.

When asked whether LGBT students and their families would be welcome at a private Christian school in Indiana, the principal responded, “We believe that the Bible clearly teaches that a gay/lesbian lifestyle is contrary to God’s commands. LGBT students and families would not be able to sign agreement with our Statement of Faith.”⁵¹ Another principal stated that “We welcome any student and any family that will acknowledge and respect our statement of faith, core values and philosophy.”⁵² The practice of excluding students and families on the basis of sexual orientation or gender identity may be widespread in the state. For example, the Archdiocese of Indianapolis reported that their schools received \$38.9 million toward tuition from the voucher program during the 2018–19 school year.⁵³ A recent policy from the archdiocese states that transgender students may not be eligible for enrollment.⁵⁴

⁴⁸ *Id.*; See also Eckes, Mead, & Ulm, *supra* note 29, at 551.

⁴⁹ *Zelman v. Simmons-Harris*, 536 U.S. 639, 645 (2002).

⁵⁰ Donheiser, *supra* note 1.

⁵¹ Jeff LaFave, *Hotline: A Sensitive Voucher Question*, BLOOMINGTON HERALD-TIMES (Feb. 10, 2014), https://www.hoosiertimes.com/herald_times_online/opinion/hotline-a-sensitive-voucher-question/article_104db739-2017-5322-9c90-578474cd8307.html [https://perma.cc/6EDT-5WEV]; Eckes, Mead, & Ulm, *supra* note 29.

⁵² *Id.*

⁵³ *Office of Catholic Schools: Catholic Schools*, ARCHINDY.ORG, <https://www.archindy.org/ocs/schools.html> [https://perma.cc/UW5K-9ZJM].

⁵⁴ Arika Herron, *Policy May Bar Transgender Students from Catholic Schools in Central and Southern Indiana*, INDIANAPOLIS STAR (June 24, 2020, 5:12 PM), <https://www.indystar.com/story/news/education/2020/06/24/indianapolis-archdiocese-new-policy-may-bar-transgender-students-attending-catholic-schools/3252282001/> [https://perma.cc/W2JV-USSW].

Georgia, too, has gained attention for this type of exclusion.⁵⁵ One study found that at least one-third of the private schools participating in Georgia's program had explicit anti-gay policies.⁵⁶ The study documented how both admissions and discipline policies work to restrict enrollment for LGBT children and families.⁵⁷ The report also pointed out that some national organizations for private schools encourage such policies based on their interpretation of the Bible.⁵⁸

Florida is another state with a record of participating religious schools that exclude students on the basis of sexual orientation. In fact, the *Orlando Sentinel* revealed that 83 schools had rules that refused to admit LGBT students or would expel them upon discovering their sexual orientation and gender identity.⁵⁹ Some schools also denied admittance to students on the basis of their parents' sexual orientations.⁶⁰ This reporting also revealed the plight of Cari and Nicole Haagenson, a same-sex couple.⁶¹ Cari sought to enroll her two oldest children in the Master's Academy of Vero Beach, a school that the children had previously attended when Cari was married to a man.⁶² The school refused to admit the girls upon learning about Cari's relationship with another woman.⁶³

III. STATE ACTION CHALLENGES

Students and parents like the Haagensons may eventually challenge their exclusion from certain voucher schools on the account of sexual orientation by filing suit against the private school, the state, or both. Claims of discriminatory exclusion are typically cast as denials of equal protection as guaranteed by the Fourteenth Amendment.⁶⁴ If families allege a federal constitutional violation, they will have to overcome the state action doctrine. As such, they will have to establish that the actions of a state actor caused the exclusion and that the denial constitutes

⁵⁵ Severson, *supra* note 3.

⁵⁶ Georgia's Tax Dollars Help Finance Private Schools with Severe Anti-Gay Policies, Practices, & Teachings, Issue Brief (S. Educ. Found., Atlanta, G.A.), Jan. 2013, at 1-2.

⁵⁷ *Id.* at 3-4.

⁵⁸ *Id.* at 16.

⁵⁹ Postal & Martin, *supra* note 2.

⁶⁰ *Id.*

⁶¹ *Id.*

⁶² *Id.*

⁶³ *Id.*

⁶⁴ See, e.g., *Parents Involved in Cmty. Schs. v. Seattle Sch. Dist.*, 551 U.S. 701, 710-11 (2007); *Loving v. Virginia*, 388 U.S. 1, 3 (1967).

an unjustifiable action that violates the federal Constitution’s mandate of equal treatment for similarly situated individuals.⁶⁵

This section analyzes the possibility of a state action claim. Because the challenge involves a claim of discrimination, the first subpart examines whether the exclusion of a student on the basis of LGBT status would violate the Equal Protection Clause. The second subpart then discusses the challenge based on five state action theories applied by the Supreme Court: (1) the public function test, (2) the symbiotic relationship test, (3) the state compulsion test, (4) the entwinement test, and (5) the state enforcement test. As noted earlier, the interaction of state programming with private actors, both schools and parents, presents challenges to any litigant wishing to challenge the exclusionary practices of these schools. The analysis shows, however, that two theories appear to hold more promise for those who may elect to contest current practices.

A. *Equal Protection*

The Equal Protection Clause of the Fourteenth Amendment provides that a state shall not “deny to any person within its jurisdiction the equal protection of the laws.”⁶⁶ This clause grants to all Americans “[the] right to be free from invidious discrimination in statutory classifications and other governmental activity”⁶⁷ and requires that similarly-situated individuals be treated the same.⁶⁸

LGBT students in public schools have argued that under the Equal Protection Clause, school policies should not treat them differently than heterosexual students.⁶⁹ When analyzing an Equal Protection Clause claim, the U.S. Supreme Court has created three levels of judicial scrutiny for certain classifications of individuals (i.e., strict scrutiny, intermediate (or heightened) scrutiny, and rational basis review).⁷⁰ Under these levels of scrutiny, it is easier for the state to justify treating students differently based on sex than it is race. To illustrate, racial classifications fall under strict scrutiny, which requires “both a compelling governmental objective and a demonstration that the classification is necessary and

⁶⁵ JOHN E. NOWAK & RONALD D. ROTUNDA, *PRINCIPLES OF CONSTITUTIONAL LAW* 343–45 (2010).

⁶⁶ U.S. CONST. amend. XIV, § 1.

⁶⁷ *Harris v. McRae*, 448 U.S. 297, 322 (1980).

⁶⁸ NOWAK & ROTUNDA, *supra* note 65, at 420.

⁶⁹ See *Nabozny v. Podlesny*, 92 F.3d 446, 449 (7th Cir. 1996); *Grimm v. Gloucester Cty. Sch. Bd.*, 400 F. Supp. 3d 444, 451 (E.D. Va. 2019); *Kasper ex rel. Adams v. School Bd.*, 318 F. Supp. 3d 1293, 1297 (M.D. Fla. 2018); *M.A.B. v. Bd. of Educ.*, 286 F. Supp. 3d 704, 709–10 (D. Md. 2018).

⁷⁰ NOWAK & ROTUNDA, *supra* note 65, at 426–28.

narrowly tailored to serve that interest.”⁷¹ Few governmental actions can survive strict scrutiny.⁷²

The next level is intermediate or heightened scrutiny, which is the standard used when the government makes sex-based classifications.⁷³ The government must demonstrate that “the classification based on sex serves important governmental objectives and that the discriminatory means employed are substantially related to the achievement of those objectives.”⁷⁴

Accordingly, if a school board adopted a policy that prohibited girls from attending school after age fifteen, it would need to have an important state objective in adopting such a policy and demonstrate that this sex-based classification was substantially related to serve that important interest. It would be difficult for any school board to enforce such a policy because there is no important state interest involved in prohibiting girls from attending school after age fifteen. It should be noted that it is not entirely clear within the judicial system whether discrimination based on sexual orientation or gender identity would receive intermediate scrutiny review.⁷⁵ In 2020, the U.S. Supreme Court held that within employment, discrimination “because of sex” includes discrimination based on sexual orientation and gender identity, although that case was litigated under a federal statute, Title VII, and not a constitutional theory.⁷⁶ Other lower federal courts have analyzed the issue under an Equal Protection framework and found that discrimination based on sex also includes sexual orientation and gender identity when analyzing cases involving discrimination of LGBT students.⁷⁷

The third and default level of judicial scrutiny is rational basis review, which requires “a legitimate government objective with a minimally rational relationship

⁷¹ Suzanne E. Eckes & Stephanie D. McCall, *The Potential Impact of Social Science Research on Legal Issues Surrounding Single-Sex Classrooms and Schools*, 50 EDUC. ADMIN. Q. 195, 199–200 (2014). See also *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 218–20 (1995).

⁷² See NOWAK & ROTUNDA, *supra* note 65, at 426–27.

⁷³ See *United States v. Virginia*, 518 U.S. 515, 533, 555 (1996).

⁷⁴ Eckes & McCall, *supra* note 71, at 202.

⁷⁵ See *Nabozny v. Podlesny*, 92 F.3d 446, 458 (7th Cir. 1996) (applying rational basis review when student alleged discrimination based on sexual orientation); *Ben-Shalom v. Marsh*, 881 F.2d 454, 464 (7th Cir. 1989) (finding that sexual orientation discrimination in the military was subject to rational basis review).

⁷⁶ *Bostock v. Clayton Cty.*, 140 S.Ct. 1731, 1740, 1744 (2020).

⁷⁷ See *Whitaker v. Kenosha Unified Sch. Dist. No. 1 Bd. of Educ.*, 858 F.3d 1034 (7th Cir. 2017); *Handling ex rel. A.H. v. Minersville Area Sch. Dist.*, 408 F. Supp. 3d 536, 573–75 (M.D. Pa. 2019); *J.A.W. v. Evansville Vanderburgh Sch. Corp.*, 396 F. Supp. 3d 833, 842, 843 (S.D. Ind. 2019).

between the means and the ends.”⁷⁸ This deferential level of review stems from the balance of powers between different parts of the government. When applying rational basis review, jurists do not weigh the wisdom or effectiveness of a policy, only its rationality.⁷⁹ If a policy-making body articulates a rationale within the scope of its authority, the policy is likely to be upheld under rational basis review, even if a judge or judges disagree with the rationale given.⁸⁰ Classifications based on sexual orientation, for example, have oftentimes fallen under this level of scrutiny in the past.⁸¹ Rational basis review is a very low level of judicial scrutiny and as a result, if this level of analysis is applied, it is much easier to justify a government policy that treats LGBT students differently from other students.

In a public school, an LGBT student who experienced discrimination based on sexual orientation or gender identity could rely on the Equal Protection Clause to challenge school officials. Likewise, if plaintiffs demonstrate the presence of state action in a private school voucher program, these protections would also apply. Although the Supreme Court has found that racial discrimination in private schools violates the Equal Protection Clause⁸² or Section 1981,⁸³ the Court has yet to extend this thinking for private schools’ treatment of LGBT individuals and as such, it is a more difficult argument within the context of voucher programs, particularly when those schools claim religion as their reason for action. As will be discussed, even when the private school accepts millions of dollars of taxpayer money through the state’s voucher program, it is unclear whether a court would find state action. Without a finding of state action for LGBT discrimination in private schools, students likely have no constitutional protections available.

B. State Action

1. Public Function Test

The public function test provides that a private entity must adhere to the

⁷⁸ Eckes & McCall, *supra* note 71, at 199 (citation omitted).

⁷⁹ NOWAK & RONALD, *supra* note 65, at 426.

⁸⁰ *See id.*

⁸¹ *See Nabozny v. Podlesny*, 92 F.3d 446, 454 (7th Cir. 1996).

⁸² *See Norwood v. Harris*, 413 U.S. 455, 455 (1973) (invalidating state program that provided textbooks to both public and private schools because state did not consider whether private schools practiced racial discrimination).

⁸³ *See Runyon v. McCrary*, 427 U.S. 160, 173 (1976) (holding that Section 1981 prohibited the racially discriminatory policies of private schools). However, the Court’s holding in *Runyon* did not address whether Section 1981 applied to private sectarian schools. *Id.* at 167.

Constitution if it is carrying out a task that has been traditionally exclusively performed by the government.⁸⁴ In *Rendell-Baker v. Kohn*,⁸⁵ the Supreme Court applied the public function test for the first time to a private school. This case involved a private high school designed to provide support to at-risk youth.⁸⁶ Public school authorities would refer students to the private school and pay the tuition costs for their attendance.⁸⁷ While the school was privately owned and operated, the majority of its funding resulted from public sources.⁸⁸ A dispute arose at the school when a few teachers who were fired argued that they did not receive due process in violation of the First and Fourteenth Amendments.⁸⁹ Note that the challengers in this case sued the school directly and argued that the private school officials were actually state actors because of the close relationship between the school and the public officials who referred children to them.⁹⁰ The Court rejected the teachers' contention that the school was a state actor because it performed the public function of providing an education.⁹¹ To satisfy the public function test, the provision of education has to be the "exclusive prerogative of the State."⁹² The legislature's decision to provide services to troubled students at public expense "in no way makes these services the exclusive province of the State."⁹³ Since the *Rendell-Baker* decision, several courts have held that private schools are not state actors under the public function test.⁹⁴ It follows, then, that the anti-LGBT admissions policies of private schools would not be subject to review under this legal theory.

2. Symbiotic Relationship Test

The symbiotic relationship test examines whether the government has so

⁸⁴ CHEMERINSKY, *supra* note 12, at 672.

⁸⁵ *Rendell-Baker v. Kohn*, 457 U.S. 830, 836–37 (1982).

⁸⁶ *Id.* at 831–32.

⁸⁷ *Id.* at 832.

⁸⁸ *Id.*

⁸⁹ *Id.* at 834.

⁹⁰ *See id.* at 835–36.

⁹¹ *Id.* at 842.

⁹² *Id.*

⁹³ *Id.*

⁹⁴ *See, e.g., Dawkins v. Biondi Educ. Ctr.*, 164 F. Supp. 3d 518, 529 (S.D.N.Y. 2018); *Johnson v. Pinkerton Acad.*, 861 F.2d 335, 338 (1st Cir. 1988); *Kach v. Hose*, 589 F.3d 626, 646–47 (3rd Cir. 2010); *Logiodice v. Trustees of Maine Central Inst.*, 296 F.3d 22, 26 (1st Cir. 2002); *Robert S. v. Stetson Sch., Inc.*, 256 F.3d 159, 166 (3rd Cir. 2001).

“insinuated itself into a position of interdependence” with the private entity “that it must be recognized as a joint participant in the challenged activity.”⁹⁵ The Supreme Court first established this test in *Burton v. Wilmington Park Authority*.⁹⁶ In this case, a restaurant that leased space from a parking garage operated by the city parking authority refused to serve Black customers.⁹⁷ The parking authority was a tax-exempt, private corporation created by legislative action of the city for the purpose of operating the city’s parking facilities.⁹⁸ The parking authority provided the restaurant utilities and helped maintain the premises.⁹⁹ One of the patrons alleged that this discriminatory treatment violated the Equal Protection Clause of the Fourteenth Amendment.¹⁰⁰ The Delaware Supreme Court ruled against the patron because the restaurant was acting in a purely private capacity.¹⁰¹

The Supreme Court disagreed, finding that the state legislature created the parking authority and in so doing gave it broad powers.¹⁰² The Court reasoned that there was sufficient state action to find a violation of the Equal Protection Clause; the restaurant was located on public property, and the rent from the restaurant financially supported the parking authority.¹⁰³ In fact, the Court suggested that the state behaved like a joint participant in the operation of this restaurant, reasoning that the state’s financial position would suffer if the restaurant did not discriminate.¹⁰⁴ In other words, the state profited from the restaurant’s discriminatory actions; it was also noted that the restaurant benefited from the parking authority’s tax-exempt status.¹⁰⁵ As a result, the Court found that the restaurant and parking authority were so physically and financially intertwined that the private restaurant’s conduct could be imputed to the government.¹⁰⁶

In *Rendell-Baker*, however, the Court refused to find that a private school for at-

⁹⁵ *Rodriguez-Garcia v. Davila*, 904 F.2d 90, 98 (1st Cir. 1990) (quoting *Burton v. Wilmington Park. Auth.*, 365 U.S. 715, 725 (1961)).

⁹⁶ *Burton*, 365 U.S. at 725.

⁹⁷ *Id.* at 715.

⁹⁸ *Id.* at 717–18.

⁹⁹ *Id.* at 720.

¹⁰⁰ *Id.*

¹⁰¹ *Id.* at 721.

¹⁰² *Id.* at 723–24.

¹⁰³ *Id.* at 723, 725.

¹⁰⁴ *Id.* at 724.

¹⁰⁵ *Id.*

¹⁰⁶ *Id.* at 725.

risk students had a symbiotic relationship with the government even though the school received virtually all of its income from governmental funding.¹⁰⁷ The Court distinguished the *Burton* case by observing that the government had financially benefited from the restaurant's discriminatory conduct.¹⁰⁸ In contrast, the private school:

is not fundamentally different from many private corporations whose business depends primarily on contracts to build roads, bridges, dams, ships, or submarines for the government. Acts of such private contractors do not become acts of the government by reason of their significant or even total engagement in performing public contracts.¹⁰⁹

Because the school's fiscal relationship with the government was "not different from that of many contractors performing services for the government," the Court concluded that there was no symbiotic relationship, as in *Burton*.¹¹⁰

In *Dawkins v. Biondi Education Center*,¹¹¹ the Southern District of New York applied *Rendell-Baker* to determine whether defendants who worked for a "public high school with private status" violated 42 U.S.C. § 1983 pursuant to the symbiotic relationship test.¹¹² New York law subjects these types of private schools to heavy regulation and close supervision.¹¹³ Additionally, these schools are almost entirely funded by the government.¹¹⁴ A former employee alleged that the school violated various constitutional provisions in the school's decision to terminate him in violation of Section 1983.¹¹⁵

The court granted the school's motion to dismiss the Section 1983 claim.¹¹⁶ The Southern District of New York refused to find that the school was a state actor under the symbiotic relationship test.¹¹⁷ Citing *Rendell-Baker*, the court ruled that the receipt of public funding did not transform the school into a state actor.¹¹⁸ Rather,

¹⁰⁷ *Rendell-Baker v. Kohn*, 457 U.S. 830, 842–43 (1982).

¹⁰⁸ *Id.*

¹⁰⁹ *Id.* at 840–41.

¹¹⁰ *Id.* at 843.

¹¹¹ *Dawkins v. Biondi Educ. Ctr.*, 164 F. Supp. 3d 518, 518 (S.D.N.Y. 2018).

¹¹² *Id.* at 521, 529.

¹¹³ *Id.* at 521.

¹¹⁴ *Id.*

¹¹⁵ *Id.* at 521–22.

¹¹⁶ *Id.* at 530.

¹¹⁷ *Id.* at 528.

¹¹⁸ *Id.*

the court explained, to satisfy the symbiotic relationship test, the employee would have to demonstrate “that this financial support specifically affected the decision to terminate his employment.”¹¹⁹ Because the employee merely alleged that the defendants received substantial funding from the government, he failed to state a claim under the symbiotic relationship test.¹²⁰ The employee further attempted to establish a symbiotic relationship by claiming that the government and the private schools were engaged in a joint venture: “the educating of New York State students with learning disabilities.”¹²¹ The court rejected this assertion, noting that the relationship between the government and the defendants was “purely contractual.”¹²² As the court explained, private contractors who perform services with governmental funding do not become state actors “by reason of their significant or even total engagement in performing public contracts.”¹²³

These cases indicate that students will have a difficult time convincing a court that voucher schools with anti-LGBT admissions policies are state actors under the symbiotic relationship test. Specifically, the students must show that the government must somehow benefit from the discriminatory conduct of the private school. As these cases make clear, courts will not find such a benefit merely because the private school is providing educational services with governmental funding.

3. State Compulsion Test

The state compulsion test provides that “a State normally can be held responsible for a private decision only when it has exercised coercive power or has provided such significant encouragement, either overt or covert, that the choice must in law be deemed to be that of the state.”¹²⁴ Additionally, this test cautions that “[m]ere approval or acquiescence in the initiatives of a private party is not sufficient to justify holding the State responsible for those initiatives under the terms of the Fourteenth Amendment.”¹²⁵

In *Blum v. Yaretsky*, the Supreme Court analyzed whether the state of New York coerced nursing homes to provide Medicaid recipients with lower levels of care in

¹¹⁹ *Id.*

¹²⁰ *Id.*

¹²¹ *Id.* at 529.

¹²² *Id.*

¹²³ *Id.* (quoting *Rendell-Baker*, 457 U.S. at 841).

¹²⁴ *Id.* (quoting *Rendell-Baker*, 457 U.S. at 841).

¹²⁵ *Id.* at 1004–05.

violation of the state action doctrine.¹²⁶ The federal Medicaid program provides federal funding to states to reimburse certain medical costs incurred by people with low income.¹²⁷ Federal regulations required that nursing homes providing care to Medicaid patients establish utilization review committees (URCs) of physicians to determine the level of care that patients needed.¹²⁸ Federal regulations also required URCs to inform the responsible state agency upon deciding that patients be discharged or transferred to a different level of care. The state of New York's policy provided Medicaid funding for private nursing home care through either "skilled nursing homes" (SNFs) or "health related facilities" (HRFs).¹²⁹ In cases where URCs recommended that patients be transferred to the less expensive alternative, the state would discontinue benefits unless the patients agreed to the transfer.¹³⁰

Medicaid patients who were subjected to this treatment alleged that the transfers deprived them of procedural due process rights to adequate notice under the Fourteenth Amendment.¹³¹ The Court rejected the patients' claim that there was state action because New York law "affirmatively commands the summary discharge or transfer of Medicaid patients who are thought to be inappropriately placed in their nursing facilities."¹³² After analyzing the pertinent statutes and regulations, the Court concluded that these decisions "ultimately turn on medical judgments made by private parties according to professional standards that are not established by the state."¹³³

In *American Manufacturers Mutual Insurance Co. v. Sullivan*,¹³⁴ the Court addressed whether the state of Pennsylvania encouraged private insurers to withhold payments in violation of the state action doctrine. The state amended its worker compensation law to authorize employers and insurers to withhold payment pending an independent review to decide whether treatment was "reasonable and necessary."¹³⁵ Workers brought a Section 1983 action, claiming that an insurance

¹²⁶ *Id.* at 1005.

¹²⁷ *Id.* at 993–94.

¹²⁸ *Id.*

¹²⁹ *Id.* at 994.

¹³⁰ *Id.* at 995.

¹³¹ *Id.* at 995–96.

¹³² *Id.* at 1005.

¹³³ *Id.* at 1008.

¹³⁴ *American Mfrs. Mut. Ins. Co. v. Sullivan*, 526 U.S. 40, 47 (1999).

¹³⁵ *Id.* at 43.

company had withheld particular benefits through the review procedure without providing due process in violation of the Fourteenth Amendment.¹³⁶

The workers argued that Pennsylvania “encouraged” the withholding of payments by amending the statute to provide for utilization review, “an option they previously did not have.”¹³⁷ The Court rejected this assertion. It did acknowledge that the state’s provision of an option for insurers to defer payment pending review could be seen “as encouraging them to do just that.”¹³⁸ However, the Court characterized the state’s decision as “subtle encouragement” that was “no more significant than that which inheres the State’s creation or modification of any legal remedy.”¹³⁹ Indeed, the Court continued, “[t]he State’s decision to allow insurers to withhold payments pending review can just as easily be seen as state inaction.”¹⁴⁰ The Court declared that it would not impose constitutional restraints on private actors by characterizing the state’s inaction as encouragement.¹⁴¹

At first glance, the *Blum* case suggests that students would not be able to show that states had coerced private schools to discriminate against LGBT students under the state compulsion test. To establish coercion, the students would have to demonstrate that the statutes and regulations force private schools to discriminate on the basis of sexual orientation.¹⁴² Private school choice laws appear to do no such thing. For example, Florida’s Family Empowerment Scholarship Program, a voucher program for low-income students, provides, “[b]efore enrolling in a private school, a student and his or parent or guardian must meet with the private school’s principal or the principal’s designee to review the school’s. . . code of school conduct.”¹⁴³ Similarly, Florida’s Tax Credit Scholarship Program, which is also for low-income students, declares, “[e]ach parent and each student has an obligation to the private school to comply with the private school’s published policies.”¹⁴⁴ This language suggests that the private schools, not the state, make decisions as to whether students are eligible for admission. Thus, it would seem that participating Florida private schools with anti-LGBT policies would not become state actors

¹³⁶ *Id.* at 47–48.

¹³⁷ *Id.* at 53.

¹³⁸ *Id.*

¹³⁹ *Id.*

¹⁴⁰ *Id.*

¹⁴¹ *Id.* at 54.

¹⁴² *See* *Blum*, 457 U.S. at 1005–08 (explaining that New York Medicaid funding policy did not coerce private reviewers to place patients in nursing homes with lower levels of care).

¹⁴³ FLA. STAT. ANN. § 1002.394(9)(e) (2020).

¹⁴⁴ *Id.* at § 1002.395(7)(d) (2020).

under a compulsion theory.

However, *Dumont v. Lyon*¹⁴⁵ suggests that *Blum* is not controlling for private-school-choice programs because states, not private schools, are the state actors. Instead, state action might come from the states knowingly creating the mechanism that enables participating private schools to discriminate. In this case, two Michigan same-sex couples alleged that state-contracted child placement agencies rejected them as prospective foster parents because of their sexual orientation.¹⁴⁶ The couples brought a Section 1983 claim in federal district court, alleging that the state's Department of Health and Human Services' practice of allowing state-contracted and taxpayer funded agencies to use religious criteria to exclude prospective foster parents was in violation of the Establishment Clause and Equal Protection Clause.¹⁴⁷ It is important to note here that, unlike the other cases reviewed above, the plaintiffs filed suit against the state itself, not against the private agencies that had declined to serve them because of their sexual orientation.¹⁴⁸ In other words, they argued that the state acted in contravention of the Fourteenth Amendment. They did not argue that the private agencies should be considered state actors for Fourteenth Amendment purposes.

The State Defendants moved to dismiss, arguing that the decisions of the faith-based agencies could not be attributed to the state per the *Blum* case.¹⁴⁹ The court denied the defendant's motion.¹⁵⁰ In reaching this decision, the court distinguished *Blum* from the instant case.¹⁵¹ The same-sex couples challenged "a specific state procedure—the State's procedure of contracting with faith-based child placing agencies that discriminate on the basis of sexual orientation."¹⁵² Thus, the couples' complaint was not based on the "purely private decisions on the faith-based agencies in turning them away."¹⁵³

¹⁴⁵ *Dumont v. Lyon*, 341 F. Supp. 3d 706, 713 (E.D. Mich. 2018).

¹⁴⁶ *Id.* at 713.

¹⁴⁷ *Id.*

¹⁴⁸ *Id.* The plaintiffs also argued that they had suffered stigmatic injury as a result of the denial of their application. *Id.* at 720. A stigmatic injury occurs as a result of discriminatory treatment. A child denied admission to a voucher school might likewise claim to be the victim of a stigmatic injury.

¹⁴⁹ *Id.* at 744.

¹⁵⁰ *Id.* at 747.

¹⁵¹ *Id.*

¹⁵² *Id.* at 745.

¹⁵³ *Id.*

The court went on to say that *Blum* was not controlling.¹⁵⁴ “Because the state actors in *Blum* took *no* action themselves,” the decision explained, “the Supreme Court necessarily had to determine whether the state should be obligated to shoulder the blame for solely private action.”¹⁵⁵ Conversely, the couples’ assertions in the instant case suggested that faith-based agencies could refuse to work with same-sex couples only because of the state department’s practice of entering into contracts permitting such refusals.¹⁵⁶ Therefore, the district court reasoned, “[t]he State Defendants could thus be liable not because the decision to turn away a same-sex couple itself was state action, but because a jury might find that the decision to turn away a same-sex couple was a reasonably foreseeable consequence of the action taken by the State Defendants.”¹⁵⁷

Similar to the *Dumont* case, students who have been denied admission to or expelled from participating private schools with anti-LGBT policies could argue that the state action arises from the state’s permission of the schools’ discriminatory behavior. It is certainly reasonably foreseeable that some faith-based private schools would discriminate on the basis of sexual orientation. It is important to acknowledge the difference between the *Dumont* case and the private-school-choice programs discussed in this article. *Dumont* dealt with a contract between the state and faith-based agencies. There is no such contractual arrangement between the state and participating private schools in private-school-choice programs. But this distinction should not matter because states require private schools to register with the state and seek state approval for participation in the program.¹⁵⁸ In addition, states often advertise the existence of the programs and the schools that participate on state websites.¹⁵⁹ Arguably, state voucher programs have set up an even more

¹⁵⁴ *Id.* at 746.

¹⁵⁵ *Id.* (emphasis in original) (internal citations and quotations omitted).

¹⁵⁶ *Id.*

¹⁵⁷ *Id.* (internal brackets omitted) (citing *Paige v. Coyner*, 614 F. 3d 273, 280 (6th Cir. 2010)); *See also*, *Fulton v. City of Philadelphia*, 140 S. Ct. 1104 (2020) (where U.S. Supreme Court granted certiorari to examine a case involving a religious organization that was denied a city contract because it refused, based on religious grounds, to provide services to married same-sex couples who sought to participate in the organization’s foster care program).

¹⁵⁸ *See, e.g.*, GEORGIA DEPARTMENT OF EDUCATION, SPECIAL NEED SCHOLARSHIP PROGRAM RESOURCES: 20–21 PRIVATE SCHOOL APPLICATION (2020), <https://www.gadoe.org/External-Affairs-and-Policy/Policy/Pages/Special-Needs-Scholarship-Program-Resources.aspx> [https://perma.cc/VX4M-EE29].

¹⁵⁹ *See, e.g.*, OHIO DEPARTMENT OF EDUCATION, DIRECTORY OF NONPUBLIC SCHOOLS AND SERVICE PROVIDERS THAT PARTICIPATE IN SCHOLARSHIP PROGRAMS (2019),

elaborate system that foreseeably leads to sexual orientation discrimination. Similarly to *Dumont*, states could stop this foreseeable discriminatory behavior by forbidding it.

Additionally, students might be able to show that states have significantly encouraged participating private schools to enforce their anti-LGBT admissions policies, thus establishing state action. At first glance, this task seems insurmountable. Citing *American Manufacturers*, a court might characterize the failure of private school choice laws to prohibit participating schools from discriminating on the basis of race as “state inaction.”¹⁶⁰ But an examination of these statutes’ legislative history might reveal that lawmakers were signaling to certain schools that it was okay to exclude LGBT students. For example, several states include statutory provisions that require parents and students to comply with all private school policies, which would include the discriminatory practices causing exclusion of LGBT youth and families.¹⁶¹ Moreover, some states, like Arizona, alert participating private schools that they “shall not be required to alter [their] creed[s], practices, admissions polic[ies] or curricul[a].”¹⁶² In these instances, such explicitly permissive policies exist in statutes that omit any prohibition against religious or sexual orientation discrimination.¹⁶³ This combination, permitting exclusionary policies in the absence of prohibitions against discrimination on the basis of religion¹⁶⁴ and/or sexual orientation, could be read as tacit state approval of exclusionary policies. In such cases, courts might conclude that states were doing more than merely approving of or acquiescing to the discriminatory practices of these schools.

The fallout surrounding the *Orlando Sentinel’s* reporting of the anti-LGBT admissions policies of participating Florida private schools provides an example. This revelation came at the time the state legislature was considering House Bill 7067,¹⁶⁵ a bill that would increase the scope of Florida’s private-school-choice options by raising the household income eligibility for the Florida Empowerment

<http://education.ohio.gov/Topics/Other-Resources/Scholarships/Ohio-Scholarship-Providers-Interactive-Directory> [<https://perma.cc/9GLC-6KHB>].

¹⁶⁰ *American Mfrs. Mut. Ins. Co. v. Sullivan*, 526 U.S. 40, 53 (1999).

¹⁶¹ See, e.g., FLA. STAT. ANN. 1002.39(9)(D) (2020); GA. CODE ANN. § 20-2-2114(i) (2020); LA. REV. STAT. §§ 17:4022(6), 17:4021(D)(4) (2020); MISS. CODE ANN. §37-173-11(d) (2020).

¹⁶² A.R.S. § 15-2404(C).

¹⁶³ Eckes, Mead, & Ulm, *supra* note 29, at 543.

¹⁶⁴ Recall that the voucher program upheld by the U.S. Supreme Court included a prohibition against religious discrimination. *Zelman v. Simmons-Harris*, 536 U.S. 639, 645, 662–63 (2002).

¹⁶⁵ H.R. 7067, 2020 Leg., 123rd Sess. (Fla. 2020).

Scholarship and Florida Tax Credit Programs. Rep. Carlos Guillermo Smith responded by introducing an amendment to the bill that would prohibit participating private schools from discriminating against LGBT students.¹⁶⁶ The state house of representatives voted down the amendment, even though debate illuminated the exclusionary practices of some participating schools.¹⁶⁷ During the debate, Rep. Jennifer Sullivan asserted that the amendment was unnecessary because no student had reported being expelled from a school because of their sexual orientation.¹⁶⁸ However, the statements of Rep. Kimberly Daniels, who also opposed the amendment, suggested that other concerns were at play. Daniels expressed her opposition to the amendment by acknowledging that Smith had a right to advocate for the LGBT community. But Daniels also asserted that she had a right to defend the concerns of religious private schools, explaining, “I’m a champion of the G-O-S-P-E-L. The gospel of Jesus Christ.”¹⁶⁹ Daniels went on to argue that a non-discrimination requirement would violate the Free Exercise Clause of participating schools with anti-LGBT admissions requirements.¹⁷⁰ Significantly, she argued that a non-discrimination provision “would trespass on what we call in the military a A.O. . . . These are the areas of operation of these private schools.”¹⁷¹ Daniels’ statements suggest that she was not merely acquiescing to the admissions decisions of these schools. Rather, she was defending these schools’ “right” to discriminate.¹⁷² At a minimum, such state actions may be viewed as deliberately indifferent¹⁷³ to the discriminatory effects of such policy

¹⁶⁶ House Amend. 856839, H.R. 7067. (failed).

¹⁶⁷ Fla. H.R. Sess. Video (Mar. 6, 2020), *supra* note 10, at 3:38:24.

¹⁶⁸ *Id.* at 3:18:36.

¹⁶⁹ *Id.* at 2:21:59.

¹⁷⁰ *Id.* at 2:22:59.

¹⁷¹ *Id.* at 2:23:07.

¹⁷² Please note the discussion explaining how the state may be vulnerable to a state action challenge by creating a private school system that could foreseeably lead to sexual orientation discrimination by some participating private schools. *See supra* notes 145-164.

¹⁷³ Courts have held that governmental actors who act with deliberate indifference to knowledge of discriminatory complaints have violated non-discriminatory requirements of both the Fourteenth Amendment and federal statutes. *See generally* *Doe v. Taylor Indep. Sch. Dist.*, 15 F.3d 443 (5th Cir. 1994) (holding that deliberate indifference to actual notice of a teacher’s sexual misconduct with a student violated the student’s Fourteenth Amendment right to substantive due process); *Davis ex rel. LaShonda D. v. Monroe County Bd. of Educ.*, 526 U.S. 629 (1999) (holding that deliberate indifference to notice of peer sexual harassment violates Title IX).

pronouncements.

4. Entwinement Test

The entwinement test provides that a private entity is a state actor “when it is entwined with governmental policies, or when [the] government is entwined in [its] management or control.”¹⁷⁴ The Court first articulated this theory in *Brentwood v. Tennessee Secondary School Athletic Association*.¹⁷⁵ In *Brentwood*, an interscholastic athletic association had penalized a private school for violating the association’s regulations relating to recruitment.¹⁷⁶ The athletic association was a not-for-profit organization that coordinated sports competitions for public and private high schools in the state of Tennessee.¹⁷⁷ Brentwood Academy, a private parochial school, was one of the voluntary members of the athletic association. After the association placed Brentwood Academy on probation for player recruitment violations, the school sued.¹⁷⁸ The private school argued that the association was a state actor and therefore its enforcement of the rule was in violation of the Fourteenth Amendment, among other claims.¹⁷⁹

The Court found that the athletic association was a state actor under the entwinement test. In reaching this decision, the Court observed that 84% of the association’s membership consisted of public schools.¹⁸⁰ There was also entwinement between the state board of education and the association.¹⁸¹ State board members served on the association’s committees in a nonvoting capacity, and the association’s ministerial members were treated as state employees “to the extent of being eligible for membership in the state retirement system.”¹⁸²

Subsequent litigants have not been able to convince courts of similar “entwinements” so as to impute state action from the acts of private entities. For example, applying the entwinement test, the First Circuit in *Logiodice v. Trustees of Maine Central Institute* held that a private school, which had contracted with a school district to educate its high-school-age students at public expense, was not a state

¹⁷⁴ *Brentwood Acad. v. Tennessee Secondary Sch. Athl. Ass’n*, 531 U.S. 288, 296 (2001) (internal quotations and citations omitted).

¹⁷⁵ *Id.*

¹⁷⁶ *Id.* at 293.

¹⁷⁷ *Id.* at 291.

¹⁷⁸ *Id.* at 293.

¹⁷⁹ *Id.*

¹⁸⁰ *Id.* at 299–300.

¹⁸¹ *Id.* at 300.

¹⁸² *Id.*

actor under § 1983 when it disciplined a student.¹⁸³ The student alleged that the school violated his due process rights by suspending him for seventeen days without a hearing.¹⁸⁴ The contract provided the school's board of trustees with sole authority over school disciplinary matters.¹⁸⁵

The First Circuit rejected the claim that the private school was a state actor under the entwinement test. The court identified several similarities between the instant case and *Brentwood*: “The state regulate[d] contract schools in various respects;” the school district sponsored 80% of the contract school students; and “in certain respects (public busing to extracurricular events, transfer of lower-school records, assistance with registration), [the contract school's] students [we]re treated as if they were regular public school students.”¹⁸⁶ However, the First Circuit found no entwinement because the private trustees, not public school officials, ran the school, and the school's contract provided that the trustees had sole authority over student discipline.¹⁸⁷

It is highly unlikely that a court will rule that the anti-LGBT admissions policies of participating private schools are subject to constitutional scrutiny under the entwinement test. Unlike *Brentwood*, there is no entwinement. In fact, the situation is similar to *Logiodice*: state laws give control over school admissions policies to private schools.

5. State Enforcement Test

The Supreme Court established this concept of state action in *Shelley v. Kraemer*.¹⁸⁸ *Shelley* encompassed two cases concerning restrictive covenants that excluded certain races from owning or occupying real property.¹⁸⁹ The first case involved a ruling by the Supreme Court of Missouri.¹⁹⁰ In 1911, thirty property owners signed an agreement that prevented their property from being occupied for fifty years “by any person not of the Caucasian race.”¹⁹¹ In 1945, the Shelleys, a Black

¹⁸³ *Logiodice v. Tr. of Maine Cent. Inst.*, 296 F.3d 22, 25, 28 (1st Cir. 2002).

¹⁸⁴ *Id.* at 25.

¹⁸⁵ *Id.* at 28.

¹⁸⁶ *Id.*

¹⁸⁷ *Id.*

¹⁸⁸ *Shelley v. Kraemer*, 334 U.S. 1 (1948).

¹⁸⁹ *Id.* at 4, 6.

¹⁹⁰ *Id.*

¹⁹¹ *Id.* at 4–5.

family, received a warranty deed to one of the parcels subject to the covenant.¹⁹² A white owner of another parcel of land under the covenant sued in state court, demanding a judgment enforcing the covenant and divesting the Shelleys of the title.¹⁹³ A state trial court denied the requested relief.¹⁹⁴ The Missouri Supreme Court reversed and directed the lower court to enforce the covenant.¹⁹⁵ The second case came from the Michigan Supreme Court.¹⁹⁶ That court also enforced a similarly worded racially restrictive covenant.¹⁹⁷

The U.S. Supreme Court reversed both decisions on the ground that the judicial enforcement of the racial covenants violated the Equal Protection Clause.¹⁹⁸ The Court observed that these agreements by themselves did not deprive the prospective Black landowners of their constitutional rights.¹⁹⁹ However, the judicial enforcement in state courts of these racially restrictive covenants did constitute state action in violation of the Equal Protection Clause.²⁰⁰ The Court reached this conclusion because “the States have made available to [the private persons wishing to discriminate] the full coercive power of the government to deny to petitioners, on the grounds of race or color, the enjoyment of property rights.”²⁰¹

It is important to note, however, that legal scholars have expressed concern about the danger that the state action theory first enunciated in *Shelley*. As Laurence Tribe has explained, the consistent application of *Shelley*'s principles “would require individuals to conform their private agreements to constitutional standards whenever, as almost always, the individuals might later seek the security of potential judicial enforcement.”²⁰² To avoid this problem, several courts have limited the scope of *Shelley* to disputes involving racial discrimination.²⁰³ This

¹⁹² *Id.* at 5.

¹⁹³ *Id.* at 6.

¹⁹⁴ *Id.*

¹⁹⁵ *Id.*

¹⁹⁶ *Id.*

¹⁹⁷ *Id.* at 6–7.

¹⁹⁸ *Id.* at 22.

¹⁹⁹ *See id.* at 14.

²⁰⁰ *Id.* at 20.

²⁰¹ *Id.* at 19.

²⁰² LAURENCE H. TRIBE, *AMERICAN CONSTITUTIONAL LAW* 1697 (2d ed. 1988).

²⁰³ *See, e.g.,* *Golden Gateway Ctr. v. Golden Gateway Tenants Ass'n*, 29 P.3d 797, 810 (Cal. 2001) (“Although the United States Supreme Court has held that judicial effectuation of a racially restrictive covenant constitutes state action..., it has largely limited this holding to the facts of those cases.”); *Mahoney v. Nat'l Org. for Women*, 681 F. Supp. 129, 133 (D. Conn. 1987) (“However,

restriction would seemingly foreclose any challenge to anti-LGBT provisions under a state enforcement theory of state action.

However, in *Lavoie v. Bigwood*,²⁰⁴ the First Circuit applied a more expansive approach to *Shelley* that could enable students to challenge the state enforcement of anti-LGBT admissions provisions. In *Lavoie*, a tenant rented space in a mobile park located in New Hampshire.²⁰⁵ After complaining to public officials about the owner's management of the park, the tenant alleged that the owner brought an eviction proceeding through a state municipal court.²⁰⁶ In response, the tenant sued in state court, alleging that the defendants sought the eviction in retaliation for the tenant's exercise of his rights of speech and association.²⁰⁷ The tenant further claimed that New Hampshire's landlord-tenant and zoning laws transformed the "purely private" landlord-tenant relationship into state action.²⁰⁸ A federal district court dismissed the case, finding that the owner's alleged conduct was not state action.²⁰⁹

The First Circuit reversed the lower court's decision.²¹⁰ In reaching this conclusion, the appellate court identified two "polar propositions" in the state action jurisprudence.²¹¹ Terms like "state compulsion or involvement" resided at the "state action" pole whereas phrases like "neutrality," "purely private," and "merely private" resided at the opposite pole.²¹² In sorting out the use of these terms, the court acknowledged that states were involved in private action to some degree.²¹³

To develop its own theory of neutrality, the First Circuit relied on a Supreme

subsequent decisions have carefully limited *Shelley* to its facts"); *Parks v. "Mr. Ford"*, 556 F.2d 132, 136 n. 6a (3rd Cir. 1977) ("In cases [in which state courts enforced to take actions which are permitted but not compelled by law], state action has been found only when the doctrine of *Shelley* . . . has been found applicable."); *Tansey-Warner, Inc. v. E. Coast Resorts, Inc.*, No. 720, 1978 WL 22460, at *3 (Del. Ch. Nov. 27, 1978) ("Extensions of state action have been limited to cases involving racial discrimination.").

²⁰⁴ *Lavoie v. Bigwood*, 457 F.2d 7 (1st Cir. 1972).

²⁰⁵ *Id.* at 8.

²⁰⁶ *Id.*

²⁰⁷ *Id.* at 8–9.

²⁰⁸ *Id.* at 9.

²⁰⁹ *Id.*

²¹⁰ *Id.* at 15.

²¹¹ *Id.* at 10.

²¹² *Id.*

²¹³ *Id.*

Court case, *Griffin v. Maryland*.²¹⁴ In *Griffin*, a deputy sheriff sought to prosecute certain Black patrons for criminal trespass because they refused to leave a privately-owned amusement park.²¹⁵ Maryland contended that there was no state action because it was “not really enforcing a policy of segregation since the owner’s ultimate purpose [was] immaterial to the state.”²¹⁶ The Court rejected this assertion because the president of the corporation managing the park had asked the deputy sheriff to enforce its policy of racial segregation.²¹⁷

The First Circuit took the following principle from *Griffin*: “A state, then, must be more strictly neutral than to permit any of its officers to identify the subjects of the discrimination in the first instance.”²¹⁸ Although *Griffin* did not cite *Shelley*, the First Circuit viewed *Shelley* to be an earlier application of this neutrality principle.²¹⁹ To enforce the covenant, the court explained, “the state court had necessarily to take evidence that the prospective buyer was black and to take notice that the clause being enforced was a racially restrictive one.”²²⁰ Citing *Shelley* and *Griffin*, the First Circuit then developed a theory of neutrality to be applied to cases apart from racial discrimination:

[A] state may at the behest of private persons apply sanctions pursuant to general rules of law which have discriminatory as well as non-discriminatory application if it does not accept the responsibility of employing a discriminatory classification. Such responsibility would exist when, in resorting to a state sanction, a private party must necessarily make the state privy to his discriminatory purpose. Similarly, in such a case as this, the state would retain a neutral posture unless it was necessarily apprised of the landlord’s purpose to violate rights of free speech and association. While not entirely satisfactory, this approach at least recognizes conscious state involvement without insisting upon an unattainable purity.²²¹

Applying this standard of neutrality, the First Circuit reasoned that an eviction in retaliation of First Amendment rights, standing alone, was private action.²²² However, it held that the mobile park tenant sufficiently alleged state action by “asserting a town purpose to restrict sites for mobile homes and a concomitant

²¹⁴ *Griffin v. Maryland*, 378 U.S. 130 (1964).

²¹⁵ *Id.* at 131.

²¹⁶ *Id.* at 136.

²¹⁷ *Id.* at 136–37.

²¹⁸ *Lavoie v. Bigwood*, 457 F.2d 7, 11 (1st Cir. 1972).

²¹⁹ *Id.*

²²⁰ *Id.*

²²¹ *Id.* at 11–12.

²²² *Id.* at 12.

private monopoly over the allocation of those sites.”²²³ It is important to note that the *Lavoie* case did not involve the state court enforcement of a private person’s request to deprive another person of their constitutional rights. Nevertheless, *Lavoie* clearly indicates that state enforcement of a private action would be state action if the party to a lawsuit appraises a state court of its unconstitutional motivation.²²⁴

Building on *Shelley* and *Lavoie*, plaintiff families may argue that the state effectively enforces private schools’ anti-LGBT policies that deprive students of a state benefit under the Due Process Clause. Such state agency enforcement would violate the Equal Protection Clause on the basis of sexual orientation. For example, Indiana requires that each private school annually register and be approved for participation in its voucher program.²²⁵ That process requires each school to submit a current copy of the school’s admissions policy.²²⁶ Only those schools that have been “approved” by the state agency are listed as participating schools.²²⁷ As such, a school’s admissions policy that denies admission to LGBT students gains approval and enforcement by the state. Plaintiffs may also argue that because the child meets all state eligibility requirements for participation in the voucher program, any deprivation of the benefit is also a deprivation of a property interest—the entitlement to participate in a state benefit on terms equal to others. To establish a property interest to this benefit, the student would have to establish “more than an abstract need or desire” and “more than a unilateral benefit.”²²⁸ Instead, the student must have a “legitimate claim of entitlement.”²²⁹ Property interests are not created by the federal constitution, but are derived from independent sources such as state law.²³⁰ Although these programs are created by state law, federal constitution law determines whether this interest associated with the benefit of voucher

²²³ *Id.* at 14.

²²⁴ See *Casa Marie, Inc. v. Superior Ct. of Puerto Rico for the Dist. of Arecibo*, 988 F.2d 252, 260 (1st Cir. 1993) (finding no state action because was unaware of any discriminatory animus regarding the restrictive covenant).

²²⁵ IND. CODE § 20-51-4-3(f) (2020); see also SCHOOL APPLICATION MEMO, IND. DEP’T OF EDUC., <https://www.doe.in.gov/sites/default/files/choice/choice-school-app-memo-2021.pdf> [<https://perma.cc/UC8H-BW7H>].

²²⁶ SCHOOL APPLICATION MEMO, *supra* note 225.

²²⁷ *Id.*

²²⁸ *Bd. of Regents of State Colls. v. Roth*, 408 U.S. 564, 577 (1972).

²²⁹ *Id.*

²³⁰ *Town of Castle Rock, Colo. v. Gonzales ex rel. Gonzales*, 545 U.S. 748, 756 (2005).

participation rises to the level of a legitimate claim of entitlement.²³¹

By examining the school choice statutes, regulations, and legislative history, the student would attempt to show that state law guarantees them a right to equal access to a state benefit²³²—participation in a voucher program—and that the state’s role in tacitly enforcing the school’s action is attempting to deny the student of that benefit. Representative Anna Eskamani raised this concern in the debate over House Bill 7067, which expanded school choice in Florida. She explained,

... as we expand this program to more and more kids, . . . you’re going to see more kids who are gay who won’t benefit, and I am concerned that if you are a gay child growing up in a different part of the state, and you want to practice choice, but every school in that perimeter has anti-LGBT policies, does that child have choice?²³³

If a student could establish such a property right to participation in the program, it would follow that the state court enforcement of the anti-LGBT policy would violate the Equal Protection Clause. As in *Shelley*, the state would “have made available to [the private persons wishing to discriminate] the full coercive power of the government to deny to petitioners, on the grounds of [sexual orientation].”²³⁴ In effect, the argument would be that anti-LGBT policies are the restrictive covenants of voucher program participation.

IV. CONCLUSION

As this discussion shows, the reason we have yet to see litigation on the exclusion of LGBT students from private schools participating in voucher programs likely stems from the obstacles to convincing a court that sufficient state action exists to incur the protections of the Fourteenth Amendment. In fact, those theories that would involve suing the schools directly—the public function test, the symbiotic relationship test, and the entwinement test—hold little promise of success. In each instance, it would be difficult, given existing precedent, to convince a court that the participation of the private school in a public program transformed school officials into state actors subject to the requirements of the Fourteenth Amendment.²³⁵

However, two approaches may provide an avenue for success: the state

²³¹ *Id.* at 757.

²³² Plaintiffs may also assert violations of Title VI for denial of equal access to a state benefit. See generally Eckes, Mead, & Ulm, *supra* note 29.

²³³ Fla. H.R. Sess. Video (Mar. 6, 2020), *supra* note 10, at 3:22:24.

²³⁴ *Shelley v. Kraemer*, 334 U.S. 1, 19 (1948).

²³⁵ For a similar conclusion, see generally Vanessa Ann Countryman, *School Choice Programs Do Not Render Participant Private Schools State Actors*, 2004 U. CHI. LEGAL F. 525 (2004).

compulsion test and the state enforcement test. In both instances, plaintiffs would challenge the state directly for its unequal implementation of the voucher program. In other words, like the plaintiffs in *Dumont*, challengers would “allege that their claims concern only the State’s provision of taxpayer-funded government services based on religious and discriminatory criteria and do not challenge any private [school’s] provision of [educational] services or use of non-public funds.”²³⁶ Whether cast as state compulsion or state enforcement, courts might well agree that states cannot divorce their actions from those of the private schools when the result is a group of children with limited access to a state-created benefit. As the Supreme Court ruled in the landmark marriage equality case, *Obergefell v. Hodges*,

Indeed, in interpreting the Equal Protection Clause, the Court has recognized that new insights and societal understandings can reveal unjustified inequality within our most fundamental institutions that once passed unnoticed and unchallenged.²³⁷

It is also interesting to observe that many of the cases that have refused to recognize state action have litigated claims under the Due Process Clause rather than the Equal Protection Clause of the Fourteenth Amendment, and many asserted the rights of adult workers rather than those of students. While both claims obviously hinge on the presence or absence of a state actor, the fact that the situations involve exclusionary admissions policies directed at a discreet group of children may give jurists pause. The parallels between these exclusionary practices and earlier practices of private schools’ denial of children’s access on the basis of race²³⁸ may make courts more open to the complaints of excluded children and families.

It is also important to acknowledge that getting a court to recognize state action is only the first step. Even if a court recognizes the state’s role in the exclusion of

²³⁶ *Dumont v. Lyon*, 341 F. Supp. 3d 706, 714 (E.D. Mich. 2018). The Southern Education Foundation made the same argument in its study of Georgia’s voucher program and the exclusion of LGBT students: “Under state and federal constitutions, a private religious institution has the right to believe whatever it thinks Holy Scripture commands. It also has the right under current law to operate its private affairs in accordance with those beliefs. But, state financing transforms a private action into an action of the state – from a private action of a particular sect in society to a public action that involves and represents the entire democratic society. The virulent anti-gay policies and practices that Georgia’s tax credit program supports in many of its private schools raise the question of whether any state government should be in the business of helping to finance educational institutions that condemn, exclude, penalize and, in some cases, demonize children and families simply on the grounds of who they are or what they believe.” S. Educ. Found., *supra* note 56, at 17.

²³⁷ *Obergefell v. Hodges*, 576 U.S. 644, 673 (2015).

²³⁸ *Norwood v. Harris*, 413 U.S. 455 (1973); *Runyon v. McCrary*, 427 U.S. 160 (1976).

LGBT children from state-funded voucher programs, plaintiffs would then have to survive states' defenses of those programs. For example, a state may argue that a child can choose another private school without similar restrictions or could return to the public school system. As such, the state may argue that the child has not suffered sufficient injury to bring a claim. However, to quote the *Dumont* court once more, "[p]laintiffs' need not demonstrate that they would have been completely foreclosed—only that they could not compete for the right to [to participate in the voucher program] on the same footing as everyone else."²³⁹

States may also contend that their actions serve the legitimate purpose of respecting the religious rights of participating private schools. While a full explication of the tension between religious freedoms of the schools on the one hand and the rights of children to enjoy the benefits of state programs free from discrimination on the basis of religion and sexual orientation on the other is beyond the scope of this paper, a key to this tension may be in the purpose of the program.²⁴⁰ Because the programs have been designed to benefit children and their families, the argument could be made that the state's first obligation is to ensure that any benefit created by the programs is offered to those primary beneficiaries on equal terms. In fact, the *Zelman* Court's approval of the Cleveland voucher program rested on the idea that the benefit accrued to the child and that the funding received by participating schools was an indirect result of the private choices of these parents.²⁴¹ The children were viewed as the primary beneficiaries of the program. Elevating a school's asserted right to deny admission to a child on the basis of sexual orientation would subvert the primary purpose of the program. Moreover, the Supreme Court directed that any voucher program that includes religious schools must ensure that "[p]rogram benefits are available to participating families on neutral terms, with no

²³⁹ *Dumont*, 341 F. Supp. 3d at 722.

²⁴⁰ Focusing on the purpose may help to distinguish a claim of this type from recent cases involving religion and the state. For example, *Trinity Lutheran Church of Columbia, Inc. v. Comer* involved a program designed to provide state funds for playground resurfacing. The beneficiary was the playground owner (the church) and the Court found exclusion from that program simply because the playground was owned by a religious entity violated the church's First Amendment rights. *Trinity Lutheran Church of Columbia, Inc. v. Comer*, 582 U.S. ---, 137 S.Ct. 2012, 2017, 2024 (2017). The Court's latest voucher case, *Espinoza v. Montana Department of Revenue*, can also be distinguished. That case reviewed Montana's justification for interpreting its state constitution to set a higher standard for indirect funding to religious entities than the federal Establishment Clause. *Espinoza v. Montana Dep't of Revenue*, 140 S.Ct. 2246, 2253–54 (2020). The case did not involve the legal questions that would be raised by a challenge to private schools' exclusion of LGBT voucher users.

²⁴¹ *Zelman v. Simmons-Harris*, 536 U.S. 639, 662 (2002).

reference to religion.”²⁴² A state’s approval and enforcement of private schools’ exclusionary practices result in participation being offered on non-neutral terms with reference to religion.

The last five years have borne witness to incredible advances in the recognition of the rights of LGBT individuals. From the landmark ruling guaranteeing the right to marry²⁴³ to the recent recognition that federal non-discrimination law forbids discrimination on the basis of sexual orientation and gender identity,²⁴⁴ the Supreme Court has mandated that states respect the rights of all individuals to be treated fairly. In so doing, the protections of federal law have been extended and the Court has explicitly noted that the rights of every LGBT person must be legally protected from state actions that result in the diminution of a person’s dignity. It would be a perversion of justice to place state-operated voucher programs outside the ambit of those protections. For as the Court observed just five short years ago, “The Constitution promises liberty to all within its reach, a liberty that includes certain specific rights that allow persons, within a lawful realm, to define and express their identity.”²⁴⁵ That liberty must extend to all children who seek to participate in state voucher programs. Only then will the troubling headlines cease.

²⁴² *Id.* at 653.

²⁴³ *Obergefell v. Hodges*, 576 U.S. 644, 135 S. Ct. 2584 (2015).

²⁴⁴ *Bostock v. Clayton Cty.*, 140 S.Ct. 1731(2020).

²⁴⁵ *Obergefell*, 576 U.S. at 651-652.