On the Dole for the Homeless Soul:

Religious and Sex Discrimination by Sectarian Adoption Services

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Abstract

Religious institutions have historically taken care of orphaned or unwanted children. Although the U.S. has provided public child services for nearly a century, the country still relies heavily on private, faith-based organizations to care for and place children with families. Some of these organizations receive public funds, yet their mission statements often prioritize placing young people with families that meet religious standards; they may reject parents who have religions or lifestyles that they disagree with. Such religious discrimination brings to the fore the Free Exercise and Establishment Clauses of the First Amendment and the Equal Protection Clause of the Fourteenth Amendment, as well as social considerations such as the Best Interests of the Child (BIC). This chapter will explore the legal, political, and social labyrinth that is closing doors to potential parents in favor of saving souls.

This is the author's manuscript of the work published in final edited form as:

Morris, P. L., & Sarapin, S. H. (2022). On the dole for the homeless soul: Religious and sex discrimination by sectarian adoption services. In K. A. Johnson & J. J. Asenas (Eds.), Religious freedom v. Equal protection: Clashing American rights.

Introduction

In the United States, over half a million children are without a permanent home: 437,000 are in foster homes and 125,000 are waiting to be adopted.[1] Given this child welfare crisis, the exclusion of otherwise suitable parents who fall outside narrowly defined religious principles is counterproductive. Yet private agencies argue that "principles of non-discrimination would present them with 'an untenable choice…between their desire to help children and families and their fidelity to their religious principles,'" removing experienced and successful agencies from an overtaxed system.[2] In the United States, the government provides funding and licensure for childcare and placement for both public and private (often religiously oriented) agencies. Private agencies must be licensed by states, yet some still espouse and enact religious values in the process of placing children. Sectarian child welfare agencies often choose to turn away prospective parents who are not coreligionists or based on their preferred family structure (e.g., single parents, non-married couples, and LGBTQ couples). Currently, information about those turned away is not collected, so evidence of the problem is anecdotal through news stories and court cases. At issue in this situation are several legal conflicts involving the Free Exercise and Establishment Clauses of the First Amendment as well as the Equal Protection Clause of the Fourteenth Amendment. There is "much complication and confusion in religion clause jurisprudence by attempting to balance the separation required by the Establishment Clause with the accommodation needed for religious freedom in a highly devoted and pluralistic society."[3] The Supreme Court of the United States (SCOTUS) has not yet weighed in on discrimination by sectarian adoption agencies, and the current legal situation is murky.

Without clear legal guidelines, funding for sectarian adoption agencies may change with the political winds. The Obama-era rule, finalized in 2016 after the *Obergefell v. Windsor*

SCOTUS decision regarding same-sex marriage, enforced non-discrimination for agencies receiving aid from the Department of Health and Human Services (DHHS). Faith-based organizations (FBOs) could not receive federal money if they "wished to be selective in which prospective foster or adoptive parents, or children, they would serve."[4] Several court cases, some of which are described in this chapter, were launched under this rule. In the era of growing support for non-discrimination, long-standing Catholic and other Christian child placement agencies have chosen to close rather than adhere to laws or policies that prevent them from excluding potential families based on their religious beliefs. For example, Catholic foster care and adoption agencies in Washington, D.C., Boston, the State of Illinois, San Francisco, and Buffalo have closed as a result.[5]

The Trump Administration reversed course and awarded a waiver on *state*-non-discrimination policy to South Carolina in January of 2019.[6] In addition, in November 2019, the Trump Administration announced a change to *federal* rules to preserve federal funding of faith-based adoption agencies, regardless of their views on same-sex marriage.[7] Under this new rule, the DHHS revised the 2016 rule; private entities which receive public funding and business contracts may institute discriminatory practices toward individuals predetermined to be unsatisfactory as parents.

Adding to the complexity is that the regulation of adoption is largely decentralized as a state responsibility. For example, in 2006, Catholic Charities of Boston ended adoption services because in Massachusetts all adoption agencies must be licensed by the state, whether or not they receive state dollars, and licensure depends upon the agency obeying state anti-discrimination laws.[8]

What is often lost in these political and legal battles is the human issue. Children are not goods, services, or property to be used as a resource for any organization. Religion and child welfare have been associated for much of recent history, as sectarian organizations voluntarily took on the "mission" of caring for children when others could not. For as long as this has been the case, people have questioned whether these organizations are engaged in this work for the benefit of the child or evangelism.

This chapter will first present a brief review of the role of religion in adoption, explicate the goal of establishing practicable principles regarding the best interests of the child, and present mission statements of several FBOs that contract with the government for child welfare services. Next is a review of the legal and constitutional issues, presenting several recent and ongoing court cases. Finally, the discussion proposes resolutions that meet the paramount goal: the best interests of the child.[9]

Religion and Adoption: Historically Tangled

Christian teaching commands the church to care for those who cannot care for themselves. The New Testament of the Bible states: "Religion that God our Father accepts as pure and faultless is this: to look after orphans and widows in their distress and to keep oneself from being polluted by the world" (New International Version, James 1:27). Godparents were chosen by parents to take in children should the worst happen, as it so often did in times of war, pestilence, and poverty. Legal adoption, however, was largely absent in Western Europe, due to the emphasis on primogeniture (bloodline heredity). The Church did not support adoption either, preferring that childless couples leave their legacy to the Church, and that unwanted, orphaned, or excess children be given to the Church, often as an oblation, providing "recruits or servants

for the religious establishments."[10] Furthermore, this stance was "reinforced by a pious fear that Christian orphans might be adopted by non-Christian families."[11]

In the United States, early colonists largely followed these traditions. However, life in the New World was far away from relatives, established religious sites, and concerns about the inheritance of the family land. Nearer were conditions that usually left children orphaned, abandoned, and homeless.

In 1851, the State of Massachusetts became the first in the world to codify adoption into a law (An Act to Provide for the Adoption of Children), and did so with the welfare of the child in mind. England would not enact its first adoption laws until 1926. In the next 25 years, two dozen U.S. states followed suit. These laws arrived just in time for the fabled orphan trains, a grand experiment in providing "wholesome" families and homes (meaning Protestant farm families--a more moral climate than the cities) for 84,000 East Coast children living in asylums, in poorhouses, and on the streets.[12] In the 66 years the trains ran, these early state laws presided over adoptions. The orphan trains were a religious movement, and prospective parents had to provide a ministerial letter of reference.[13] Although the first adoption laws were silent on the issue of religion, it was assumed that adoptive parents were of good moral (usually Christian) standing, and judges were allowed to approve or deny adoptions as they saw fit.

The early 20th century brought influenza, world wars, and the Progressive Era. A "generation of orphans"[14] sparked a social movement that was concerned about their welfare and resulted in child-centered state and federal law and the standardization and professionalization of adoption practices.[15] Although there were some holdouts, most U.S. states passed laws legalizing adoption during this period. Although benevolent work had mostly existed in sectarian organizations, the Depression and New Deal prompted the creation of state-funded child welfare

agencies and the granting of public funds to private agencies to satisfy needs that outstripped what the private entities could handle. In a mere 10-year period, between 1925 and 1935, thirty-nine states enacted or revised adoption legislation.[16]

Although not typically codified in adoption law, one philosophy that lasted through the 1970s was the pro forma matching of adoptees to potential parents—in race, appearance, culture, intelligence, and religion.[17] Placing children into homes where they could pass as biological children meant that children were chosen on the basis of race. For many years, the adoption of black children into non-black families was taboo. Although this belief subsided by the 1970s, some blacks today believe that such placements mean a loss of the child's culture and transracial adoptions remain controversial.[18] Along these lines, children were also matched to prospective parents' religious beliefs, on the assumption that the child's soul was born into a particular system of belief and should therefore stay there. Both Catholics and Jews feared the assimilation of 'their" children into mainstream Protestantism. Matching goals were promoted by the social work field for many decades.

Beginning in the 1960s, social workers determined that to satisfy the goal of keeping children's best interests at heart, the children should be placed in adoptive families regardless of "matching" criteria; it became clear that "matched" children were not better off than others, particularly as the stigma of adoption waned and rates of international adoptions rose.[19] The decisions in *Wilder v. Bernstein* (78 Civ. 957 (S.D.N.Y, 1973)) and *Compos v. McKeithen* (341 F. Supp. 264 (E.D. La. 2971)) declared policies of racial and religious matching unconstitutional. Congress passed the Howard M. Metzenbaum Multiethnic Placement Act in 1994, which prohibited adoption agencies from turning away adoptive parents based on race.[20] This does not mean that race and religion are not considered; rather, they are discretionary instead of

mandatory. For example, New York state law requires that a "child's religious faith be preserved and protected":

> Whenever a child is committed to any agency, association, corporation, institution or society, other than an institution supported and controlled by the state or a subdivision thereof, such commitment shall be made, when practicable, to an authorized agency under the control of persons of the same religious faith as that of the child.[21]

If the child is placed with someone of a different religion, the court must present "facts that impelled" such a decision.

One question that remains, however, is this: What, exactly, makes a good adoptive family? As we will describe in this chapter the answer is still being debated today. At times, single parents and unmarried couples were turned away (and sometimes still are). Today, LGBTQ couples face the same problems. Adoption has points of controversy that are not surprising, given the interplay between race, social issues, cultural values, and adoption practice, and other concerns.

The Best Interests of the Child

Those unfamiliar with the courtroom machinations in custody, foster-care, and adoption cases might think that the determination of the best interests of the child (BIC) is a simple task for a judge—perhaps that there is a standard list of requirements to check off to ascertain the optimal family situation for all children. In a well-known biblical case in which two women claim the same child to be their own, King Solomon decided that the love and rights of the biological mother are the relevant criteria in disputes in which the best interests of the child should be foremost on the judge's mind in determining who should have custody.[22] Unfortunately, years of child custody jurisprudence have not resulted in a clear, concretized

version of the BIC standard. Although attempts to codify BIC in the U.S. began as early as the 1840's, today's BIC legal principle and the societal norms affecting it are complicated and imprecise.[23] Relationships and economic circumstances in each family are unique to that family and cannot be treated in exactly the same way as any other family. Foster, Jr. (1972) expounds:

> the controlling principle of a child's best interests is an amorphous concept which may serve as a basis for rationalization of *any* [emphasis added] result and because of an unfortunate judicial—and human—tendency to stereotype relationships.[24]

As Foster points out, BIC can be used to justify a wide variety of decisions, some of which may reflect not the best interests of the child at all, but the perspective of a judge based on his or her personal experience, prejudice, and perspective.

BIC is one of two basic rules of thumb in adjudicating custody issues; the other is the fitness of the potential or current parent.[25] The combination of these indistinct and indeterminate measures ensures an imprecise, universal solution to a multitude of unique family dynamics, leaving the family court judge with little concrete legal direction for making an extremely consequential decision; it "invites reliance by the judge on personal values."[26] Such guidelines may not be in the best interest of the child; rather, they may be in the best interest of the judge, the state, budget, and expedition. Schwartz writes: "To be sure, there are adverse consequences to a system governed by the indeterminate 'best interests' standard. These disadvantages include a lack of predictability and the disproportionate influence that the personal values and biases of judges and agency workers may wield."[27]

Overwhelmed? Courts employ The customary judicial idioms serve to dispose of each case quickly, requiring much less work from the court and allowing more cases to be heard.[28] Foster, Jr., helps us understand what these shibboleths are and how they operate: "The

temptation is great for overburdened courts to resort to secondary rules of thumb such as ‘a natural parent is to be preferred over a stranger,’ ‘a mother is to be preferred over a father,’ and that ‘the non-custodial parent should be given liberal visitation rights.’”[29] The repercussions of recent legislation and administration policies will demonstrate how this generally accepted understanding of what is in the best interest of children has managed to disregard other variables for decades.

As an example of the courts’ wavering over the meaning of BIC, consider the changes in family court custody statistics over time. As of 2011, Hughes, Jr., reported that across the United States, in the context of divorce, mothers were awarded primary custody 68-88% of the time, fathers, 8-14%, and both equally, 2-6%.[30] In 2014, mothers were awarded custody of the children about 60% of the time, indicating a trend toward joint custody.[31] Just seven years after Hughes, Jr.’s study, Kentucky became the first state to delineate joint and equal custody as the starting point, or “legal presumption,” regarding custody following divorce. A default judgment of joint custody appears, on its face, to be a truly fair way to treat both the father and the mother, and yet, it is concomitantly an assumption that both parents are good and suitable parents for this specific child. If there is no mandatory examination of BIC, serious family problems might not be uncovered, and the children could end up in a dangerous home environment. BIC should be a priority over parental rights.[32]

However, according to law, there is one priority—that the child’s basic human needs are met. Mnookin warned that “the court’s child-protection function is to enforce minimum social standards, not to intervene coercively in an attempt to do what is best or least detrimental.”[33] Continuing in that vein, Appel and Boyer expound:

> [I]n the exercise of its child protection function, the state's goal is initially not to ensure the best possible end for the child, but rather to ensure that the child's basic needs are met by the parent. In implementing this goal, courts face substantial pressure to compel conformance with societal standards of parenting. Judges must be careful to distinguish cultural or value-based differences in child-rearing practices from parental conduct that falls beneath minimally acceptable parenting standards and raises a legitimate concern about the health, safety, or welfare of the child.[34]

Next, we look at the publicly available mission statements of several FBOs that carry out adoption and foster care services on behalf of the state.

The Mission for Souls

Mission statements have been an essential management tool since the early 1980s for both for-profit and non-profit organizations, in every industry.[35] It is the most common method for communicating the organization's purpose, core values, goals, and strategic direction to all its stakeholders, including employees, customers/clients, benefactors, supervisory legal entities, vendors, and the public. The public includes investors and users of the services or goods.[36] When communicated in all its internal and external documents, the mission statement not only reminds everyone associated with the organization of its raison d'être, but also of its self-perceived or desired identity in the larger world. For faith-based organizations, balancing its identity with its fundraising needs is challenging because to receive public funds, "a faith-based organization is expected to function like any other nonprofit in promoting activities without religious intent or discrimination."[37]Thus, FBOs, particularly those who contract with the government, may struggle to define themselves when their religious ideals conflict with the state's call for equal treatment. Their mission statements often reveal how they have chosen to position themselves.

Much of the business management literature has focused on the effect of mission statements across dozens of industries on the organization's performance. In fact, most executives and researchers erroneously believe that exceptional performance results from strong, well-written, and oft-repeated mission statements. In contrast, "Little evidence exists, however, that 'proves' their [mission statements'] true value. Most studies have tended to focus almost exclusively—even obsessively—on their content. None has attempted to compare 'prescription with practice,' and only a few have tried to link findings about mission statements to any measures of performance or satisfaction."[38] To this day, despite the paucity of supportive findings, researchers continue in this vein using similar experimental designs to find almost no evidence of direct, positive, and significant relationships between mission statements and performance.[39] We believe, however, that the content of the mission statement can be valuable in another sense.

Whereas mission statements, per se, are not legally binding for an organization, they do articulate organizational priorities. Regarding faith-based adoption agencies, does the mission statement prioritize evangelism over the best interest of the child in finding a permanent, safe, and loving home or vice versa? Does the mission statement meet legal standards for an organization performing a government service, and eligible for government funding?

Eligible or not, there are good reasons to not fund a faith-based organization. Referring to *Agostini v. Felton,* 1997 and *Mitchell v. Helms,* 2000, Bielefeld and Cleveland recognized Saperstein's explanation of "a number of policy reasons to avoid direct government funding of pervasively sectarian FBOs, even though the Supreme Court held this funding to be legal if funds are used for secular purposes."[40] The public is frequently kept out of the loop because religious nonprofits tend to disclose less accountability information than larger, secular nonprofits,

believing that the organization's association with a religious entity enhances its trustworthiness. That accountability is demonstrated by showing information such as the number of employees, the amount and source of donations, expenses, and the annual report. The administration and board members of the FBO may believe that "trust between donors and these organizations is already established through a religious bond. Consequently, religion-related nonprofits do not anticipate donors requesting additional accountability information."[41] Without greater disclosure, it is unclear whether the services provided warrant tax payer support.

The lack of public disclosure of accountability information has the power to negatively affect donations to the organization:

> Both corporations and nonprofits need a 'social license to operate.' They maintain the trust of important stakeholders by showing that they adhere to certain social norms and expectations of behavior. Their image, or brand, is extremely important and stakeholders, by withdrawing support as consumer or as donor/supporter, are in a position to influence their organizational success or failure.[42]

If the public trust could be augmented, the organization may not find as great a need to seek government financial support because its like-minded co-religionists would be more apt to continue donating to it, perhaps even in greater sums. To exemplify this, we next contrast mission statements (from Web sites) of several FBOs.

St. Vincent Catholic Charities and Bethany Christian Services of Michigan will be discussed within a legal case later in this chapter. Currently, both organizations' sites provide little information about prospective parents, perhaps as a result of the recent litigation. St. Vincent Catholic Charities of Michigan is an organization headquartered in Lansing, MI (stvcc.org). It offers foster-care, adoption, counseling, and immigration services. Its mission

statement appears on the home page of its website: “The mission of St. Vincent Catholic Charities is the work of the Catholic Church, to share the love of Christ by performing the corporal and spiritual works of mercy.” On its page about adoption, there is surprisingly scant information about the process. The foster-care page offers much more information, including the qualifications for potential foster parents (“you do not have to be Catholic”). Further information about adoption requires a call to its office or attendance at an orientation meeting. St. Vincent does provide a detailed annual report that lists the government funding, which accounts for 68.3% of its revenue. Bethany Christian Services’ page (Grand Rapids, MI; bethany.org) states: “Bethany demonstrates the love and compassion of Jesus Christ by protecting children, empowering youth, and strengthening families through quality social services.” No details about prospective parents are given, only the instructions to “Contact Us.” Bethany’s annual report is available on the site, but its accounting of its revenue is unclear. For example, one category of income in 2018 was “reimbursement for children’s services” at an amount of almost $77 million. Another similarly vague category was “investments and other revenue” in the amount of just over $2 million. Government funding is not distinguished as such.

In contrast to the above two organizations, we present two mission statements which explicitly indicate the desire for religious–Christian–adoptive families. America World Adoption in McLean, VA (awaa.org), a Christian International Adoption Agency, opens its home page with a photo of three adorable children with their arms around each other. The mission statement, which also appears on the “About” page, shows up on the home page in large, bold type: “Building families according to God’s design of adoption, while caring for vulnerable children around the world.” This statement is then followed by a biblical quote from Jeremiah 29:11: “For I know the plans I have for you, declares the LORD, plans to prosper you and not to

harm you, plans to give you a hope and a future." Its vision statement ("America World desires for every adoptable orphan to be placed in a Christian home.") makes clear its religious objectives. Christian Homes & Family Services (Abilene, TX; christianhomes.com/): "Changing lives and building Christian families through maternity, foster and adoption services." The vision statement is "A Christian home for every child." Under requirements for adoptive parents is that both parents must be of the Christian faith and both be active members of the same church, where they both attend weekly. There is no mention of sexual orientation. The agency does not break down its financial information in such a way as to note revenue at all. It does report that the amount of money spent is $2.3 million.

Finally, we include two examples of organizations that make clear their intention to include all types of prospective parents. Family Connections Christian Adoptions (Fresno, CA; fcadoptions.org/): "Family Connections Christian Adoptions exists to assist the waiting children of the world into loving, permanent families. As a living expression of our love for Jesus Christ, we are committed to providing quality adoption services to children everywhere in need of forever homes, and to every family who welcomes them." In addition, the home page says: "FCCA operates in accordance with all state and federal non-discrimination laws and regulations. In addition, as a member of the Evangelical Council on Financial Accountability (ECFA), we are committed to ethical, responsible, and transparent financial stewardship." The site posts the 2016 annual report, which details its revenue in a pie chart. Denoting a "slice" amounting to 37.5% as government/contracts, the actual figure is not given.

The Barker Adoption Foundation (Bethesda, MD; barkeradoptionfoundation.org): "Barker provides lifelong services for all in the adoption constellation and advocates for ethical, respectful, and child-centered adoption practices." The site defines the organization's child-

centered focus this way: “While we serve all members in the constellation of adoption relationships, our primary client is the child, who has no voice and often no advocate…The litmus test for all we do is whether we are acting in the child’s best interest.” And this is how the foundation expounds on its inclusiveness: “Barker values diversity of perspective, culture, race, ethnicity, religion, economic circumstances, age, sexual orientation, gender expression, and marital status. We strive to remove barriers for clients who seek our programs and services, and we value and seek diversity in our board governance structure and staff composition.”

The Constitutional Issues

Although the human side of adoption is vital, legal issues are also at the forefront because:

> Adoption is a social service to serve the legal needs of the community. It is a government provided and government regulated service. It is a legal construct. Oversight is necessarily run by the state …even when it out-sources this service to private organizations, including those religiously motivated.[43]

Arriving at a legal and constitutional solution to the problem of matching enough competent parents and suitable homes for children waiting to be adopted today necessitates that we understand the foundational law that affects our implementation of foster-care and adoption services. Until gay marriage was legalized in *Obergefell v. Hodges* (2015), some state laws prevented LGBTQ adoptions because they stated that the adopting couple must be married. Others still use highly gendered language, such as “husband and wife,” although this has been read to allow married same-sex couples. A key point is that LGBTQ persons are not currently a protected class, which makes the Equal Protection doctrine that protects other classes problematic. Another key point is that adoption law is regulated by state, not federal, statues.

That means claims would not fall under the Religious Freedom Restoration Act (RFRA), which has largely fallen out of favor politically,[44] except as individual states have enacted statutes as a result. Therefore, we examine the First Amendment Free Exercise and Establishment Clauses as they may be used by the parties on either side of this issue and the Equal Protection Clause of the Fourteenth Amendment, as used by the sectarian adoption agencies. It is a difficult decision of equality versus neutrality, with valid claims on both sides.

Free Expression—Religious Freedom

The FBOs argue that their rights under the Free Exercise Clause are violated when state actions enforce non-discrimination statutes in adoption and foster-care placement—something that conflicts with their free exercise of religion. The current test used in Free Exercise Clause cases involving actions taken by individual states comes from the SCOTUS decision in *Employment Division v. Smith* (1990), reaffirmed as the applicable standard for states in the SCOTUS case *City of Boerne v. Flores*.[45] This case established that if a law is neutral and generally applicable but has an incidental effect (even if burdensome) on the free exercise of religion, it can still be constitutional.[46] A neutral law cannot specifically restrict religious practices, or show animus in its enactment; after *Smith*, a free exercise claim must show not just burden, but discrimination.[47] States that have anti-discrimination statutes regarding potential adoptive parents will likely meet the requirements of neutrality and general applicability and thus not be struck down by a Free Exercise claim.[48] In addition, posits Rutledge, sectarian agencies receiving state licenses for foster care and adoption are "acting as a government agent, performing a government function"[49] and, therefore, should not be given exemptions from anti-discrimination clauses. Such groups should

give up active vocations that can be regulated by the state, or considered state action, if it intends to maintain a discriminatory stance toward homosexuals. It is a loss to free exercise that seems inevitable as the state commits more and more to principles of equality.[50]

Rutledge feels that FBOs that cling to discriminatory practices, citing religious ideals, cannot be reconciled with the principles of nondiscrimination embraced by government. Therefore, the only option is for them to leave the business of child welfare to secular organizations or FBOs which are willing to adhere to state and federal law.

Establishment Clause

Both state statutes that *allow* discrimination by FBOs and state *anti-discrimination* statutes can be contested under the Establishment Clause. The traditional test for challenges to this clause comes from *Lemon v. Kurtzman* (1971). The Lemon test states that the governmental action being challenged must (a) have a secular purpose; (b) not have a primary effect of inhibiting or promoting religion; and (c) not create excessive entanglement between the state and religion.[51]

Laws that allow FBOs to turn away parents for religious reasons are said to be protecting the free exercise of religion and this has been established as a permissible secular purpose. Therefore, the statutes would pass the first and second prongs of the Lemon test.[52] Likewise, statutes prohibiting discrimination are also generally acceptable. The third prong of the test depends on the wording of the law and how it refers to the rules, documents, beliefs, or doctrine of the organization that describes the selection of potential parents. If enforcing the state statute requires “inquiry into the laws and practices of a religious group,” that would be “considered excessive entanglement” and would not pass.[53] However, laws that refer to a non-doctrinal,

written organizational policy would pass. In this case, "permissive accommodation becomes relevant…where there is 'play in the joints'" between the free exercise and establishment clauses."[54]

Although it is still in use, the Lemon test has been questioned for much of its existence, particularly by SCOTUS Justices. Justice William Rehnquist in his dissent of *Wallace v. Jaffree* (1985), a case about school prayer, claimed that the test is not grounded in the history of the First Amendment and that "The three-part test has simply not provided adequate standards for deciding Establishment Clause cases…Even worse, the *Lemon* test has caused this Court to fracture into unworkable plurality opinions."[55] Fast forward to 2005, where in *Van Orden v. Perry* (constitutionality of a Ten Commandments monument), Justice Stephen Breyer in his concurrence wrote that "Lemon has had a checkered career in the decisional law of this Court."[56] Justice Antonin Scalia has also been vocal about abandoning the use of the Lemon test, in particular the first prong. In 1987, in his dissent to *Edwards* v. *Aguillard* (teaching creationism in schools) Scalia complained that the court's "embarrassing Establishment Clause jurisprudence"[57] using the Lemon test is too flexible, lacks clarity and predictability and "exacerbates the tension between the Free Exercise and Establishment Clauses."[58] In 2005, dissenting to *McCreary v. ACLU* (a Ten Commandments monument case) Scalia wrote that "as bad as the Lemon test is, it is worse for the fact that, since its inception, its seemingly simple mandates have been manipulated to fit whatever result the Court aimed to achieve."[59] Given such criticism, it seems that the likelihood of state adoption clauses may not be weighed using the Lemon test at the SCOTUS level.

Issa contends that despite the similarity of these cases to others contesting the Establishment Clause, they are at heart more complicated:

> The adoption context provides many unique interests that may not be present in a typical church-state case. For example, in the adoption context, all states claim that the promotion of the best interests of children is paramount…and states are constitutionally prohibited from putting the interests of the children below religious interests…Thus, these religious exemptions, which look like permissive accommodations, should fall because they reverse the order of interests—putting religion over children's welfare."[60]

Another constitutional promise that has been invoked by both FBOs and potential adoptive parents is Equal Protection.

Equal Protection

Equal Protection aims to prevent government from discriminating against groups of similarly situated people. In other words, that legislation should not target a group for unfair treatment. Different levels of scrutiny, or burdens of justification, are used for different legal classifications of the protected group and the importance of the right or interest; three levels of scrutiny are currently recognized.[61] Strict scrutiny is used for situations involving groups of race or national origin, and the fundamental rights of speech and religion. In this instance, the government must show a *compelling* purpose that cannot be achieved via other means in order to defend legislation. Intermediate scrutiny requires the government to show an *important* objective is being sought for the legislation. Finally, rational basis is used when stricter levels do not apply.

Examining competing Equal Protection claims puts the court in the position to decide who is more deserving of protection: FBOs, potential parents, or foster and adoptable children. To date, LGBTQ persons have not been established as a protected group under the Fourteenth Amendment that would require strict scrutiny like that of race and religion.[62] Should that occur,

the issue at hand would shift to focus on this clause rather than those of the First Amendment. In the cases where courts have taken up questions of homosexuality, any Equal Protection evaluation has been only at the rational level resulting in discriminatory policies being upheld (e.g., *State Department of Health & Rehabilitative Services v. Cox*, 1993). In the case of the sectarian child welfare agencies, state regulations forcing them to adhere to anti-discrimination laws that conflict with religious views could be an argument for a violation of Equal Protection, and those laws would be subjected to strict scrutiny. In addition, it may be argued that the government has a responsibility to ensure that children "in the system" are also treated equally; that is, children are not put in an inferior position of finding a permanent home because of the policies of the organization that they have been assigned to. It is perhaps because the use of Equal Protection by both sides is possible that it is rarely used in the high-profile cases we examined.

State Laws and Court Cases

Adoption regulations in the states continue to change, especially those laws that protect either the rights of the religious agencies or the potential parents. The contesting of the constitutionality of both types of statutes is evidenced by an increase in the number of complaints filed. Nine states have statutes explicitly prohibiting discrimination of prospective foster and adoptive parents on the basis of sexual orientation or general non-discrimination statutes: California, Oregon, Wisconsin, Massachusetts, New York, Rhode Island, New Jersey, North Dakota, and Maryland.[63] Eleven states have passed laws allowing child placement agencies to turn away anyone who doesn't match their religious beliefs or moral convictions, including same-sex couples: Alabama, North Dakota, South Dakota, Virginia, Mississippi, Michigan, Texas, Kansas, Oklahoma, South Carolina, and Tennessee.[64] Notably, this list has

considerable overlap with the list of states with Religious Freedom Restoration Act (RFRA)-inspired statutes. Eight of these states have passed conscience clauses in just the past three years; the most recent, Tennessee, was passed in January 2020. A conscience clause is "a clause in an act or law providing exemptions on the grounds of conscience or belief."[65] Also called refusal clauses, they have been used by medical professionals who refuse to perform services that were legalized by the *Roe v. Wade* decision.[66] In adoption and foster care, such a clause enables placement agencies to act in accordance with their conscience without fear of government interference. The 2016 Mississippi conscience clause law was upheld by the U.S. Court of Appeals for the Fifth Circuit in *Barber v. Bryant* (860 F.3d 345 (5th Cir. 2017)). However, notable repeals of bans and conscience clauses have occurred in Arkansas (2010-2011) and Florida (overturning a prior decision that had upheld the ban in 2004), and a proposed conscience clause failed to pass in Colorado in 2018.

Several state statutes (both non-discrimination and conscience clauses) have been challenged in court, and several are still in process. We will briefly explore five such cases. Mixed signals from lower courts mean the standoff likely will not end unless the Supreme Court gets involved.

South Carolina

In January 2018, the South Carolina DHHS granted an exemption to the religious discrimination rule to Miracle Hill Ministries, which accepted only Protestant, churchgoing people to its federally funded foster-care program and required participants to sign a statement of faith. That meant Miracle Hill Ministries would be permitted to deny services to LGBTQ, Jewish, and even Catholic families wanting to foster a child despite receiving about $600,000 in public funding in 2018.[67] Just a month later, a Catholic mother of three, Aimee Maddonna, was

denied an opportunity to volunteer at one of Miracle Hill's children's homes and sued the DHHS, accusing it of religious discrimination.[68] Before the case was heard in court, Miracle Hill relented and allowed Catholics to serve as volunteers and foster parents as long as they agreed to a doctrinal statement of belief. Mission Hill still will not allow Jews, Muslims or same-sex couples to foster children. South Carolina's battles are not over. In *Rogers v. United States Department of Health and Human Services,* a married lesbian couple was turned away by Miracle Hill.[69] The case (opened May 2019) is still open at the district court level. The plaintiffs cite violations of the Establishment, Equal Protection, and Due Process Clauses of the U.S. Constitution.[70]

Michigan

In 2015, Michigan passed a law allowing adoption discrimination, a law heavily favored by two private FBOs that "together facilitate 25-30% of Michigan's foster care adoptions."[71] In 2017, the American Civil Liberties Union (ACLU) sued over the Michigan Department of Health and Human Services' contract with taxpayer-funded, state-contracted agencies, such as St. Vincent Catholic Charities and Bethany Christian Services, in *Dumont v. Gordon* (E.D. Mich., 2017). These agencies refused to place children with same-sex couples. The plaintiffs cited the Equal Protection and Establishment Clauses, claiming the following:

> …agencies that use religious criteria to turn away prospective parents, [cause] Plaintiffs stigmatic harm and [deny] Plaintiffs the same opportunities to work with a child placing agency that is available to every other family in Michigan seeking to adopt.[72]

The case was decided for the plaintiffs, and the Michigan Attorney General declared that adoption agencies contracting with the state can no longer decline to work with LGBT families. Bethany Christian Services opted to change its policy rather than stop serving in Michigan's

foster care system. In 2018, Bethany worked with about 8 percent of the foster or foster-to-adopt cases in Michigan and also operates across the United States.[73] However, St. Vincent Catholic Charities is fighting the Michigan mandate and suing the state (*Buck v. Gordon* (W.D. Mich., 2019)) on both First and Fourteenth Amendment grounds. As a result, in September 2019, a Michigan judge issued a preliminary injunction allowing St. Vincent to continue working while the case winds through the courts and stated that strict scrutiny applies in the Free Exercise claim.[74]

New York

The New York State Office of Children and Family Services sought to enforce a 2013 state non-discrimination statute concerning licensed adoption and foster care agencies—regardless of whether they receive any state or federal funding. The Alliance Defending Freedom sued in *New Hope Family Services v. Poole* (U.S.C.A. 2nd Circuit, 2018) on behalf of faith-based adoption provider New Hope Family Services, which refuses to serve same-sex couples, claiming the non-discrimination statute violates the agency's Free Exercise and Equal Protection rights. In March 2019, a District Court judge dismissed the case. New Hope has appealed and in November 2019, won a small victory: the 2nd Circuit Court of Appeals ruled that the agency could "keep processing adoptions while a three-judge panel considered whether the case would be reinstated."[75]

Texas

Two female Texas A&M University professors say they were denied a chance to become foster parents for refugee children because they didn't "mirror the Holy Family."[76] They sued the U.S. Department of Health and Human Services (HHS) and the U.S. Conference of Catholic Bishops (USCCB), a Catholic group contracted by the government to administer a refugee

program. This case is known as *Marouf v. Azar* (391 F. Supp 3d 23 (2018)). The couple asserts violations of the Establishment Clause and the Equal Protection Clause.[77] The case is currently pending before the U.S. District Court of District of Columbia.

Pennsylvania

The City of Philadelphia learned in March 2018 that two of its foster-care providers would not accept same-sex couples to be foster parents, so the city ceased referring children to these agencies. Catholic Social Services (CSS), represented by the Becket Fund for Religious Liberty, sued the City of Philadelphia asking the court to order the city to renew the agency's contract (*Fulton v. City of Philadelphia)*. CSS argued that its right to free exercise of religion and free speech entitled it to reject qualified same-sex couples because they were same-sex couples, rather than for any reason related to their qualifications to care for children.[78] The agency turned to the courts, citing its right to free speech and freedom of religion, but the courts have so far rejected its claims; a federal district court, the Third Circuit Court of Appeals, and SCOTUS have denied CSS's motions for injunctions.[79] The Third Circuit Court of Appeals ruled that the city was simply enforcing a neutral law prohibiting discrimination based on a person's sexual orientation. The judges held further that Catholic Social Services "has failed to make a persuasive showing that the City targeted it for its religious beliefs, or is motivated by ill will against its religion, rather than a sincere opposition to discrimination on the basis of sexual orientation."[80] The plaintiffs continue to appeal and have asked SCOTUS to hear the case; it will be heard in October, 2020.[81]

Discussion and Conclusion

We believe that FBOs which receive government aid and/or which contract with the government to handle state child welfare cases should be held to account for violation of federal

nondiscrimination laws. This already includes protections for the religion of prospective parents and when sexual orientation becomes protected under the 14th Amendment. It will also apply if SCOTUS provides a definitive ruling in an LGBTQ adoption discrimination case (e.g. *Fulton v. City of Philadelphia)*. Amid the upheaval in his state, then Massachusetts Lieutenant Governor Kerry Healy said, "I believe that any institution that wants to provide services that are regulated by the state has to abide by the laws of the state…and our antidiscrimination laws are some of our most important."[82] FBOs that do not receive aid (but which must be licensed by states to operate) are less clearly subject to federal and state laws.

FBOs should not receive government funding if they discriminate on the basis of sexual orientation, marital status, and religion. Discrimination is unconstitutional, and a waiver of maintaining nondiscriminatory policies exempts behavior that is ordinarily not permitted. The term "waiver" says it all; according to U.S. law, a waiver is "intentionally or voluntarily giving up one's recognized right."[83] In this case, the government is ceding its right to require nondiscriminatory activities and policies of faith-based agencies in the foster-care and adoption business. Harvard Law professor Martha Minow, speaking at Princeton on "Should Religious Groups be Exempt from Civil Rights Laws", said that "Always granting exemptions undermines civil rights laws…Each additional exception curtails the application of the overarching norm – and civil rights laws as a result can be too easily and thoroughly undermined."[84]

In addition to a change in policies to allow adoption by all otherwise qualified potential parents, there should be regulations about total transparency on all literature produced by these agencies, including websites. The Barker Adoption Foundation's mission statement could be used as a template for FBOs that change their modes of operation to be constitutional. Even

though The Salvation Army no longer discriminates, its mission statement is confusing and could lead one to believe that their first priority is serving Jesus Christ.

We agree with others who have emphasized that the interests of the child are perhaps of more importance than any legal wrangling and the time it will take for clearer mandates.[85] Lyew writes that there is room for reform on both sides:

> Debate involving true concern for the best interest of children is rare. Commonly entangled with religious freedom arguments, advocacy for marriage equality, support for the “optimal” family…a child’s best interest may easily be lost amongst the competing groups pushing to advance one issue or another. Children are unable to advocate for themselves, and the unfortunate, unintended consequence of the passionate, well-intentioned efforts of these groups is that a child’s best interests may be pushed to the background.[86]

Lyew’s point is that the many parties involved in child placement (parents, agencies, churches, judges, and so on) creates a complex web of ideals, values, and goals. Most children are unable to advocate for their own interests, and so within this web, the strand of the child can be obscured or set aside in favor of other ambitions.

Although the BIC seems like a clear enough mandate, it also may not resolve this dilemma. The goal is to place as many children with families, preferably permanently, as possible. On one hand, including all qualified parents regardless of their family structure or creed is desirable. And LGBTQ parents adopt and foster at greater rates than do heterosexual parents. As of 2016, 21.4% of same-sex couples were raising an adopted child and 2.9% fostering a child compared to 3.0% (adopted) and 0.4% (fostering) of opposite-sex couples.[87] On the other hand, forcing anti-discrimination statutes upon faith-based organizations that have been devoted to

child welfare for decades (or longer, Catholic Charities opened its first U.S. orphanage in 1727) may cause those organizations to close their doors, eliminating what can be a significant amount of placement work in some geographical areas. In Philadelphia, the shuttered Catholic Social Services was serving several hundred foster children, and the closure came amid the city's urgent call for 300 more foster families to help handle the city's 6,000 foster children.[88] Here, both adoptive parents and children lost; Lyew called the closure a "profound negative impact."[89] Catholic Charities is also known for being able to find homes for hard-to-place children, and was responsible for a third of all Boston private adoptions.[90]

A legal decision would be desirable that would both curb excessive litigation (a slow and expensive process) and prevent an exodus of agencies and professionals from the field. Proposals for a compromise involving conscience clauses have been put forward and, in some cases, have been enacted. In some states (such as Michigan's religious freedom adoption law)[91], when a FBO refuses to place with a family due to religious objections, the agency is required to refer the otherwise qualifying family to an agency that will accept them or at the least provide them with a list of alternative agencies. Called a disclosure requirement, this tactic was also used following *Roe v. Wade,* where healthcare providers could decline to provide the service, as long as they offered a referral to one that would. [92] We propose an additional requirement: that FBOs be required to record and disclose the number of parents rejected on the basis of their religion, and the results of referrals to alternative agencies. The success of such a compromise would depend on a thorough study of the amount of FBO placement in a particular jurisdiction and the availability of alternative agencies; no compromise should become a roadblock and prevent access to potential adoptive parents. Lyew proposes two exceptions: first, that more diligence must be taken with hard-to-place children by any agency and, second, that children of a certain

age and maturity are allowed to express their own preferences about religion and same-sex couples in placement decisions.[93]

Unfortunately, writes Lyew, "this problem cannot be resolved if it continues to be a politicized issue involving religious freedom against rights for same-sex couples and vice versa, rather than a children's issue which impacts thousands of children lacking a comparably strong voice."[94]

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