



## The Child Welfare Provider Inclusion Act: Ensuring a Free Marketplace of Adoption Providers

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Charitable and nonprofit organizations, many of them faith-based, contribute to the public good in ways that are almost immeasurable. Charitable work has long played an integral part in the common good of our society, providing significant and numerous benefits to people in ways the government cannot.

For example, the hundreds of ministries represented by the Evangelical Council for Financial Accountability (ECFA) collectively provide more than \$9.2 billion in relief assistance.<sup>1</sup> In 2010 alone, the Catholic Church spent approximately \$97 billion on healthcare networks, about \$47 billion on colleges, and \$4.6 billion on 'national charitable activities.'<sup>2</sup> In 2009 alone, overseas relief and development supported by American churches exceeded \$13 billion. Religious groups are supported by religious people driven by religious ideals to conduct humanitarian work, feed the hungry, cloth the needy, and house the poor. These groups also provide education, drug rehabilitation, prison work, adoption placements, and numerous other services.<sup>3</sup>

They are often very effective at what they do. The University of Chicago found that "67 percent of the graduates of a drug rehabilitation program sponsored by Teen Challenge," a faith-based network of Christian substance-abuse prevention and treatment programs, "were drug-free seven years after participating in the program..." That rate is "much higher than the 10 to 15 percent cure rate for other federally funded drug rehabilitation programs."<sup>4</sup>

Religious organizations are heavily involved in adoption, and contribute especially in helping find homes for special needs children who are often difficult to place. As reported by the U.S. Conference of Catholic Bishops (USCCB), "[o]f the 3,794 completed adoptions by Catholic Charities agencies in 2009, 1,721 (45 percent) were of children considered to have special needs. In the same year, 541 of 1,716 adoptions (32 percent) provided by Bethany Christian Services, the largest faith-based adoption agency in the United States, were of hard-to-place older children previously in foster care."<sup>5</sup>

Charities providing adoption and foster care services in particular provide important services to children and families, including alternatives to abortion. Moreover, their broader assistance helps alleviate the burdens on mothers and families in difficult situations. For instance, in 2014 alone, Catholic Charities served over 8.7 million people in the United States.<sup>6</sup> The charity served over 524,000 people with some kind of housing service, provided more than 10.4 million client services that strengthened food security, benefitted over 875,000 people with some type of health service, provided 18,265 full time/client-earned job placements, served nearly 400,000 refugees and immigrants, served over 1.2 million vulnerable people, and provided adoption services to over 45,000 people.<sup>7</sup> Catholic Charities does much in the way of public service, yet the organization is still being threatened by government discrimination against its

religious tenets. The charity has already been forced to stop assisting with adoptions in certain locations, and along with Bethany Christian Services and other providers, is at risk of being forced out of more.

## **How Did We Get Here?**

Anti-faith policies on issues like abortion and same-sex marriage have led some states to start to discriminate against faith-based adoption providers. There have been attacks on pro-life healthcare providers for years, leading to the federal government passing conscience protections for pro-life healthcare entities going back to the 1970's. Despite the existence of these protections, in 2011 HHS ended its contract with the USCCB's Migration and Refugee Services (MRS) for providing services to survivors of human trafficking because the organization was not willing to also provide referrals for "reproductive health services" such as abortion.<sup>8</sup>

While such problems continue, a new front has opened over what it means to be a family, and what it means for people to be "married." Regardless of what one thinks on these issues, what is clear is that many who support redefinitions of family and marriage are imposing their views on others by means of government power. Despite the amazing work, and the thousands of children and families helped by faith-based adoption providers, we have seen a shocking promotion of anti-faith policies that has negatively impacted the wellbeing of children and families, and in addition constitutes a direct assault on religious entities.

For years, when the government recognized marriage could only be between a man and a woman, religious child welfare organizations were able to operate in a way that was consistent with their beliefs simply by working with legally married couples. Then, as states began redefining marriage, and it was ultimately imposed on the country by the Supreme Court, faith-based adoption providers felt government pressure to compromise their beliefs in order to keep operating.

Despite high numbers of children still in foster care and waiting to be adopted, governmental authorities were busy harassing religious organizations – the very entities who could help place these children – about their beliefs. They could either betray their conviction that marriage is between one man and one woman, or cease operating. In some places, they have already been forced to make this choice.

## Massachusetts

When same-sex marriage became legal in Massachusetts in 2004, Catholic Charities of Boston was suddenly faced with a legalized version of marriage which contradicted what the church believed, and the organization could consequently face claims of sexual orientation discrimination by working with some marriages but not others. Indeed, it did face such claims. Subsequently, rather than be forced to violate its beliefs, Catholic Charities removed itself from the adoption placement process.<sup>9</sup>

In the years immediately following, from 2008 to 2012, adoptions in Massachusetts dropped by 28 percent (a drop of just under 800).<sup>10</sup> Examining the state's data from 2010 to 2014, while the number of children adopted stayed roughly the same during the first three years (it even increased slightly), the number of children adopted dropped sharply in 2014. This constituted a 200 percent change in the difference between the numbers of children waiting for adoption and children adopted.<sup>11</sup> The same report has the number of children awaiting adoption in those years at: 2,757; 2,665; 2,467; 2,483; and 2,762.<sup>12</sup> Then, in 2015, another government analysis had them increasing to 3,052 (this same study had 2,675; 2,469; 2,492; and 2,771 for 2011 to 2014 – a difference, though an inconsequential one).<sup>13</sup>

In the time since religious providers have been forced out of Massachusetts, the number of children adopted has been dropping while thousands more are sitting in foster care waiting to be adopted (and in the most recent year for which there is data, that figure increased). Meanwhile, instead of trying to care for those kids, the state was busy shutting down providers who could help place them. When it was shut down in 2006, Catholic Charities in Boston had placed 720 children, and 682 were waiting for adoption in Massachusetts.<sup>14</sup> Religious providers are helping fill a real need which is already understaffed. Forcing them out will make things worse. Yet already, at this point, observers saw emerging obstacles and a storm brewing for religious adoption providers.<sup>15</sup>

### San Francisco

Later in 2006, Catholic Charities in San Francisco was forced out of the adoption space for the same reason.<sup>16</sup>

### The District of Columbia

A few years later, in 2010, rather than be forced by the government to violate faith tenets about marriage and family, Catholic Charities in the District of Columbia chose to shut down adoption services as well.<sup>17</sup>

### Illinois

In 2011, the state of Illinois ended its historic relationship with Catholic Charities – the very entity that “inspired the state to address child welfare in the first place” – for the same reason.<sup>18</sup> Although Catholic Charities was willing to refer same-sex couples to other adoption agencies, the state refused to accommodate the organization.<sup>19</sup> In Illinois from 2008 to 2012, adoptions decreased by 19 percent.<sup>20</sup> (While Illinois shows a drop in adoptions from 2010 to 2014 just like Massachusetts,<sup>21</sup> the data is disputed by the state.<sup>22</sup>) When Catholic Charities was shut down in Illinois in 2011, 2,000 children were displaced. That was 11 percent of the 17,641 Illinois kids waiting to be adopted.<sup>23</sup> The fact is that fewer children have been adopted after religious agencies have been shut down. When kids should be matched with families, they are instead being displaced by activists who simply don’t like the beliefs of the agencies. Forcing out providers for this reason is simple bigotry against religion.

Examining figures going back to 2001, the number of children adopted consistently decreased in Illinois, Massachusetts, California, and the District of Columbia.<sup>24</sup> All these jurisdictions are seeing fewer children adopted, yet instead of trying to place these children, they (or cities within them) have been busy shutting down the adoption providers who could help do so.

In addition to the dropping number of adoptions in these places, there is a massive disparity between the number of children waiting to be adopted versus the number actually adopted. As of 2015, there were 14,181 kids awaiting adoption in California,<sup>25</sup> 224 in the District of Columbia,<sup>26</sup> 3,052 in Massachusetts,<sup>27</sup> and 3,225 in Illinois.<sup>28</sup> Instead of forcing providers out of these places, states should be focused on getting these kids placed. These states need all the help they can get, yet they are excluding from the marketplace the very adoption agencies who can help care for children in need.

### **We Now Have a National Problem**

In 2014, in the wake of these developments, LDS Family Services (which would not place children in same-sex marriages) quietly shifted away from being a full-service adoption agency, and moved its focus to adoption-related counseling. While the organization publicly stated that its decision was not caused

by pressure on other private religious agencies, it still occurred at the same time others have been under scrutiny due to their beliefs about marriage.<sup>29</sup>

Then in 2015, the Supreme Court redefined marriage in *Obergefell v. Hodges* for the entire country to include same-sex couples.<sup>30</sup> This brought religious adoption providers and others living out their beliefs about marriage one step closer to a myriad of religious freedom conflicts. Indeed, at oral argument in the case, the Obama administration's Solicitor General flatly stated that religious schools would be forced to compromise their beliefs or lose tax-exempt status<sup>31</sup> – a sign which was ominous for similarly-situated adoption agencies too.

The emerging threats to faith-based adoption providers are occurring at the time we need them most. Across the United States, the number of children being adopted is declining.<sup>32</sup> Looking at the time period from 2001 to 2012, we see a 14 percent nationwide decrease (20,520) in the number of children adopted: 140,034 in 2001, 139,647 in 2008, and 119,514 children in 2012.<sup>33</sup> Looking at the period from 2012 to 2016, the number of children in foster care and the number of children waiting to be adopted increased by the thousands.<sup>34</sup>

Just this year, news broke that a same-sex couple in Philadelphia was unable to work with Bethany Christian Services to adopt a child due to that organization's beliefs. Apparently unaware it was working with agencies with a religious founding and core tenets, the city – with the American Civil Liberties Union (ACLU) in tow – responded with a harsh denunciation of such “discrimination.” Despite launching a campaign to recruit hundreds of new foster families just weeks prior,<sup>35</sup> the city then shut down intakes (pending a review) at Bethany Christian Services along with Catholic Charities.<sup>36</sup> The 233 children placed through the two organizations will remain where they are, but new placements would stop. But who will step in and fill the gap? In Philadelphia, Catholic Social Services placed 266 children in foster homes in the previous year, while Bethany Christian Services found homes for 170. Both organizations have held contracts with the city since the mid-1990s.<sup>37</sup>

The exclusion and forced removal of religious providers from the adoption space described above has already occurred in at least three states/territories and two large cities, and shows no sign of stopping – to the detriment of the children who need them most. With warning clouds like these on the horizon, it makes sense that some would consider how to best protect religious freedom.

### **What Is the Solution?**

Laws preventing government discrimination against faith-based adoption and foster care providers are needed at the federal and state level. The Child Welfare Provider Inclusion Act (CWPIA) meets this need, as it can protect faith-based adoption and child welfare providers from being excluded from the marketplace, and harming the kids and families they serve. CWPIA ensures all available agencies can continue to serve the 440,000 children in the foster care system and the more than 100,000 awaiting adoption. Having the maximum number of adoption agencies possible increases the diversity of families who can be recruited and trained to care for children. In light of the growing number of children who are in foster care because of America's drug crisis (92,000 of them in 2016), we need to preserve the ability of all agencies to serve them.

In Congress, CWPIA was introduced by Rep. Mike Kelly (R-Pa.) in the House as H.R. 1881 and by Senator Mike Enzi (R-Wyo.) in the Senate as S.811. It provides that the federal government (and states receiving federal funding) “shall not discriminate” against private adoption and child welfare agencies that “decline to provide, facilitate, or refer for a child welfare service that conflicts with” the agency's

sincere beliefs or moral convictions.<sup>38</sup> Similar laws at the state level ensure the same protections. Alabama, Michigan, Mississippi, North Dakota, South Dakota, Texas, and Virginia have passed legislation similar to CWPIA.<sup>39</sup>

State versions of CWPIA are moving this session in Kansas and Georgia, and the federal versions mentioned previously are pending in the House and Senate.

CWPIAs have drawn a reaction from those entities opposed to freedom for adoption providers. After Michigan passed a version of CWPIA, the ACLU sued, seeking to have the law ruled unconstitutional.<sup>40</sup> More recently, a same-sex couple filed a lawsuit against the federal government and Catholic Charities in Texas after the organization declined to work with them because of its beliefs.<sup>41</sup> Such actions further confirm the need for federal and state CWPIAs, which not only protect freedom but help children in foster care by ensuring the maximum number of organizations are able to meet their needs.

### CWPIA Helps Keep the Maximum Number of Providers in the Adoption Marketplace

#### *Including More Providers Helps Children*

If we fail to ensure the maximum number of providers (both religious and non-religious) are able to assist with adoptions, children will languish and needlessly await loving families. Allowing religious adoption providers to continue to operate according to their convictions keeps them in the marketplace, and benefits the kids and families who work with them.

Contrary to popular claims, there is no “denial” of service to same-sex couples by the state in these cases; if a religious provider can’t work with a certain couple, there are numerous other agencies who will. For instance, the City of Philadelphia, which recently suspended operations with two faith-based providers, works with 26 adoption agencies in total, so same-sex couples still have 24 other agencies to work with.<sup>42</sup> The Archdiocese of Philadelphia and Bethany Christian Services are on the record in stating that they always direct same-sex couples to agencies that can assist them.

This allows everyone to achieve their desired outcome – the private groups can honor their conscience, and same-sex couples can find an agency to work with them. This win-win situation, however, is unacceptable to opponents of CWPIA, who want to force private agencies to violate their beliefs (an aim exposed by their opposition to CWPIA). Yet such compulsion *would not result* in more kids being adopted, and would carry with it the cost of violating the conscience of private agencies. Indeed, it may result in fewer children being adopted, as groups are forced out of the space.

The benefit to children is possible because of the freedom provided by CWPIA, which is misunderstood by those like the Lambda Legal attorney suing Catholic Charities in Texas, who claimed the organization was “[u]sing religion as an excuse . . . to discriminate.”<sup>43</sup> Such statements show a negligent or willful misunderstanding of freedom and the role of religious beliefs in guiding one’s place in a free society, and show the need for CWPIAs all the more.

Indeed, a cursory overview of how religious organizations operate would show statements like this to be false. Among other things, the sincerity of the beliefs of such organizations is proven by the fact that they inform a host of different circumstances, not just LGBT issues. For example, Catholic Charities itself won’t place children with a number of different family situations – including two people living together but not married, or a group of people living together.<sup>44</sup> Another adoption agency, Christian Homes and Family Services, only works with Christian couples who are members of and attend a church weekly,

have been married at least two years (and if it is a second marriage for either party, they must be married for at least three years; and if it is a third marriage for either party, they must be married at least five years), and meet multiple other requirements.<sup>45</sup> The Texas Baptist Home for Children will place with single, divorced, widowed, or married couples – but if married, they must have been married for at least two years. This is in addition to a host of other requirements imposed by the organization.<sup>46</sup> Whether a couple identifies as LGBT or not has nothing to do with these specific requirements – they must be met either way.

It is clear that these organizations’ beliefs drive how they view adoption – whether concerning same-sex couples or anyone else. Indeed, couples may fail to meet these organizations’ standards for adoptive parents for a number of different reasons – *regardless of their sexual orientation*. Thus, it is not just a matter concerning same-sex couples, and by definition can’t be “discrimination” against them. Rather, these agencies are acting according to their beliefs concerning faith and other matters – which they as autonomous organizations have the freedom to do – and these beliefs and requirements affect a number of people who can and can’t adopt from them, whether they identify as LGBT or not.

Same-sex couples are able to adopt children; *there has not been one publicized incident* in which a same-sex couple *has not been able to adopt solely because they identify as LGBT*. These couples have plenty of agencies to work with; they just can’t work with certain religious organizations. Because these couples can work with other groups to adopt kids, the government has no interest weighty enough to justify *forcing certain religious adoption agencies* to violate their beliefs.

Georgia’s CWPIA was recently criticized on the grounds that “[a]doption rates didn’t change much after previous states enacted these kinds of religious adoption laws.”<sup>47</sup> Any reasonable observer would see such a statement as pointless; of course they did not, for these laws only protect the ability of agencies to remain open which are already open. The law was also the subject of the meritless claim that it will cause more children to remain in foster care. The facts actually show the opposite – when religious agencies are forced out of the space (in the absence of CWPIA), more children end up back in foster care. For example, when Catholic Social Services and Bethany Christian Services were stopped from working with the City of Philadelphia because of their faith tenets, they had placed 233 children – but new placements were put on hold.<sup>48</sup> Where would those kids remain? In foster care. Who could help them? The agencies that will be excluded from the marketplace – if CWPIA is not passed.

Such baseless lines of attack further confirm the need to protect agencies from religious discrimination. The many children waiting to be adopted need all the help they can get, but adoption agencies that can help them are at risk of being forced out of the marketplace in the absence of the freedom provided by CWPIA.

#### *Including More Providers Helps Religious Families Who Want to Work with a Religious Agency – Which Also Helps Children*

Many families seeking to adopt are religious families, and they will want to work with a religious agency that shares their faith. If they can’t do so because of the forced absence of religious agencies, they may leave the marketplace – leaving their desire to adopt unfulfilled, and children without potential adoptive parents. CWPIA results in the inclusion of more agencies in the marketplace with which prospective parents can choose to partner – keeping those parents in the marketplace, and allowing more children the chance of a stable home.

In a time of declining numbers of adoptive families, we need all the adoptive parents we can get. The rate at which adults become adoptive parents is declining. The adoption rate per 100,000 adults (defined as persons 18 years and older who become adoptive parents) was 65 in 2001, 60 in 2008, and 49 in 2012. The adoption rate “decreased 24 percent from 2001 to 2012, which is greater than the 15-percent decline in the total number of adoptions.”<sup>49</sup>

Recently, one activist criticized the CWPIA pending in Georgia with the following: “What Georgia really needs is more foster parents and adoptive parents – not more adoption agencies.”<sup>50</sup> They should think very carefully about where those adoptive parents will come from. There is a huge, and likely erroneous, assumption embedded in that statement: That religious parents will still adopt even if they have to work with an agency that does not share their faith. If providers that share their faith are forced out of the marketplace, these families may leave the marketplace too. At a minimum, the potential for change is all negative; there is no up-shot – no more kids or parents will be served if providers are forced out of the marketplace.

Moreover – as mentioned in the introduction to this analysis – just as some religious entities have great success with drug-rehab programs, religious families are often very effective in working with kids. It has been observed that “[t]he dropout rate for prospective foster parents who work directly with the state is 80 percent in the first two years. Faith-based parents are far more likely to be among the 20 percent who stick with the goal of adopting a child, adoption experts say.”<sup>51</sup> As *The Economist* put it, “[s]tate legislators should not put another obstacle in [childrens’] way by worrying about the religious beliefs of their would-be adopters. Instead, statehouses should be thinking hard about how to find loving homes for more of these children.”<sup>52</sup>

Yet not all seem to be doing this. Just a few days after putting out an urgent call asking 300 families to foster children, the City of Philadelphia halted the work of agencies who could assist with that task because of their core beliefs.<sup>53</sup> It would be humorous if it weren’t so tragic. It is painfully clear that our country needs all of the adoptive parents it can get. However, when religious parents leave the marketplace because their religious provider of choice has been forced out, it is children (and adoptive families) who are harmed.

Some are seeking an inclusive environment for agencies. When the freedom of one faith-based provider in South Carolina came under pressure recently, the governor expressed support and the agency remained open – allowing it to continue to help care for the children and their adoptive families in that state.

Yet others insist on attacking protections that would help more children be adopted. Said the Georgia law’s critic, “[w]e should be getting every type of family adopting or fostering, not limiting that” . . . “[w]e need to encourage a larger, more diverse number of parents to adopt.”<sup>54</sup> Everyone can agree with this objective. Laws like the Georgia CWPIA will actually help ensure this laudable objective, not work against it. No families are excluded from adopting by CWPIAs. But if agencies are forced out of the marketplace, certain families may leave too – which would result in fewer “type[s] of famil[ies]” adopting.

On this point, the ACLU’s “fact sheet” on LGBT adoptions displays a deft slight of hand, pointing out the disparity between the large number of children in need of adoption and the relatively smaller number of parents and families willing to take them, and then arguing that LGBT families can help fill this void.<sup>55</sup> But they are already filling the void, and no one is trying to stop them from filling the void. The ACLU implies that allowing religious agencies to only place children with moms and dads in accord

with their beliefs will result in LGBT families not adopting, but this isn't true. LGBT individuals can continue to adopt with dozens of non-religious agencies. Every state works with LGBT couples and has agencies that do so.<sup>56</sup> CWPIA simply aims to protect religious entities from being forced out of the marketplace.

There is simply no evidence of LGBT families being prevented from adopting simply because certain private religious agencies will not place children with them. No government is barring LGBT-friendly agencies from the adoption space, and so LGBT families will always have agencies to work with. But religious agencies must be permitted to continue operating too. If they are forced to stop placing children, not only will their freedom be infringed, but it will be a blow to the many children currently sitting in foster care who badly need their help.

## Conclusion

The threats to religious adoption providers are some of the more notable threats to freedom that have arisen in recent years.<sup>57</sup> Many who have monitored these developments have observed the need to protect these groups.

Aside from protecting their freedom for its own sake, these religious providers must be protected for the sake of the children who are awaiting adoptions. If we fail to ensure the maximum number of providers (both religious and non-religious) are able to assist with adoptions, children will languish and needlessly await loving families.

Many of these children are cared for by religious parents who want to work with an agency that shares their beliefs. If such agencies are forced out of the marketplace, there is a risk that such parents will be too. Alienating these loving parents from adopting children will likely increase the number of children awaiting adoptions in the long term.

For all these reasons, federal and state-level CWPIAs are a valid and reasonable legislative response to the current situation, and will encourage all the parents currently pursuing adoption to keep doing so as well as help ensure the maximum number of adoptive children are cared for. Given the current adoption statistics, from which we see the number of children needing parents is greater than the parents willing to adopt, our society cannot afford to lose potentially adoptive religious parents as a result of the exclusion of faith-based adoption agencies from the marketplace. CWPIA is a legislative remedy that will ensure this does not happen.

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[http://www.lgbtmap.org/equality-maps/foster\\_and\\_adoption\\_laws](http://www.lgbtmap.org/equality-maps/foster_and_adoption_laws).

<sup>57</sup> In addition to these domestic issues, adoption advocates are facing hurdles in the international context. See Jayme Metzgar, "Bucking Trump Deregulation Agenda, State Department Chokes International Adoption," *The Federalist*, March 19, 2018, accessed April 9, 2018, <http://thefederalist.com/2018/03/19/bucking-trump-deregulation-agenda-state-department-chokes-international-adoption/>. These issues are beyond the scope of this briefing, however.