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#16-006

NO. STATE OF NEBRASKA
OFFICIAL
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DEPT. OF JUSTICE

SUBJECT: Whether the Child Welfare Services Protection Act Proposed Under LB 975, as Amended, Violates State or Federal Law

REQUESTED BY: Senator Mark Kolterman
Nebraska Legislature

WRITTEN BY: Douglas J. Peterson, Attorney General
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INTRODUCTION

LB 975, as amended by AM2308, proposes adoption of the Child Placement Services Preservation Act [the "Act"]. The Act seeks to provide faith-based child placement agencies (FBCPAs) with the ability to perform the child placement services of recruitment, training and supporting of foster family homes, while maintaining their sincerely held religious beliefs, without the threat of adverse action against them. AM2308, § 2(4). Specifically, § 5 of the proposed legislation states:

> To the fullest extent permitted by state and federal law, the state shall not take an adverse action against a child-placing agency because the agency declines to provide or facilitate a child placement service that conflicts with the child-placing agency's sincerely held religious beliefs.

You have presented a series of legal questions about whether such language complies with both constitutional and federal regulatory guidelines. In order to properly analyze the legal questions presented, it is necessary to understand how the Nebraska

Department of Health and Human Services (HHS) utilizes child-placing agencies (CPAs). Accordingly, we begin our discussion with background information pertaining to the manner in which HHS contracts with CPAs to provide foster care services for children and families.

BACKGROUND

CPAs are utilized by HHS for the primary purposes of recruiting, retaining, and supporting foster care families. In providing these services, HHS contracts with both secular and faith-based CPAs. As part of that contract, the CPAs understand that the purpose of their service is to provide Agency Supported Foster Care (ASFC) services for children and families of the State of Nebraska.[1]

The Subawards are normally entered into on a yearly basis and can be terminated at any time based upon mutual consent or by either party for any reason upon submission of a 90-day notice. The Subaward provides that HHS has final authority in all decisions pertaining to child welfare services, and further provides that HHS may immediately terminate the agreement if the CPA fails to perform its obligations under the subaward. The Subaward does have an antidiscrimination provision found in paragraph IV(c), but that provision relates only to employment practices by the CPAs under federal and state employment law.

The Subaward specifically notes in IV(v), titled "Independent Entity," that CPAs serve as an independent entity and that neither the CPA nor its employees shall, for any purpose, be deemed employees of HHS. A CPA shall employ and direct such personnel as it requires to perform its obligations under the Subaward, exercising full authority over its personnel in complying with all laws recognized in the employment relationship, both federal, state, county, and municipal.

The Subaward contains a "Service Attachment" which sets forth both definitions and expectations for performance by CPAs. It also includes details about reporting requirements, staff credentials, established payment rates and other details regarding the day to day services that are provided by foster care families associated with a CPA. The Service Attachment specifically defines three important terms regarding the duties performed by CPAs. Those duties are recruitment, retention, and support of foster families or prospective foster families.

With respect to recruitment, the Service Attachment provides, in pertinent part:

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[1] http://dhhs.ne.gov/children_family_services/SubGrants/Forms/AllItems.aspx (Link to copies of Subawards with attachments for the years 2014-2015 and 2015-2016 under the category Agency Supported Foster Care).

> Recruitment of agency supported foster families is defined as active and ongoing efforts to solicit families who are invested in meeting the unique needs of children and youth served by DHHS. Recruitment includes undertaking targeted and diligent efforts to locate foster families for specific children upon request by DHHS. Recruitment efforts will include engaging communities across the state through outreach and education activities to increase awareness of the need for foster parents who reflect the ethnic and racial diversity of the children served by DHHS. Recruitment activities may include: organizing special events, speaking engagements, advertising, and networking, etc.
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> The Service Attachment defines "retention" as
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> keeping both prospective and current foster, adoptive, and kinship families interested and invested in accepting placement of foster children by treating people well, meeting their needs, and providing encouragement and individualized support beginning with pre-service training continuing through post-placement services.

In providing recruitment and retention services, the CPAs are to develop, in collaboration with local HHS staff, a Foster Care Recruitment and Retention Plan that is reflective of the types of foster care homes needed, as well as the ethnic and racial diversity of children served in the service area. The plan must identify specific strategies designed to support and improve the retention of foster care families. The plan must also include time lines for strategy, implementation, and a specific measurable goal for increasing the number of newly licensed foster care families provided by the CPA.

> Finally, the Service Attachment defines "support" as
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> being readily accessible and responsive to foster families in meeting their needs and intervening as necessary to stabilize crisis episodes and prevent placement disruptions. Support includes providing face-to-face visits to the foster parent's home a minimum of one time per month, and more frequently as needed based on the needs of the foster parent and or the child as determined by the Child and Adolescent Needs and Strengths (CANS) Tool or the Family Strength and Needs Assessment (FSNA) Tool. More frequent phone calls may be necessary to maintain communication and develop ongoing rapport.

Although the Subaward and Service Attachment describe the relationship between HHS and CPAs, ultimately, Neb. Rev. Stat. § 43-285 (Supp. 2015) provides that the care of the juvenile and all placement responsibilities ultimately stay with HHS in determining issues such as care, placement, medical services, psychiatric services, training, and expenditures on behalf of each juvenile committed to HHS.

ANALYSIS

Your request letter presents several questions as to whether LB 975, and AM 2308, properly contain language protecting a faith-based CPA from any adverse action if, in recruiting, selecting, training, and support of foster care families, it incorporates its sincerely held religious beliefs. Furthermore, you ask whether providing such protection from adverse action exposes HHS to significant loss of federal funding that is utilized by HHS in making payment to its CPAs and its overall foster care system.

A. Whether child-placing agencies, in providing services related to the placement of children, would be considered state actors.

You have inquired whether CPAs, in providing services for developing foster homes for the placement of children, would be considered state actors. As noted previously, HHS enters into Subawards with numerous CPAs to recruit, train and retain foster home families and services to children in need. The question raised is whether, in contracting with the State to provide these services and homes, CPAs are performing a "public function" to the extent that they should be treated as state actors. This question is important because if the CPAs are state actors, then they must comply with all the "state shall" mandates found in the U.S. Constitution. This would include the equal protection and due process obligations found in the Fourteenth Amendment. Conversely, if CPAs are private, rather than state actors, they are not subject to constitutional mandates.

The Fourteenth Amendment protections are triggered only in the presence of state action and a private entity acting on its own cannot deprive a citizen of Fourteenth Amendment rights. *See, e.g., Flagg Brothers Inc. v. Brooks*, 436 U.S. 149, 156 (1978) ("[M]ost rights secured by the Constitution are protected only against infringement by governments"). The Supreme Court stated in *United States v. Morrison,* 529 U.S. 598, 621 (2000), that the Fourteenth Amendment "erects no shield against merely private conduct, however discriminatory or wrongful." (quoting *Shelley v. Kraemer*, 334 U.S. 1, 13 (1948)). The Constitution protects against government action, not action by a private corporation or citizens. *See Rendell-Baker v. Kohn*, 457 U.S. 830, 837 (1982) (stating "the Fourteenth amendment, which prohibits the state from denying federal constitutional rights and guarantees due process, applies to acts of the states, not to acts of private parties or entities").

The U.S. Supreme Court has developed a "close nexus test" to determine whether actions taken by otherwise private entities are state action. In applying this test, the Supreme Court looks at a broad spectrum of information. The close nexus analysis is inherently fact specific. The Supreme Court has consistently emphasized that the state actor analysis focuses on the precise activity at issue. *See Brentwood Academy v. Tennessee Secondary School Athletic Association*, 531 U.S. 288, 295 (2001) (noting a private entity can be said to have engaged in state action only "when it can be said that the State is responsible for the specific conduct of which the plaintiff complains"); *see also*

Am. Mfrs. Mut. Ins. Co. v. Sullivan, 526 U.S. 40, 51 (1991) (noting that the "state actor" inquiry "begins by identifying the specific conduct of which the plaintiff complains") (internal citations omitted); *Blum v. Yaretsky*, 457 U.S. 991, 1003-04 (1982) ("Faithful adherence to the 'state action' requirement . . . requires careful attention to the gravamen of the plaintiff's complaint . . . . [C]onstitutional standards are invoked only when it can be said that the State is responsible for the specific conduct of which plaintiff complains"); *Jackson v. Metro. Edison Co.*, 419 U.S. 345, 351 (1974) ("the inquiry must be whether there is a sufficiently close nexus between the State and the challenged action of the regulated entity *so that the action of the latter may be fairly treated as that of the State itself.*") (emphasis added).

A close nexus between the state and a private actor exists if the state has exercised a coercive power or has provided encouragement for the aggrieved action. Specifically, the Court has held that

> state action requires *both* an alleged constitutional deprivation "caused by the exercise of some right or privilege created by the State or by a rule of conduct imposed by the State or by a person for whom the State is responsible," *and* that "the party charged with the deprivation must be a person who may fairly be said to be a state actor."

Am. Mfrs. Mut. Ins. Co, 526 U.S. 40, 50 (1999) (emphasis in original).

While AM2308 involves the area of foster care, the state actor versus private actor analysis has arisen in a broad range of cases where government and private spheres have intertwined. Case law reveals that the mere presence of a state-funded contract and regulatory scheme is not dispositive of the state action issue. For example, in *Rendell-Baker*, the Supreme Court held that the decisions of a private nonprofit school to discharge employees could not be attributed to the State even though the school received public funds, was subject to public regulation, served a function the State was legislatively obligated to provide, and contracted with the State to provide such services. The Court in *Rendell-Baker* did not attribute the school's decisions to fire the employees to the State even though public funds accounted for as much as 99% of the school's operating budget. The Court reasoned that despite such pervasive regulation, it was "not sufficient to make a decision to discharge, made by private management, state action." 457 U.S. at 842. The Court further held that even though the school was performing a public function, that fact alone did not end the state actor analysis. Rather, the relevant question "is not simply whether a private group is serving a 'public function'...[T]he question is whether the function performed has been 'traditionally the *exclusive* prerogative of the State.'" *Id.* (emphasis in original) (quoting *Jackson*, 419 U.S. at 353).

In *Jackson v. Metro. Edison Co.*, a customer brought suit against a privately owned and operated utility corporation. The company had a state license to do business in Pennsylvania and was highly regulated. The customer contended the company was a state actor and had violated her civil rights by shutting off her electric service without due

process. The Supreme Court found the actions of the private utility company, though subject to "extensive and detailed" regulation, were not imputable to the State. "The mere fact that a business is subject to state regulation does not by itself convert its action into that of the State for purposes of the Fourteenth Amendment." 419 U.S. at 350. There was no coercive imposition by the state that led the company to shut off the electricity, and thus, no state action.

An instructive case in state actor analysis involving social services is *Lown v. Salvation Army*, 393 F. Supp. 2d 223 (S.D.N.Y 2005). In *Lown*, the court held that the Salvation Army, a religious corporation, did not waive its Title VII ministerial exemption when it accepted government-funded contracts to perform secular social services in the area of government-mandated custodial care for children, including foster care and adoption services. Alluding to *Rendell-Baker*, *Brentwood Academy* and several of the other cases cited above, the court held that the plaintiffs failed to prove that the state had any role in the development of the Salvation Army's personnel policies. 393 F. Supp. 2d at 243. Instructive in the court's analysis was the fact that employees delivering social services did not act under the control of the government. There was no evidence "that any government agents held positions of authority within the hierarchy of the Salvation Army," or that the employees received public employee benefits for their services. The court held the Salvation Army was thus not a state actor. *Id.* at 244.

Another case involving the state actor issue in the context of foster care is *Leshko v. Servis*, 423 F.3d 337 (3rd Cir. 2005). In this case, the foster child, Karen Leshko, was severely burned while living with her foster parents after having been removed from the custody of her natural mother. Upon reaching the age of majority, Leshko sued the foster parents and the governmental entities for depriving her of her Fourteenth Amendment right to be free from physical harm. In discussing whether the administration of foster care services has been traditionally the *exclusive* prerogative of the State, the court stated:

> No aspect of providing care to foster children in Pennsylvania has ever been the exclusive province of the government. Even today, while removing children from their homes and placing them with other caregivers arguably are exclusively governmental functions in Pennsylvania, the hands-on care may be tendered by families, private organizations, or public agencies. 423 F.3d at 343.

In dismissing the plaintiff's case, the court noted that the traditionally exclusive public function requirement is a "rigorous standard" that is "rarely satisfied." Subsequently, there was not a close nexus between the State and the challenged action such that the private behavior could be attributed to the State itself. 423 F.3d at 346.

Numerous courts have adopted the reasoning proffered in *Lown* and *Leshko*. *See Johnson v. Rodrigues,* 293 F.3d 1196 (10th Cir. 2002) (private adoption care center did not perform functions traditionally reserved exclusively to the state and, as there was "no

close union" between Utah and the private adoption center, there could be no action under color of state law). *Milburn by Milburn v. Anne Arundel Cnty. Dep't of Soc. Servs.*, 871 F.2d 474, 479 (4th Cir. 1989) ("The care of foster children is not traditionally the exclusive prerogative of the State...."); *Rayburn ex rel. Rayburn v. Hogue*, 241 F.3d 1341, 1347 (11th Cir. 2001) (affirming district court finding that public function test was not met because "the [S]tate exercised no encouragement of the Hogues' actions, nor is foster care traditionally an exclusive [S]tate prerogative.") (alterations in original); *Phelan ex rel. Phelan v. Torres*, 843 F. Supp. 2d 259, 271 (E.D.N.Y. 2011) ("[F]oster care agencies do not perform a function that has been 'traditionally *exclusively* reserved to the State.'") (emphasis in original, citing *Jackson*, 419 U.S. at 352).

A common theme in cases that have otherwise found private entities to be state actors is an extremely direct relationship between the state and the challenged action of the entity. For example, in *Brentwood Academy,* the Supreme Court held that an interscholastic high school athletic association's regulatory activity was state action because of the entwinement of public officials within the association. The factors which drove the Court's decision included: public school representatives comprised 84% of the voting membership of the governing council; employees of the association were given state pensions; and Tennessee Board of Education Members were ex officio members of the governing council of the organization. 531 U.S. at 291.

In *Americans United for the Separation of Church and State v. Prison Fellowship Ministries Inc.*, 509 F.3d 406 (8th Cir. 2007), the Eighth Circuit addressed a challenge to the State's funding of a religious rehabilitation program run within the State of Iowa's prison system. The court concluded that Iowa had provided financial aid to the program, but also had given Prison Fellowship access to state corrections facilities; allowed the organization 24-hour power to incarcerate, treat, and discipline inmates; and provided "privileges in contracts with the organization." This led the court to conclude that Prison Fellowship was a state actor. 509 F.3d at 423.[2]

To undertake a "close nexus" analysis on AM2308 and its application to FBCPAs, it is necessary to determine, with particularity, the specific conduct which allegedly violates the Constitution, and scrutinize whether that conduct can be attributed to the

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[2] We have reviewed the Pennsylvania federal district court cases referenced during the Committee hearing on LB 975 addressing the state actor issue. *Harris ex rel. Litz v. Lehigh Cnty. Office of Children & Youth Servs.*, 418 F. Supp. 2d 643 (E.D. Pa. 2005); *Donlan v. Ridge,* 58 F. Supp. 2d 604, 609 (E.D. Pa. 1999). In both cases, the court rejected claims that private foster care agencies were not state actors on the ground that the agencies were authorized to remove children from their homes, which is traditionally a function within the exclusive prerogative of the State. 418 F. Supp. 2d at 651, 58 F. Supp. 2d at 609. These cases are inapposite because, as shown in the Subaward and attachments, CPAs in Nebraska do not maintain the exclusive prerogative of the state to remove children from homes.

State. We have reviewed the materials you provided to our office, as well as the transcript of the legislative hearing, contracts between the state and CPAs, and all pertinent statutes and regulations.

First, we are aware of concerns that LB 975 may possibly violate the Constitution by allowing FBCPAs to refuse to provide services to a child in need of foster care based on the child's religion or religious beliefs. We note that the plain language of AM2308 would clearly prohibit such action, as it would be in contravention of state and federal law for FBCPAs to discriminate against a beneficiary (the foster child).[3] Also, as several FBCPAs testified at the hearing that they would not refuse to provide services to a foster child based on the child's religion or religious beliefs, it would appear to us that such a concern is not well-founded, at least based on the material we have reviewed. Committee Records on LB 975, 104th Leg., 2d Sess. 66, 76 (February 17, 2016).

Second, we understand that concerns have been raised that FBCPAs will refuse to recruit prospective foster parents based on the religion or religious beliefs of those prospective foster parents (i.e., they will not assent to the FBCPA's statement of faith or religious mission). A corollary concern is that FBCPAs will not align with LGBT foster parents, or individuals living outside of traditional marital arrangements. The question, then, is whether a refusal to recruit based on the aforementioned reasons can reasonably be attributed to the State. As noted in the Background section, the Service Attachment to the Subaward between HHS and the CPA provides that recruitment "is defined as active and ongoing efforts to solicit families who are invested in meeting the unique needs of children and youth served by DHHS." Recruitment involves a variety of activities, including "organizing special events, speaking engagements, advertising, and networking." The particulars of how these recruiting goals are accomplished appears to remain largely in control of the respective CPAs. There is no indication that the State of Nebraska intrudes to any substantial degree in that process.

Moreover, a review of the materials reveals no particular facts from which to conclude a close nexus exists between CPAs and the recruitment of foster families. For example, there are no facts showing that the State has any representation on the boards of CPAs, or that CPA employees are treated as state employees. Likewise, there is nothing to suggest that CPAs utilize state property in furtherance of recruiting efforts. We think it is significant that HHS has no responsibility to monitor and regulate the foster parents until after a placement is made. And, as for placement, there is no mandate whereby a CPA is required to place any particular child in need of a foster home. "An action taken by a private entity with the mere approval or acquiescence of the state is not a state action." *American Mfrs.*, 526 U.S. at 52. In our view, the fact that the State of Nebraska allows CPAs to recruit prospective foster care families who affirm the religiously motivated mission of those organizations does not rise to the level of making CPAs state actors.

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[3] We deal at length with the question of the meaning of beneficiary below in our response to your second question.

B. Whether AM2308 violates Executive Orders No. 13279 or No. 13559.

During the legislative hearing before the Judiciary Committee, some committee members expressed concern that FBCPAs were "violating federal law." These concerns involved Executive Order 13279, signed in 2002 by President Bush and affirmed later by President Obama in Executive Order 13559. As Executive Order 13279 was substantively left unchanged by Executive Order 13559, references in the remainder of this opinion will be to Executive Order 13279 (hereinafter "EO 13279").

On January 29, 2001, President Bush created the White House Office of Faith-Based and Community Initiatives (FBCI) within the Executive Office of the President. Later that year, he signed EO 13279, which expounded upon the principles outlined in the FBCI. These policies have since been replicated in all regulations and guidance materials relating to the FBCI, and the FBCI's regulations now affect nearly all federal funding streams for social services.

EO 13279 is entitled "Equal Protection of the Laws for Faith-Based and Community Organizations," and it declared that the government should provide a level playing field in federally funded grant programs by allowing religious and secular groups to compete for grants. Specifically, the preamble of the order indicates that it is intended to provide guidance to Federal agencies and to ensure "equal protection of the laws for faith-based and community organizations...so that they may better meet social needs in America's communities..." (EO 13279, § 2). The overarching theme of the order is thus one of equality, or even-handedness, between secular and faith-based organizations (hereinafter "FBOs") which utilize federal funding to address social welfare concerns.

Section 2 sets forth the "Fundamental Principles and Policymaking Criteria" which are to guide Federal agencies. In pertinent part, this section provides:

- FBOs must be able to compete on an equal footing for financial assistance;
- No FBO should be discriminated against because of its religion/religious belief;
- Consistent with the Free Exercise Clause and the Free Speech Clause of the Constitution, FBOs should be eligible to compete for and fully participate in such programs "without impairing their independence, autonomy, expression, or religious character."
- An FBO "may retain its independence and may continue to carry out its mission, including the definition, development, practice, and expression of its religious beliefs."
- A participating FBO "may retain religious terms in its organization's name, select its board members on a religious basis, and include religious references in its organization's mission statements and other chartering or governing documents."

In addition to the accommodation of the religious nature and mission of the FBOs prescribed in the EO, Section 2 subjects FBOs to certain prohibitions. For example:

- The order prohibits FBOs from discriminating against program *beneficiaries or potential beneficiaries* on the basis of religion or religious belief.
- FBOs that receive direct government funding cannot use those funds on "inherently religious activities, such as worship, religious instruction, and proselytization," which need to be separated by time or space from the government-funded activities.
- Participation by a *beneficiary* in an inherently religious activity must be voluntary and cannot be supported by Federal financial assistance. (emphasis added).

Foster care and adoption services are intended to provide needed assistance to children. Prospective foster parents stand in the position of *cooperators* in the provision of that assistance, not as *beneficiaries*. Given the breadth of the relevant EO (i.e., its application to nearly every social service program administered by the Federal Government), "beneficiaries" is most properly understood as taking on the plain meaning of those intended to be assisted by the particular program or service at issue. With respect to foster care and adoption, Title IV-E's statement of purpose is to assist states in providing foster care and adoption services "*for children*" (42 U.S.C. § 670) (emphasis added). This is naturally consistent with AM2308's expressed intent, which is to preserve the work of FBOs "[i]n order to serve the best interests of *the children* of this state[.]" (AM2308, § 2(2)) (emphasis added).

The Subaward agreement between CPAs and HHS provides that it is "designed to meet the complex needs of the children who have experienced trauma, abuse, neglect and other serious issues which require out of home placement." (Agreement p.16). In other words, the benefits of these contracts are designed to serve the foster children.

This plain meaning is confirmed by the source language of the Charitable Choice provisions found in the EO. The content of the EOs promulgated by Presidents Bush and Obama is nearly identical to that contained in the original Charitable Choice provisions adopted by President Clinton in 1996, 1998, and 2000, and applied only to three specific programs (TANF, Community Block Grants, and SAMHSA, respectively). This includes the statutory language expressed in 42 U.S.C. § 604a, where we find practical guidance for determining the scope of the meaning of "beneficiary."

42 U.S.C. § 604a(e)(1) provides the right of an "individual" who objects to the religious character of an FBO social service program to be referred to an alternative provider. The subsequent presidential orders contained a substantially similar protection for a "beneficiary[.]" (*See, e.g.*, EO No. 13559, Sec. 2(h)(i)). But the older statute – again, the basis of the language in the subsequent orders – includes additional clarification of the meaning of "individual." First, the heading of 42 U.S.C. § 604a(e) confirms that an "individual" is indeed a "beneficiary" (even though only the latter term was carried over in the presidential orders). More specifically, the heading states: "Rights of *beneficiaries* of assistance[.]" (42 U.S.C. § 604a(e)) (emphasis added). The section further proceeds to provide for the rights of "*individuals*." (emphasis added) Then in 42 U.S.C. § 604(a)(e)(2), the statute provides that "[a]n *individual* described in this paragraph is an individual who

receives, applies for, or requests to apply for, *assistance*" under the programs provided for in the statute (i.e., Titles I, II, and IV-A of the Social Security Act). (42 U.S.C. § 604(a)(e)(2)) (emphasis added). In other words, the source language for the Charitable Choice provisions now at issue (i.e., the meaning of "beneficiary" in the later EOs) effectively defines "beneficiary" to be the one receiving or seeking *assistance – not* the one seeking *to assist*. This is consistent with the plain meaning of "beneficiary" with respect to foster care and adoption services, where it is the children who are most plainly said to receive *assistance*, and the foster parents who are mostly plainly said *to assist*.

Application of Executive Order 13279 to AM2308.

The language of AM2308 is consistent with the language and intent of EO 13279. It allows FBCPAs to compete with other CPAs without requiring them to compromise their sincerely held religious beliefs. Specifically, it allows FBCPAs to decide how to recruit and train prospective foster care families who affirm the FBCPAs' religious beliefs. The prohibitions contained in EO 13279 address delivery of needed services to the beneficiaries or potential beneficiaries, which, pursuant to AM2308, are the foster children. Therefore, the FBCPAs could not force children to attend any "inherently religious" activity.

However, a FBCPA would be allowed to recruit and train foster families that satisfy the FBCPAs' religious requirements. Once the child is placed in that family, EO 13279 would prohibit the FBCPA or the foster family from forcing the foster child, as the beneficiary, from participating in religious activities. Our review of AM2308 shows it to be consistent with the stated purpose of EO 13279.

EO 13279 has the force of law only to the extent it requires agencies of the Federal Government to allocate financial assistance for a broad range of social service programs to FBOs on an equal basis as non-faith-based organizations.[4] It is evident that President Bush promulgated the order with the explicit purpose of applying it to nearly *all* social service programs. The order is nearly identical to the "Charitable Choice" protections for

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[4] An Executive Order, in and of itself, does not have the force of law. In *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952), the Supreme Court announced, with regard to Presidential Executive Orders, that "[t]he President's power, if any, to issue the order must stem either from an act of Congress or from the Constitution itself." 343 U.S. at 585. When such orders are issued pursuant to "an express or implied authorization from Congress, [the President] exercises not only his powers but also those delegated by Congress." *Dames & Moore v. Regan*, 453 U.S. 654, 668 (1981). "In such a case the executive action 'would be supported by the strongest of presumptions and the widest latitude of judicial interpretation, and the burden of persuasion would rest heavily upon any who might attack it.'" *Id.* (*quoting Youngstown Sheet & Tube Co.,* 343 U.S. at 637). The authority of Executive Order 13279 is derived from the Free Exercise Clause of the U.S. Constitution.

faith-based organizations that had previously been enacted under President Clinton and codified in statute with respect to the administration of TANF funds, Community Service Block Grants, and the Substance Abuse and Mental Health Services Act. (*See, e.g.*, 42 U.S.C. § 604a).

Furthermore, EO 13279 called for and was implemented by a series of administrative regulations, including 45 C.F.R. § 87.2, which governs the formula and block grant administration of "any . . . program" administered by the Federal Department of Health and Human Services, including federal payments for adoption and foster care services pursuant to Title IV-E of the Social Security Act. Consistent with the directive of the Executive Order, however, the regulatory provisions do not create any substantive or procedural right of judicial review, but provide only for the "internal management" of said social service funds. (*See* EO 13279, § 7).

The "Fundamental Principles" contained in both EOs state that "[t]he Nation's social service capacity will benefit if all eligible organizations, including faith-based . . . organizations, are able to compete on an equal footing for Federal financial assistance used to support social service programs." (EO 13559, § 2(b)). The express purpose is to encourage FBOs to receive federal financial services in the administration of social service programs while maintaining their "religious character" and "carry[ing] out" their "mission, including the definition, practice, and expression of [their] religious beliefs . . ." (*Id.*, § 87.2(d)).

To read "beneficiary" to include foster parents would likely lead to an absurd result, given the purposes of the EOs. That is, the orders are intended to *increase* the number of FBOs that participate in the provision of social service programs with the help of federal financial assistance. To read "beneficiary" to include prospective *parents* in the context of adoption and foster care services would likely lead to a *decrease* in the aid provided by FBOs in that field, given the salience of family structure to various systems of religious belief. In other words, it strains credulity to assume that reading "beneficiary" to include "prospective parents" in the adoption and foster care context would not place a significant burden on a number of FBOs and effectively force them to close operations. We believe this result would be irrational in light of the express purposes of the EOs, and thus counsels against such a broad meaning of the term "beneficiary."

C. Whether AM2308 violates 42 U.S.C. § 1996b, § 2000d, 45 C.F.R. § 80.3(b), or 45 C.F.R. § 260.34.

You have asked whether AM2308 violates 42 U.S.C. § 1996d, 45 C.F.R. § 80.3(b), or 45 C.F.R. § 260.34. For the reasons set forth below, the answer to this question is no.

42 U.S.C. § 1996b.

This federal statutory provision states that a "person or government that is involved in adoption and foster care placements" may not discriminate against prospective

adoption and foster care parents on the basis of the parents' or the child's race, color, or national origin. *See* 42 U.S.C. § 1996b(1)(A)-(B). However, AM2308 expressly applies only "to the . . . extent permitted by state and federal law,"[5] and thus it incorporates by reference all federal restrictions on the otherwise broad discretion of FBCPAs. Therefore, by its own terms, AM2308 is inoperable with respect to any matter on which there is a valid law to the contrary. This would include the prohibition on CPAs discriminating in "child placement services" on the basis of race, color, or national origin, even if said limitation violated a sincerely held religious belief.[6]

42 U.S.C. § 2000d.

Similarly, this provision states that "[n]o person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance." *See* 42 U.S.C. § 2000d. As a provision of federal statute, it is incorporated by reference into AM2308, which therefore cannot be understood to authorize any CPA to discriminate against any person on the basis of race, color, or national origin, even if such limitation violated a sincerely held religious belief.

45 C.F.R. § 80.3(b).

Section 80.3 of the Code of Federal Regulations essentially implements 42 U.S.C. § 2000d by prohibiting discrimination on the basis of race, color, or national origin against any person under nearly any program administered by the Federal Department of Health and Human Services. *See* 45 C.F.R. § 80.3(a). Section 80.3(b) specifically prohibits any "recipient under any program" from "directly *or through contractual or other arrangements*" discriminating on the basis of race, color, or national origin, *see* 45 C.F.R. § 80.3(b) (emphasis added), making clear that such restrictions apply to FBCPAs that contract with the state.

But again, AM2308 is subject to any contravening federal law. Thus, any right framed by AM2308 in absolute terms is at the same time, by the very terms of AM2308, limited by federal restrictions, including the provisions of 45 C.F.R. § 80.3 prohibiting discrimination on the basis of race, color, or national origin.

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[5] This qualifier effectively means: "Unless otherwise prohibited by state and federal law . . ."

[6] Even if AM2308 did not expressly cede to supervening federal restrictions, the Supremacy Clause of the U.S. Constitution would automatically apply the federal restrictions against otherwise conflicting state-law rights. *See* U.S. Const. art. VI, para. 2. But AM2308's express language stating the same effectively incorporates by reference *into the meaning of the state statute itself* any conflicting-and thus limiting-restrictions of federal law.

45 C.F.R. § 260.34.

45 C.F.R. § 260.34 applies to the Charitable Choice provisions in the application of TANF. TANF funding is utilized by the Nebraska DHHS-Division of Children and Family Services to pay for some child welfare services that are provided by CPAs (both secular and faith-based CPAs). CPAs do not receive TANF funding directly.

This funding is thus subject to 45 C.F.R. § 260.34. Section 260.34(f) prohibits discrimination against a "TANF applicant or recipient on the basis of religion" – in lieu of discrimination against "a beneficiary" as described by EO 13279. Insofar as TANF applies to *foster care and adoption services*, the beneficiary of these funds remains the child. Thus, AM2308 does not violate this provision because it is only directed towards the religious beliefs of the CPAs as it selects foster families, and not the foster children as beneficiaries.

D. Whether AM2308 puts Nebraska at risk of losing federal funding under 45 C.F.R. § 80.8(a).

You have asked whether AM2308 puts Nebraska at risk of losing federal funds under 45 C.F.R. § 80.8(a). For the reasons outlined below, the answer to this question is no.

45 C.F.R. § 80.8(a) provides for possible suspension or termination of federal financial assistance only for violations of "this regulation." The nondiscrimination provisions of the regulation are contained in 45 C.F.R. § 80.3(b) and pertain to race-based discrimination. AM2308 makes a religious exception for FBCPAs consistent with EO 13279 and in all other purposes is subject to these limitations and thus does not put the state at any risk of losing federal funds under 45 C.F.R. § 80.8(a).

E. Whether AM2308 is consistent with the Free Exercise Clause of the U.S. Constitution and art. 1, § 4 of the Nebraska Constitution.

In our response to question B., we noted that one of the fundamental principles underlying the EO is that, "[c]onsistent with the Free Exercise Clause and the Free Speech Clause of the Constitution, FBOs should be eligible to compete for and fully participate in [federally funded] programs 'without impairing their independence, autonomy, expression, or religious character.'" (EO 13279, § 2). AM2308 is also consistent with the Free Exercise Clause because it helps ensure, like the EO, that FBCPAs are positioned on equal footing with non-religious agencies in Nebraska. This position is supported by significant precedent.

The Supreme Court has held that there is nothing constitutionally suspect about government accommodation of religious organizations in their dealing and interactions with the government. Making such accommodations "follows the best of our traditions." *Zorach v. Clausen*, 343 U.S. 306, 314 (1952). Courts "have long recognized that the

government may (and sometimes must) accommodate religious practices and that it may do so without violating the Establishment Clause." *Corporation of the Presiding Bishop of the Church of Jesus Christ of Latter Day Saints v. Amos*, 483 U.S. 327, 334 (1987).

Neb. Const. art. I, § 4 adopts the same standard as the Federal Free Exercise Clause. *In re Interest of Anaya,* 276 Neb. 825, 758 N.W.2d 10 (2008). The Nebraska Constitution also contains a "conscience clause" which is consistent with the intent of AM2308. It provides:

> All persons have a natural and indefeasible right *to worship Almighty God according to the dictates of their own consciences.* No person shall be compelled to attend, erect or support any place of worship against his consent, and no preference shall be given by law to any religious society, *nor shall any interference with the rights of conscience be permitted.* No religious test shall be required as a qualification for office, nor shall any person be incompetent to be a witness on account of his religious beliefs; but nothing herein shall be construed to dispense with oaths and affirmations. Religion, morality, and knowledge, however, being essential to good government, it shall be the duty of the Legislature to pass suitable laws to protect every religious denomination in the peaceable enjoyment of its own mode of public worship, and to encourage schools and the means of instruction. (emphasis added).

Based on our review, AM2308 is consistent with these provisions of the Federal and State Constitutions.

F. Whether AM2308 violates the Establishment Clause of the U.S. Constitution or art. I, § 4 of the Nebraska Constitution.

At the outset, we note that AM2308 does not create a new scheme under which, for the first time, FBCPAs are able to compete for foster care and adoption recruitment and placement services. FBCPAs presently compete for government funding to provide such services. Assuming for the sake of argument that an Establishment Clause action was commenced against the State of Nebraska for simply allowing FBCPAs to compete with secular, non-religiously motivated CPAs, the chance of succeeding under such a legal theory would be, in our view, remote.

Pursuant to such a theory, the Establishment Clause would presumably prohibit the State from working with any religious state actor. Indeed, the logical conclusion of such a determination could have the result of precluding any religiously motivated CPA from contracting with the State as foster or adoption agencies. This outcome has no basis in our constitutional traditions. Indeed, across the nation, governmental entities regularly contract with faith-based child-welfare agencies, and that is the express contemplation of federal law and the Bush/Obama Charitable Choice Executive Orders.

Moreover, Establishment Clause claims would theoretically need to be aimed at specific actions having the effect of impermissible government advancement of religion. For example, such claims would need to allege that services provided with public funds were in and of themselves religious (i.e., inherently religious); that FBCPAs were discriminating against beneficiaries based on religion; or that a particular FBCPA was chosen because of its religious nature.

Alleged government establishments of religion are evaluated under the general framework set forth in *Lemon v. Kurtzman*, 403 U.S. 602 (1971), as later modified in *Agostini v. Felton*, 521 U.S. 203 (1997). Under *Agostini*, a law does not violate the Establishment Clause if: (1) it has a secular purpose; and (2) its principal or primary effect neither advances nor inhibits religion. 521 U.S. at 233-34. The factors considered in evaluating the "effects" prong are whether the law results in government indoctrination, whether the law defines recipients with respect to religion, and whether the government is excessively entangled with religion. *Id.*

Secular purpose

Nebraska's policy of funding foster care and adoptive placements and services is clearly not motivated by a wholly religious purpose. In fact, in reviewing the "Agency Supported Foster Care Subaward" agreements between the State of Nebraska and Nebraska CPAs, the stated purpose of such funding is "[t]o provide Agency Supported Foster Care (ASFC) services for children and families of the State of Nebraska." (Subaward at 1). This stated policy has no religious consideration.

As for AM2308, its stated purpose is "to secure safe and loving foster and adoptive homes for children in need by protecting child-placing agencies against adverse action by the state." Committee Records on LB 975, 104th Leg., 2d Sess. 18 (Introducer's Statement of Intent) (Feb. 17, 2016). The bill allows and will encourage HHS to continue its practice of contracting with a diverse array of CPAs, some of which are guided by their religious faith, to serve children in need. This stated purpose is consistent with the EOs issued by Presidents Bush and Obama, a policy which fosters accommodation of religiously oriented social service providers.

Principal or primary effect which neither advances nor inhibits religion

Once again, a perusal of the Subaward agreements reveals no design to advance religious objectives. Likewise, AM2308 portrays no intent to advance religious tenets in the administration of services to foster care and adoptive social service organizations. In fact, by the plain wording of the amendment, these organizations are constrained from proselytizing or utilizing funding for any inherently religious purpose, and may not discriminate against the beneficiaries of such services based on religion or religious belief.

Excessive entanglement

Finally, allowing FBCPAs to compete on an equal footing with secular CPAs does not create an excessive entanglement. Such a policy arguably alleviates this tension because it strikes a balance between the countervailing principles of the Free Exercise and the Establishment Clauses of the Constitution. Just as governments are prohibited from making any law establishing religion, they are likewise prevented from prohibiting the free exercise of religion. In turn, AM2308 alleviates, to the extent permitted by state and federal law, government interference with the ability of Nebraska FBCPAs to carry out their religious missions in the process of recruiting and training potential foster parents.

Under the facts and information presented to us at this time, we conclude that AM2308 does not invoke Establishment Clause concerns.

G. Whether AM2308 violates the Equal Protection Clause of the U.S. Constitution or art. 1, § 3 of the Nebraska Constitution.

Our determination that CPAs are not state actors is dispositive of the question of whether AM2308 violates equal protection considerations. We concur with a North Dakota Attorney General Opinion regarding the constitutionality of a North Dakota bill providing similar protections to those included in AM2308. The opinion states:

> A child placing agency's decision not to perform or participate in a particular placement would be a decision made by the agency and not the state. Under SB 2188 the state would remain completely neutral regarding that decision. Accordingly, a child-placing agency would not be a state actor when deciding whether to perform or participate in a placement. (2003 ND Op Atty Gen L-18 (NDAG), 2003 WL 1829244 *7).

Such state neutrality would alleviate any equal protection concerns. Pursuant to the information provided to our office and our review of AM2308, we cannot say that AM2308 violates equal protection.

CONCLUSION

Based on the foregoing, we conclude that: (1) child-placing agencies are likely not state actors; (2) AM2308 does not violate Executive Orders 13279 or 13559; (3) AM2308 does not violate 42 U.S.C. §§ 1996b and 2000d, 45 C.F.R. § 80.3(b), or 45 C.F.R. § 260.34; (4) Nebraska is not likely to lose federal funding under 45 C.F.R. § 80.8(a) if AM2308 is enacted; (5) AM 2308 is consistent with the Free Exercise Clause of the U.S. Constitution and Article 1, § 4 of the Nebraska Constitution; and (6) AM2308 does not violate the Establishment Clause or the Equal Protection Clause of the U.S. Constitution.

Very truly yours,

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Clerk of the Nebraska Legislature

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