LETTER OPINION
2003-L-18

March 19, 2003

Honorable Merle Boucher
House Minority Leader
600 E Boulevard Ave
Bismarck, ND 58505

Dear Representative Boucher:

Thank you for your March 5, 2003, letter requesting my opinion regarding the constitutionality of Senate Bill No. 2188.

Once enacted "'[a] statute is presumptively correct and valid, enjoying a conclusive presumption of constitutionality unless clearly shown to contravene the state or federal constitution.'" Traynor v. Leclerc, 561 N.W.2d 644, 647 (quoting State v. Ertelt, 548 N.W.2d 775, 776 (N.D. 1996)). Because it is the Attorney General's role to defend statutory enactments from constitutional attacks, this office has been reluctant to issue an opinion questioning the constitutionality of a statutory enactment. Accordingly, absent controlling case law to the contrary, this office will not declare that a bill, if enacted, would be unconstitutional. In this case there is substantial case law that supports the constitutionality of SB 2188.

SENATE BILL NO. 2188

Senate Bill No. 2188 would amend N.D.C.C. § 50-12-03 and create a new section to chapter 50-12. Section 50-12-03 relates to licensure for child-placing agencies. The amendment would provide that "[t]he department of human services may not deny a license because of the applicant's objection to performing, assisting, counseling, recommending, facilitating, referring, or participating in a placement that violates the applicant's religious or moral convictions or policies." The new section to chapter 50-12 would read:

> **Objection to placement for religious or moral convictions or policies – Immunity – Effect.** A child-placing agency is not required to perform, assist, counsel, recommend, facilitate, refer, or participate in a placement that violates the agency's religious or moral convictions or policies. A

> state or local government entity may not deny a child-placing agency any grant, contract, or participation in a government program because of the child-placing agency's objection to performing, assisting, counseling, recommending, facilitating, referring, or participating in a placement that violates the child-placing agency's religious or moral convictions or policies. A child-placing agency is not civilly or criminally liable for refusing to perform, assist, counsel, recommend, facilitate, refer, or participate in a placement that violates the child-placing agency's religious or moral convictions or policies. Refusal by a child-placing agency to perform, assist, counsel, recommend, facilitate, refer, or participate in a placement that violates the child-placing agency's religious or moral convictions or policies does not constitute a determination that the proposed adoption is not in the best interest of the minor.

Senate Bill No. 2188 can be referred to as a "conscience clause" – a statute intended to protect child-placing agencies' rights to refuse to provide or participate in activities to which the agencies have moral or religious objections. "Congress and most state legislatures have enacted 'conscience clauses' . . . to protect health care providers' rights to refuse to provide or participate in certain procedures to which they have moral or religious objections." Lynn D. Wardle, J.D., Protecting the Rights of Conscience of Health Care Providers, 14 J. Legal Med. 177 (June 1993). The North Dakota Legislature has enacted a conscience clause to prevent health care providers from having to participate in the performance of an abortion. N.D.C.C. § 23-16-14. Similarly, the intent of SB 2188 appears to be to protect child-placing agencies from having to perform or participate in placement related activities that violate an agency's religious or moral convictions or policies.

CONSTITUTIONAL ACCOMMODATION OF RELIGIOUS PRACTICES

Chapter 50-12, N.D.C.C., provides for licensure and regulation of child-placing agencies.[1] Compared to other jurisdictions, N.D.C.C. ch. 50-12 places very few burdens or restrictions on child-placing agencies. Although N.D.C.C. § 50-12-05 permits the Department of Human Services to adopt rules regarding placements, the Department has not done so. Based upon my review of N.D.C.C. ch. 50-12, permitting a child-placing agency to elect not to perform or participate in a placement or associated activity would not be contrary to any requirement in N.D.C.C. ch. 50-12. In other words,

[1] There are currently six licensed child-placing agencies. Three of those agencies are affiliated with religious denominations. One of the remaining three is religiously based, although not affiliated with a particular denomination. Thus, there are currently two licensed child-placing agencies that are not religiously based or affiliated. One child-placing agency that is not religiously based is currently seeking licensure.

it does not appear that enactment of SB 2188 exempts child-placing agencies from any current licensure law or regulation.

Absent unusual circumstances, a child-placing agency is a "public accommodation" subject to the North Dakota Human Rights Act, N.D.C.C. ch. 14-02.4. Among other things, N.D.C.C. ch. 14-02.4 prohibits discriminatory practices in public accommodations. Senate Bill No. 2188 would exempt a child-placing agency from the requirements of N.D.C.C. ch. 14-02.4 to the extent the child-placing agency elects not to perform or participate in placement related activities because the placement or placement related activities violate the child-placing agency's religious or moral convictions or policies.

United States Supreme Court case law indicates that exempting child-placing agencies from licensure or other statutory requirements on religious grounds is constitutional. In Corporation of Presiding Bishop of Church of Jesus Christ of Latter-Day Saints v. Amos, 483 U.S. 327 (1987), the Supreme Court addressed the constitutionality of the religious exemption to Title VII's prohibition against religious discrimination in employment to secular non-profit activities of religious organizations. Section 702 of the Civil Rights Act of 1964 exempts religious organizations from Title VII's prohibition against discrimination in employment on the basis of religion. The Court noted the tension inherent in the Establishment Clause and the Free Exercise Clause of the First Amendment:

> This Court has long recognized that the government may (and sometimes must) accommodate religious practices and that it may do so without violating the Establishment Clause." It is well established, too, that "[t]he limits of permissible state accommodation to religion are by no means co-extensive with the noninterference mandated by the Free Exercise Clause." There is ample room under the Establishment Clause for "benevolent neutrality which will permit religious exercise to exist without sponsorship and without interference.

Id. at 334 (citations omitted). The Court then proceeded to apply the Lemon test[2] and found § 702 constitutional.

The first factor in the Lemon test requires that the law have a "secular legislative purpose." Id. at 335. As explained by the Court, "[t]his does not mean that the law's

[2] The Lemon test was first adopted by the United States Supreme Court in Lemon v. Kurtzman, 403 U.S. 602 (1971). Although the Supreme Court has applied and adapted the test to various circumstances, the test has not been overruled. A law that satisfies the Lemon test should satisfy the analysis currently used by the Supreme Court. See N.D.A.G. 2002-F-05.

purpose must be unrelated to religion--that would amount to a requirement 'that the government show a callous indifference to religious groups,' and the Establishment Clause has never been so interpreted." Id. (quoting Zorach v. Clauson, 343 U.S. 306, 314 (1952). Rather the aim of the first prong of the Lemon test is to prevent the relevant governmental decision maker "from abandoning neutrality and acting with the intent of promoting a particular point of view in religious matters." Id. The Court then held that "it is a permissible legislative purpose to alleviate significant governmental interference with the ability of religious organizations to define and carry out the religious mission." Id.

The second part of the Lemon test requires that the law neither advance nor inhibit religion. Id. at 336. The Court explained: "A law is not unconstitutional simply because it allows churches to advance religion, which is their very purpose. For a law to have forbidden 'effects' under Lemon, it must be fair to say that the government itself has advanced religion through its own activities and influence." Id. at 337. Section 702 satisfied the second prong of the Lemon test because it "is rationally related to the legitimate purpose of alleviating significant governmental interference with the ability of religious organizations to define and carry out their religious missions." Id. at 339.

The final prong of the Lemon test is that the law may not foster an excessive entanglement of the state with religion. Id. The Court held that Section 702 easily passes this part of the Lemon test because it actually "effectuates a more complete separation" of church and state by avoiding intrusive inquiry into the religious beliefs of the religious organization. Id.

Relying on the Amos decision, the Fourth Circuit Court of Appeals upheld a regulation which exempted church-run childcare centers from licensing requirements. Forest Hills Early Learning Ctr., Inc. v. Grace Baptist Church, 846 F.2d 260 (4th Cir. 1988), cert. denied, 488 U.S. 1029 (1989). The court explained that it did "not discern any distinctions that would justify a result in this case different from that reached in Amos." Id. at 264. Rather, exempting church-run childcare centers from licensure was even more justified than the employment practice in Amos. "Indeed, if an exemption is permissible in the context of employment practices in a gymnasium, one can only be more solidly justified where it acts to prevent state interference with church programs that provide education and care for children." Id.

Although decided prior to the Amos decision, another federal court held Arkansas statutes relating to religious childcare facilities licensing exemptions constitutional in Arkansas Daycare Ass'n v. Clinton, 577 F. Supp. 388 (E.D. Ark. 1983). Like in Amos, the Court in Arkansas Daycare Ass'n identified the conflict between the Establishment Clause and the Free Exercise Clause:

> The First Amendment contains not one, but two limitations on the powers of government concerning matters of religion. While governments are prohibited from making any law "respecting an establishment of religion", they are, likewise, prevented from "prohibiting the free exercise thereof." The usual application of Lemon fails to recognize the State's interest in preserving the free exercise of religious freedoms.

Id. at 395.

Noting that the United States Supreme Court has stated that "the Free Exercise Clause and Establishment Clause overlap and that maintenance of neutrality is difficult," the court explained that "[r]eligion and secular governmental regulation must coexist. Between the twin boundaries of the religion clauses lies a zone of permissible state regulation." Id. at 395. According to the court:

> The width of the zone varies with the weight of the State's interests balanced against the affected religious beliefs. While regulating in this zone, the State may make legitimate accommodations of religious beliefs. If the State does not regulate because it recognizes a religious belief, then it accommodates that belief. Thus, regulation and accommodation may vary inversely. Under-regulation may result in an over-accommodation and vice versa. In drawing the line between regulation and accommodation, the State must be particularly careful to recognize its role of neutrality.

Id. at 395-96 (citations omitted).

The court concluded that the "exemption from the formality of obtaining a license is a reasonable accommodation to the religious beliefs recognized by the legislature." Id. at 396.

More recently, in Children's Healthcare is a Legal Duty, Inc. v. Min De Parle, 212 F.3d 1084 (8th Cir. 2000), cert. denied, 532 U.S. 957 (2001), the Eighth Circuit Court of Appeals held that exceptions to the Medicare and Medicaid Acts for persons who have religious objections to the receipt of medical care did not violate the Establishment Clause. Applying the Lemon test and relying upon the Amos decision, the court held the exceptions constituted permissible accommodations of religion. Id. at 1099.

Also in 2000, the Fourth Circuit Court of Appeals held a county zoning ordinance that exempted parochial schools from a special exception requirement was valid under the Establishment Clause. Ehlers-Renzi v. Connelly Sch. of the Holy Child, Inc., 224 F.3d 283 (4th Cir. 2000), cert. denied, 531 U.S. 1192 (2001). In doing so, the court wrote:

> But the prohibition against the establishment of religion does require government neutrality toward religion and among religions. And this neutrality may be a "benevolent neutrality." Indeed, the government is entitled to accommodate religion without violating the Establishment Clause, and at times the government must do so.
> . . . .
> This authorized, and sometimes mandatory, accommodation of religion is a necessary aspect of the Establishment Clause jurisprudence because, without it, government would find itself effectively and unconstitutionally promoting the absence of religion over its practice.

Id. at 287 (citations omitted). See also Cohen v. City of Des Plaines, 8 F.3d 484 (7th Cir. 1993) (rejecting a constitutional challenge to a zoning ordinance exempting church daycare centers from the requirement of obtaining a special use permit), cert. denied, 512 U.S. 1236 (1994).

The North Dakota Supreme Court's language in Best Products Co. v. Spaeth, 461 N.W.2d 91, 101 (N.D. 1990), is instructive. In Best Products, the court upheld North Dakota's Sunday closing law. Addressing an Establishment Clause challenge, the court explained that "the accommodation of religious practices is a proper legislative end." Id. The court further explained:

> If the statute removes burdens placed on religious practitioners without directly advancing or inhibiting religion, and without excessively entangling the government with religion, the statute does not violate the constitution. To work this accommodation, the legislature can benefit religious groups; special consideration given to religious groups is not per se invalid.

Id.

The cited case law supports the constitutionality of SB 2188. It is constitutionally permissible for the North Dakota Legislative Assembly to recognize religious beliefs of child-placing agencies. And it is constitutionally permissible for the Legislature to make accommodations for those beliefs. By permitting child-placing agencies to not participate in placement activities that violate their religious or moral convictions or policies, SB 2188 permissibly accommodates the religious or moral beliefs of child-placing agencies.

CHILD-PLACEMENT AGENCY NOT A STATE ACTOR

The Constitution protects against government action, not action by a private corporation or citizen. See Rendell-Baker v. Kohn, 457 U.S. 830, 837 (1982) (stating "the Fourteenth Amendment, which prohibits the states from denying federal constitutional

rights and which guarantees due process, applies to acts of the states, not to acts of private parties or entities"); Bolinske v. North Dakota State Fair Ass'n, 522 N.W.2d 426, 430 (N.D. 1994) ("The guarantee of free speech under the First Amendment is a guarantee only against abridgement by government, federal or state; it provides no protection against infringement by a private corporation or person."); City of Jamestown v. Beneda, 477 N.W.2d 830, 834 (N.D. 1991) (same). Thus, a question regarding the constitutionality of SB 2188 necessarily raises the issue of whether a licensed child-placement agency is acting on behalf of the State. Court decisions reach different results regarding whether adoption agencies are state actors. A distinguishing factor in the results is to what extent state laws or regulations dictate the action of the child-placement agency.

In a thorough and well-reasoned decision, the Tenth Circuit Court of Appeals held adoption centers licensed by Utah are not state actors. Johnson v. Rodrigues, 293 F.3d 1196 (10th Cir. 2002), cert. denied, 123 S.Ct. 893 (2003). Significant factors relied upon by the court in reaching its conclusion were that there was minimal state involvement in the adoption process, the state did not exercise coercive power on the adoption center, and there was no cooperative action between the state and the adoption center. Id. at 1203-05.

The opposite result was reached in Scott v. Family Ministries, 135 Cal. Rptr. 430 (Cal. Ct. App. 1977). In Scott, the court found the activity of a licensed adoption agency was state action because of the state authority and power delegated to the agency under California's statutory scheme. Id. at 438. A distinguishing factor in Scott is that the adoption agency's decision was controlled by a specific state law. Id. at 437.

Whether the adoption agency's action is controlled by state law or regulation is significant. In Swayne v. L.D.S. Soc. Servs., 670 F. Supp. 1537, 1541-42 (D. Utah 1987), and Swayne v. L.D.S. Soc. Servs., 795 P.2d 637, 640 (Utah 1990), the courts held an adoption agency was engaged in state action when it terminated a father's parental rights by filing an adoption petition. Significant in those decisions is that "the statute involved is self-operative and mandates the resultant termination of an illegitimate father's parental rights." 670 F. Supp. at 1541. Thus, the state, not a private party, had made an official policy decision by enactment of the law. Id. "The only fair conclusion is that such a private party becomes a 'state actor' when his or her actions bring the statute into play so as to effectuate the pre-determined state decision to terminate parental rights." Id. at 1542. See also 795 P.2d at 640 (stating the private party becomes a state actor by effectuating the state's termination of the father's rights).

Cases holding licensed medical facilities are not state actors illustrate the significance of whether state laws or regulations dictate the action of the child-placement agency. In Watkins v. Mercy Med. Ctr., 364 F. Supp. 799 (D. Idaho 1973), aff'd, 520 F.2d 894 (9th Cir. 1975), the court held that a hospital was not a state actor when it refused to renew

the plaintiff's privileges because he would not abide by the ethical and religious directives of the facility. The hospital was licensed by the state and received state and federal funds under Medicare and Medicaid programs. Despite this, the court held the hospital was not acting under color of state law:

> The state has exacted no conditions upon the hospital concerning sterilization or abortion in order to receive tax benefits or state or federal money. The state regulations which the hospital must conform to in no way relate to its policy concerning sterilization or abortions. Since hospital policy is not and has not been affected by the benefits bestowed upon it by the state, defendants were not acting under color of state law when the policy was formulated or enforced.

Id. at 802.

The court concluded that the hospital "has the right to adhere to its own religious beliefs and not be forced to make its facilities available for services which it finds repugnant to those beliefs." Id. at 803. The court further explained that the doctor cannot force the hospital to allow him to perform the prohibited services in the hospital. "To hold otherwise would violate the religious rights of the hospital." Id.

Similarly, the court in Greco v. Orange Memorial Hosp. Corp., 374 F. Supp. 227 (E.D. Tex. 1974), aff'd, 513 F.2d 873 (5th Cir.), cert. denied, 423 U.S. 1000 (1975), found a private hospital not to be acting under color of state law because the actions in question were not regulated or supported by the state. The court explained that "there must be governmental involvement in the very activity that is being challenged. If the State is completely neutral and does not foster or encourage the hospital policy causing the plaintiff's injury, then there is no state action." Id. at 233. Because the government did not seek to regulate or influence the medical policy to be followed within the hospital, but remained "completely neutral," the hospital was not acting under color of state law when it established this policy prohibiting performance of elective abortions. Id.

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.

RELIGIOUS VERSUS MORAL CONVICTIONS OR POLICIES

Senate Bill No. 2188 applies to "moral" convictions or policies as well as "religious" convictions or policies.[3] According to The American Heritage Dictionary (2d coll. ed. 1991), "moral" means "concerned with the judgment principles of right and wrong in relation to human action and character." Id. at 813. Although moral convictions may be, and often are, based upon religious beliefs and convictions, the two are not necessarily synonymous. Moral convictions may be based upon individual beliefs and purely secular considerations.[4]

The United States Supreme Court has distinguished between philosophical and personal beliefs based on purely secular considerations and religious beliefs. "[T]o have the protection of the Religion Clauses, the claims must be rooted in religious belief." Wisconsin v. Yoder, 406 U.S. 205, 215 (1972). See also Stevens v. Berger, 428 F. Supp. 896, 899 (E.D.N.Y. 1977) (stating that for a belief to be protected by the Constitution the belief must be "based upon what can be characterized as theological, rather than secular e.g., purely social, political, or moral views"); Syska v. Montgomery County Bd. of Educ., 415 A.2d 301, 304 (Md. Ct. Spec. App. 1980) (stating that beliefs based on purely secular considerations, rather than religious, are not protected under the Religion Clauses).

I am aware of no case law that would prohibit the Legislature from exempting child-placing agencies from statutory requirements based upon the child-placing agency's secular moral convictions or policies. To the contrary, some courts have held that a statutory exception based upon religious belief must apply equally to sincerely held moral beliefs. See, e.g., Welsh v. United States, 398 U.S. 333, 357-58 (1970)

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[3] The words "convictions" and "policies" recognize the difference between individuals and organizations. Individuals may have religious or moral convictions, while organizations may adopt policies addressing religious or moral positions.

[4] The distinction between "religious" and "moral" beliefs is difficult to define. "[T]he distinction between personal and religious beliefs is inherently difficult because 'in no field of human endeavor has the tool of language proved so inadequate.'" Strayhorn v. Ethical Soc'y of Austin, No. 03-02-00066-CV, 2003 WL 740277 at 6 (Tex. Ct. App. Mar. 6, 2003) (quoting United States v. Seeger, 380 U.S. 163, 175 (1965)). See also Malnak v. Yogi, 592 F.2d 197, 210 (3rd Cir. 1979) ("Defining religion is a sensitive and important legal duty. Flexibility and careful consideration of each belief system are needed."); Church of the Chosen People v. United States, 548 F. Supp. 1247, 1252 (D. Minn. 1982) ("The definitions of the words 'religion' and 'religious' are by no means free of ambiguity. The United States Supreme Court has not established a clear standard for determining which beliefs are religious."). In Welsh v. United States, 398 U.S. 333 (1970), the Court read "religious belief" to include "deeply and sincerely" held "beliefs that are purely ethical or moral in source and content." Id. at 340.

(Harlan, J., concurring) (stating that exemptions cannot draw a line between religious and secular beliefs); Goguen v. Clifford, 304 F. Supp. 958 (D.N.J. 1969) (same); Koster v. Sharp, 303 F. Supp. 837, 845 (E.D. Pa. 1969) (same).

RELIGIOUS BELIEFS ARE NOT PART OF THE LICENSURE PROCESS

Your March 5, 2003, letter states that SB 2188 requires the Department of Human Services "to ascertain the child placement agency's religious or moral convictions or policies as part of the licensing process for placement for adoption or foster care children." I do not read SB 2188 to require such a determination. Chapter 50-12, N.D.C.C., does not require that an applicant for licensure agree to perform, assist, counsel, recommend, facilitate, refer, or participate in any particular type of placement or activities associated with placement. In other words, it does not appear that the Department of Human Services, under N.D.C.C. 50-12, could deny an applicant a license for electing not to participate in any aspect of a placement. As part of the licensure process, there is no legal basis for the Department of Human Services to consider a child-placement agency's beliefs regarding participating in particular placement activities.

FAIRNESS TO POTENTIAL ADOPTIVE PARENTS

Your letter also points out that a potential foster parent or adoptive parent "is entitled to fair and equal consideration regardless of religion, race, ethnic origin, gender, sexual preference or physical appearance." Senate Bill No. 2188 does not prohibit "fair and equal consideration" of potential foster and adoptive parents. It specifically provides that a decision by a child-placing agency not to assist in a placement because of religious or moral convictions or policies "does not constitute a determination that the proposed adoption is not in the best interest of the minor." In other words, in accommodating the child-placing agency's religious or moral convictions or policies, SB 2188 does not impair a potential foster or adoptive parent's opportunity to seek services from another child-placement agency.

CONCLUSION

The United States Supreme Court has acknowledged that it "has struggled to find a neutral course between the two Religion Clauses, both of which are cast in absolute terms, and either of which, if expanded to a logical extreme, would tend to clash with the other." Walz v. Tax Comm'n of N.Y., 397 U.S. 664, 668-69 (1970). The Court has further explained:

> The general principle deducible from the First Amendment and all that has been said by the Court is this: that we will not tolerate either governmentally established religion or governmental interference with

> religion. Short of those expressly proscribed governmental acts there is room for play in the joints productive of a benevolent neutrality which will permit religious exercise to exist without sponsorship and without interference.

Id. at 669.

Based upon Amos and the other cases cited in this opinion, it is my opinion that SB 2188 is a constitutionally permissible accommodation of the religious and moral beliefs of child-placement agencies.

Sincerely,

Wayne Stenehjem
Attorney General

dab/vkk