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AS WINDING AS THE SERPENTINE WALL:

TENNESSEE'S ADOPTION STATUTE UNDER *LEMON*

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I. INTRODUCTION

Imagine a married couple, Sarah and David, that were madly in love with a life full of promise ahead of them. David, a general practice physician, was giddy at the thought of being a father. Sarah, for her part, picked up baby fever shortly after their marriage in 2017. The couple waited a year for David to finish his residency, and soon they were trying for a baby.

At first, Sarah simply went off birth control. When pregnancy did not occur, they started timing Sarah's cycles. A few months later they went to a fertilization specialist for tests and guidance, there they received bad news. Sarah's ovaries had a deformity making pregnancy impossible. The couple was devastated and grieved at their lost hope but resolved to raise a child regardless.

Sarah, being raised Southern Baptist, approached a Christian based adoption agency out of Nashville to engage their services. She arranged a meeting time when she and David were available to discuss their options. At the appointed hour, the couple walked into the front parlor and were directed to

have a seat in their waiting area while they filled out preliminary paperwork. Once completed, they were called back into a small conference room.

A lady entered with a somber look on her face. Curious, David and Sarah greeted her and proclaimed their excitement on becoming parents. At that, the lady turned to David and stated bluntly, "We don't do mixed-race adoptions, because of our Christian belief." Stunned, Sarah stated that she too was a Christian and asked, "What in the Bible led you to such a conclusion?" The lady responded, "I don't want to argue my faith, we just don't participate." Unfortunately for the couple, David was Jewish.¹

This situation can befall any loving couple looking to adopt in Tennessee, thanks to the child placement law codified in Tennessee Code Annotated § 36-1-147.² While a typical child placement law focuses on the wellbeing of the child,³ this law enables a private child-placing agency to refuse to place a child with a stable and loving family if the placement violates "the agency's written religious or moral convictions or policies."⁴

Religion and government both dominate our lives, regardless of our beliefs or political affiliations. Government is constantly present. From regulating businesses, building infrastructure, managing crises, educating citizens, and even controlling our bodies, government has a hand in nearly everything. At the same time, religion has an influence on many of these same areas, creating unavoidable conflicts. Religious organizations run hospitals, charities, schools, labor unions, sports organizations, and political associations just to name a few.

Further complicating matters, religious views are expressed on our money, in our pledge of allegiance, during invocations of Congress, and even on the Supreme Court

¹ The couple's conversation with the adoption agency was derived from a New York Times article. Karen Zraick, *Mississippi Event Hall Refuses to Host Interracial Wedding, Then Apologizes*, The New York Times (Sept. 6, 2019), <https://www.nytimes.com/2019/09/03/us/mississippi-interracial-couple-wedding.html>.

² Tenn. Code Ann. § 36-1-147 (2020).

³ Tenn. Code Ann. § 36-1-101 (2020).

⁴ Tenn. Code Ann. § 36-1-147 (2020).

Building.⁵ Contrasting these expressions, the United States Constitution neither mentions nor references God. Instead, the Constitution's purpose as laid out in the Preamble is wholly secular, "to form a more perfect Union, establish Justice, insure domestic Tranquility, provide for the common defense, promote the general Welfare, and secure the Blessings of Liberty."⁶

What are we to make of this conundrum? The late theologian Dr. David Dungan once stated that "there is a difference between 'God and Country, and Church and State.'"⁷ Invoking a higher power to benefit a country is akin to the Declaration of Independence invoking "Laws of Nature and Nature's God" and appealing to "the Supreme Judge of the world."⁸ The Declaration of Independence is not law, however, but rather a call of protest stating in broad and neutral terms that people's rights are divine and unalienable.⁹

The Constitution tells us the other side of the story, that our Government is a human endeavor and secular in nature. Indeed, it was Thomas Jefferson who later wrote that it was the "the legitimate power of government [to] reach actions only, and not opinions," and that the Establishment Clause would "build[] a wall of separation between Church and State."¹⁰

Thus, if there is a clear demarcation between church and state; it is that government exists to regulate actions relating to justice, tranquility, defense, welfare, and liberty, but not to an individual's freedom of conscience. Applied to today's government, regulations which primarily touch upon the

⁵ Moses, along with other lawgivers, is engraved above the Supreme Court Building's entrance. *Building Features*, The Supreme Court of the United States, <https://www.supremecourt.gov/about/buildingfeatures.aspx> (last visited April 20, 2020).

⁶ U.S. Const. pmbl.

⁷ Audiotape: Dr. David Laird Dungan, Formation of the New Testament, held by First Presbyterian Church in Knoxville, Tennessee (June 2005) (on file with author).

⁸ Thomas Jefferson, the Declaration of Independence paras. 1 and 5 (U.S. 1776).

⁹ America's Founding Documents, National Archives, <https://www.archives.gov/founding-docs/declaration> (last visited Nov. 18, 2020).

¹⁰ Thomas Jefferson, Jefferson's Letter to the Danbury Baptists Para. 2 (U.S. 1802).

secular welfare of the population ought to be considered primarily on a secular basis. When religious organizations take on secular activities, such as running a hospital or an adoption agency, government regulation should be neutral towards that religion's beliefs while regulating the organization's actions as it would a secular organization.

Tenn. Code Ann. § 36-1-147 violates the Establishment Clause of both the U.S. and Tennessee Constitutions. This child placement law allows private adoption agencies to discriminate against families under the guise of religion at the expense of foster children in need of a stable home. *Lemon v. Kurtzman* created the appropriate test to determine the constitutionality of this law because it regulates a secular activity in which religious organizations participate.

Under *Lemon*, the law has no secular purpose, it has the effect of advancing religion, and it fosters excessive entanglement between government and religion. As such, Tenn. Code Ann. § 36-1-147 should be struck down. This comment will show that Tenn. Code Ann. § 36-1-147 does not comport with *Lemon* and is unconstitutional under the Establishment Clause of the First Amendment and Art. 1 § 3 of Tennessee's Constitution. Part II delves into the Court's inconsistent application of the *Lemon* test, examining which categories of Establishment Clause cases are best answered by *Lemon*. Part III explores Tennessee Establishment Clause precedent, including its faithful adherence to *Lemon*. Part IV examines Tenn. Code Ann. § 36-1-147 along with its legislative history. Part V argues that *Lemon* is the appropriate lens to analyze Tenn. Code Ann. § 36-1-147. It then applies *Lemon* and proposes that the child-placement law be struck down. Part VI briefly concludes the examination into the law's unconstitutionality.

II. THE ESTABLISHMENT CLAUSE UNDER *LEMON*

"Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof . . ."¹¹

The Supreme Court incorporated the Establishment Clause to the states through the Fourteenth Amendment in

¹¹ U.S. Const. amend. I.

1947.¹² The case, *Everson v. Board of Education*, highlighted the establishment clause's intention to raise "a wall of separation between church and State."¹³ It did little, however, to create a legal framework for Establishment Clause cases to be analyzed.

In 1971, a legal framework finally emerged in the case of *Lemon v. Kurtzman*.¹⁴ There, a unanimous Supreme Court created a three-part test to determine the constitutionality of legislative acts concerning the Establishment Clause.¹⁵ "First, the statute must have a secular legislative purpose; second, its principle or primary effect must be one that neither advances nor inhibits religion; finally, the statute must not foster an excessive government entanglement with religion."¹⁶ These elements were chosen with care and based on prior Court precedent.¹⁷

The first prong of the test, whether the statute has a secular legislative purpose, focuses on the rationale underlying the state action or statute.¹⁸ The prong requires a statute to have a "secular legislative purpose."¹⁹ This does not imply that there can be no religious purpose if an authentic secular purpose also exists.²⁰ Importantly, the secular purpose must be genuine and not merely a "sham."²¹ If the sole purpose of the state action is religious, the act is unconstitutional under *Lemon*, requiring no further inquiry into the second or third prongs.²²

The second prong is known as the effect prong.²³ Assuming a statute or act has a genuine secular purpose, the next step is to look at the "principal or primary effect" to see if

¹² *Everson v. Bd. Of Educ.*, 330 U.S. 1 (1947).

¹³ *Id.* at 16.

¹⁴ *Lemon v. Kurtzman*, 403 U.S. 602 (1971).

¹⁵ *Id.* at 612-13.

¹⁶ *Id.*

¹⁷ See *Board of Education v. Allen*, 392 U.S. 236 (1968); *Walz v. Tax Com. Of N.Y.*, 397 U.S. 664 (1970).

¹⁸ *Lemon*, 403 U.S. at 612.

¹⁹ *Id.*

²⁰ See, e.g., *McGowan v. Maryland*, 366 U.S. 420, 422 (1961) ('[T]he "Establishment" Clause does not ban federal or state regulation of conduct whose reason or effect merely happens to coincide or harmonize with the tenets of some or all religions.').

²¹ *Edwards v. Aguillard*, 482 U.S. 578, 586-87 (1987).

²² *Wallace v. Jaffree*, 472 U.S. 38, 56 (1985).

²³ *Lemon*, 403 U.S. at 612.

the act “advances [or] inhibits religion.”²⁴ The effect of the governmental action should not, at a minimum, give preference to one religion over another, including non-religion.²⁵ Government action should not have the effect of advancing or condemning a specific religion or religion generally.²⁶ Thus, despite having a secular purpose, the effect of a statute or act may render it invalid under the Establishment Clause.

The third prong asks whether a statute or act promotes excessive government entanglement with religion.²⁷ The entanglement prong considers “the character and purposes of the institutions that are benefitted, the nature of the aid that the State provides, and the resulting relationship between the government and the religious authority.”²⁸ The idea is to avoid placing the state in a position where it is regulating religion so that any state action can be considered neutral with respect to religion.²⁹

Despite the apparent consensus, fissures in applying *Lemon* emerged after its implementation.³⁰ The Supreme Court still purports to recognize and implement the *Lemon* test, but its application has been erratic and inconsistent. In certain cases, the Court has disregarded one or more of its elements.³¹ In others, the Court has re-interpreted the elements;³² and in

²⁴ *Id.*

²⁵ See *Jaffree*, 472 U.S. at 53 (“[T]he individual freedom of conscience protected by the First Amendment embraces the right to select any religious faith or none at all.”).

²⁶ *Id.* at 54 (“[T]he political interest in forestalling intolerance extends beyond intolerance among Christian sects – or even intolerance among “religions” – to encompass intolerance of the disbeliever and the uncertain.”).

²⁷ *Lemon*, 403 U.S. at 613.

²⁸ *Id.* at 615.

²⁹ See *Id.*

³⁰ See *Marsh v. Chambers*, 463 U.S. 783, 801-02 (1983) (acknowledging the *Lemon* test but relying on historical significance instead).

³¹ See *County of Allegheny v. ACLU*, 492 U.S. 573, 620-21 (1989) (The “purpose” and “entanglement” prongs of *Lemon* were not considered by the Court).

³² See *Agostini v. Felton*, 521 U.S. 203, 206 (1997) (“It is simplest to recognize why entanglement is significant and treat it . . . as an aspect of the inquiry into a statute’s effect.”)

others still, the Court has declined to use the *Lemon* test altogether.³³

Justice's Scalia and Thomas have argued doing away with the *Lemon* test altogether.³⁴ Their arguments tend to attack *Lemon* for its inadequacy in solving different kinds of Establishment Clause cases, particularly those with regards to historic symbols, monuments, and practices. Better tests may be available for these types of cases, but for the cases *Lemon* is designed to answer, the Court has yet to conceive of a better test. This resulting trend of the fact-specific approach to Establishment Clause analysis in the United States, a bedrock protection under our Constitution, is to surrender guidance and consistency to a judge's whim.

Recently in *Am. Legion v. Am. Humanist Assoc.*, the Court noted that *Lemon* "attempted to find a grand unified theory of the Establishment Clause."³⁵ The Court did this to "bring order and predictability to Establishment Clause decision making."³⁶ Unfortunately, the "grand unified theory" has been discarded by the Court in favor of fact-specific determinations that rely on differing factors depending on what kind of Establishment Clause case is at hand.³⁷

According to Justice Kavanaugh, there are five separate categories of Establishment Clause cases: "(1) religious symbols on government property and religious speech at government events; (2) religious accommodations and exemptions from generally applicable laws; (3) government benefits and tax exemptions for religious organizations; (4) religious expression in public schools; and (5) regulation of private religious speech in public forums."³⁸ Justice Kavanaugh goes on to explain that "the *Lemon* test does not explain the Court's decisions in any of those five categories."³⁹

³³ *Masterpiece Cakeshop, Ltd. v. Colo. Civil Rights Comm'n*, 138 S. Ct. 1719 (2018) (ignoring *Lemon* entirely).

³⁴ *Lamb's Chapel v. Ctr. Moriches Union Free Sch. Dist.*, 508 U.S. 384, 398 (1993) (Justice Scalia's concurrence compares *Lemon* to "some ghoul in a late-night horror movie that repeatedly sits up in its grave and shuffles abroad, after being repeatedly killed and buried.").

³⁵ *Am. Legion v. Am. Humanist Ass'n*, 139 S. Ct. 2067, 2071 (2019).

³⁶ *Id.* at 2080.

³⁷ *Id.* at 2092 (Justice Kavanaugh concurring).

³⁸ *Id.*

³⁹ *Id.*

While the Court has segmented categories of Establishment Clause cases differently,⁴⁰ there is at least one category in which the *Lemon* test is appropriate: Government acts that regulate secular activities in which religious institutions take part.

In 1968, Pennsylvania enacted a statute providing financial support to nonpublic schools for the purpose of reimbursing textbooks, teacher salaries, and instructional materials on specific secular subjects.⁴¹ Most of these schools were church based.⁴² Although the statute had a primary purpose of ensuring the quality of secular education in all schools, the programs fostered excessive government entanglement with religion.⁴³ This was due to the degree of state supervision and surveillance necessary to ensure compliance with the statutory requirements separating secular and religious education.⁴⁴

The act prospectively regulated a secular activity, education. Furthermore, the overwhelming majority of the non-public schools under the regulation were Roman Catholic, at around 95%.⁴⁵ Finally, because *Lemon* failed the excessive entanglement prong of its test, the Pennsylvania statute was held unconstitutional.⁴⁶

By contrast, historic symbols and monuments are not functions at all. Although many are secular in nature, such as an obelisk or war memorial, many others are not.⁴⁷ Further complicating matters, historic landmarks often have evolving and multiple meanings over time.⁴⁸ Applying *Lemon* simply makes little sense in these arenas, because the questions asked by *Lemon* are inconsistent with the nature of those kinds of Establishment Clause cases.

⁴⁰ Edwards, 482 U.S. at 583 n.4 (“[A] historical approach is not useful in determining the proper roles of church and state in public schools, since free public education was virtually nonexistent at the time the Constitution was adopted.”)

⁴¹ *Lemon*, 403 U.S. at 606-07.

⁴² *Id.* at 608.

⁴³ *Id.* at 614.

⁴⁴ *Id.* at 620-21.

⁴⁵ *Id.* at 608.

⁴⁶ *Id.* at 615.

⁴⁷ *Am. Legion*, 139 S. Ct. at 2082.

⁴⁸ *Id.* at 2084.

For instance, what is the primary secular purpose of maintaining a hundred-year-old Latin cross originally created by a private entity to honor WWI Veterans?⁴⁹ Every bystander will have a different takeaway based on their preferences and biases, rendering the question unanswerable. Does installing a statue of the Ten Commandments near a government building have the effect of advancing a specific religion over others?⁵⁰ Does it have the effect of advancing religion generally over non-religion? While many have said yes, many others point to Abraham's tablets as a moral foundational to law and order.⁵¹

How about allowing prayer before a session of legislature?⁵² One might expect that to foster excessive entanglement between government and religion; but opening a legislative session with a prayer of invocation is a longstanding practice that pre-dates the First Amendment altogether.⁵³ The *Lemon* test is ill equipped to answer these difficult questions due to their subjective meanings and historical weight.

Lemon is inherently forward looking, as in its first application to Pennsylvania's classroom law. There in its proper use, the state was regulating religious organizations that took on a secular activity.⁵⁴ Although *Lemon* does not always lead to consistent results when applied to historic symbols, monuments, or longstanding practices, it is the only unanimously approved Supreme Court test in an Establishment Clause case.⁵⁵ As in the original Pennsylvania case, applying *Lemon* is the best possible solution when dealing with a government act that regulates secular activities in which religious institutions partake.

⁴⁹ *Id.* at 2082 (the Court analyzing the purpose of a thirty-two-foot tall Latin cross).

⁵⁰ Compare *Van Orden v. Perry*, 545 U.S. 677 (2005), with *McCreary Cnty. V. ACLU*, 545 U.S. 844 (2005).

⁵¹ *Van Orden v. Perry*, 545 U.S. at 691-92 ("The inclusion of the Ten Commandments monument in this group has a dual significance, partaking of both religion and government.").

⁵² *Marsh*, 463 U.S. 783 (the Court held Nebraska's practice of opening legislative sessions with a prayer constitutional).

⁵³ *Id.* at 795.

⁵⁴ *Lemon*, 403 U.S. 602.

⁵⁵ *Id.*

III. ARTICLE 1 § 3 OF TENNESSEE'S CONSTITUTION UNDER *LEMON*

“That all men have a natural and indefeasible right to worship Almighty God according to the dictates of their own conscience; that no man can of right be compelled to attend, erect, or support any place of worship, or to maintain any minister against his consent; that no human authority can, in any case whatever, control or interfere with the rights of conscience; and that no preference shall ever be given, by law, to any religious establishment or mode of worship.”⁵⁶

The time has come for Tennessee's Supreme Court to once again clarify the state's Establishment Clause doctrine, and the best route is through the *Lemon* test. Tennessee's Establishment Clause doctrine has evolved alongside the Federal Courts, but unlike the Federal Courts, Tennessee has held steadfast to *Lemon*. Where Tennessee Courts have chosen not to rely on *Lemon*, they have assented to the Establishment Clause's essential tenet.⁵⁷

“Tenn. Const. art. I, § 3 and the First Amendment to the United States Constitution arise from the same constitutional milieu.”⁵⁸ This is not to say the two amendments are identical, but that they are born out of the same idea “foreclos[ing] the establishment of a state or national religion similar to other eighteenth century systems.”⁵⁹ As early as 1956, Tennessee's Supreme Court held that while the two amendments “are practically synonymous,” Tennessee's provisions are “broader and more comprehensive.”⁶⁰

A. SERPENTS, BOOZE, AND A SATAN-FREE CURRICULUM

In a 1975 case, Tennessee's Supreme Court had to consider whether drinking strychnine poison and handling

⁵⁶ Tenn. Const. art 1, § 3.

⁵⁷ See *State v. Crank*, 468 S.W.3d 15, 30 n.8 (2015) (quoting James Madison saying “[t]o give exemption to some denominations and not to all offends the equality with which all men enter society.”).

⁵⁸ *Martin v. Beer Bd.*, 908 S.W.2d 941, 949 (Tenn. Ct. App. 1995).

⁵⁹ *Id.*

⁶⁰ *Carden v. Bland*, 288 S.W.2d 718, 721 (Tenn. 1956).

snakes were legitimate parts of a church's religious service.⁶¹ The *Lemon* test was not implemented because the question was not predicated on a previous state action but revolved around whether the state may enjoin a religious group from handling snakes during worship under a public nuisance theory.⁶² Still, the court took pains to point out that while the "right to believe is absolute; the right to act is subject to reasonable regulation designed to protect a compelling state interest."⁶³

In holding that a permanent injunction was in order, the Court stated that art. 1, § 3 of Tennessee's Constitution is "substantially stronger" than the provisions of the First Amendment.⁶⁴ The Court then stated that regardless, "a religious practice may be limited, curtailed or restrained to the point of outright prohibition, where it involves a clear and present danger to the interests of society."⁶⁵

In a separate case that year, Tennessee declared its adherence to the *Lemon* test.⁶⁶ Similar to the Pennsylvania statute in *Lemon*, the case involved a state education statute. The Tennessee statute prohibited teaching creationism in public school textbooks unless it was taught as opinion rather than scientific fact.⁶⁷ In stating that the Act was "unconstitutional on its face," the Court agreed with a Sixth Circuit opinion that it failed under *Lemon*.⁶⁸

The Act failed the effect prong of the *Lemon* test because it favored "the Bible of the Jews," demonstrating "another method of preferential treatment of particular faiths by state law."⁶⁹ Further, "the statute would inextricably involve the State Textbook Commission in . . . Chief Justice Burger's third standard" set out in *Lemon*.⁷⁰ The opinion continued, "[i]t would be utterly impossible for the Textbook Commission to determine which religious theories were 'occult' or 'satanical' without seeking to resolve the theologians through the ages."⁷¹

⁶¹ State ex rel. Swann v. Pack, 527 S.W.2d 99 (Tenn. 1975).

⁶² *Id.* at 102.

⁶³ *Id.* at 107.

⁶⁴ *Id.* at 111.

⁶⁵ *Id.*

⁶⁶ Steele v. Waters, 527 S.W.2d 72 (Tenn. 1975).

⁶⁷ *Id.* at 73.

⁶⁸ *Id.* at 73-74.

⁶⁹ *Id.* at 73.

⁷⁰ *Id.*

⁷¹ *Id.*

Thus, the Act fostered an excessive entanglement between government and church.⁷²

In *Martin v. Beer*, Tennessee's Supreme Court considered the constitutionality of banning the sale of beer on Sundays.⁷³ The Court emphasized the secular importance of regulating the sale of beer as it is considered "dangerous to the community."⁷⁴ Justice Koch's opinion continues with a lengthy analysis over the Constitutional prohibition against religious preferences, affirming *Lemon* in the process.⁷⁵

The opinion first acknowledges that the "separation between church and state is blurred and indistinct and varies with the circumstances."⁷⁶ Nevertheless, the opinion then emphatically adheres to the *Lemon* test, stating that "in order to prevent the wall of separation between church and state from becoming as winding as the serpentine wall Thomas Jefferson designed for the University of Virginia, the Court has found it useful to examine the statute from three vantage points."⁷⁷

The three vantage points referenced above are the three prongs of *Lemon*: a statute's secular purpose, its principle or primary effect, and whether it fosters excessive governmental entanglement with religion.⁷⁸ The opinion then adopts a fourth prong suggested by Justice O'Connor known as the "endorsement analysis" prong.⁷⁹ It asks, "whether a reasonable observer would view such longstanding practices as a disapproval of his or her particular religious choices, in light of the fact that they serve a secular purpose rather than a sectarian one and have largely lost their religious significance over time."⁸⁰

In applying this modified *Lemon* test, the opinion states that although statutes regulating the sale of beer were originally religiously motivated, as early as 1852 courts began recognizing Sunday closing laws as having a secular purpose.⁸¹ Prohibiting the sale of beer on Sunday neither advances nor inhibits

⁷² *Id.*

⁷³ *Martin*, 908 S.W.2d 941.

⁷⁴ *Id.* at 945.

⁷⁵ *Id.* at 950-51.

⁷⁶ *Id.* at 950.

⁷⁷ *Id.*

⁷⁸ *Id.* at 950-51.

⁷⁹ *Id.*

⁸⁰ *Id.*

⁸¹ *Id.* at 952.

religion.⁸² Further, it does not foster excessive governmental entanglement with religion.⁸³ Finally, in applying Justice O'Connor's fourth prong, "a reasonable observer would not equate the adoption of such an ordinance as governmental approval or disapproval of his or her particular religious beliefs."⁸⁴

As recently as 2013, Tennessee courts have continued applying *Lemon* in Establishment Clause cases.⁸⁵ In *Christ Church Pentecostal*, the question was whether a bookstore/café area contained in a church family life center should qualify for a tax exemption.⁸⁶ The Court of Appeals relied on *Lemon* to hold that the bookstore was "nothing short of a retail establishment housed within the walls of the center, complete with paid staff, inventory control, retail pricing, and a wide array of merchandise for sale to the general public."⁸⁷

The court held that the taxation statutes have a clear secular purpose, they should be applied "equitably is a constitutional mandate."⁸⁸ In opposition, the Plaintiff's position was that taxing the bookstore "impermissibly entangles the State in matter of church doctrine by defining a 'religious use.'"⁸⁹ The court held to the contrary, stating the "imposition of property tax on church property that is . . . essentially commercial in nature does not interfere with [Christ Church Pentecostal's] doctrine, beliefs, faith, or government."⁹⁰ Thus, under the *Lemon* test, taxing a church's retail bookstore and café as a secular business does not violate the Establishment Clause, despite accepting the church's "assertion that providing 'third spaces' is part of its outreach ministry."⁹¹

Although slighted and battered in Federal courts, Tennessee courts embrace *Lemon* as the most faithful execution of Establishment Clause doctrine. While at times this has

⁸² *Id.* at 954.

⁸³ *Id.* at 954-55 (though not explicitly stated, the court held that the law does not violate Tenn. Const. art. I, § 3).

⁸⁴ *Id.* at 954.

⁸⁵ *Christ Church Pentecostal v. Tenn. State Bd. Of Equalization*, 428 S.W.3d 800 (Tenn. Ct. App. 2013).

⁸⁶ *Id.* at 804.

⁸⁷ *Id.* at 813.

⁸⁸ *Id.* at 815.

⁸⁹ *Id.* at 814.

⁹⁰ *Id.* at 818.

⁹¹ *Id.* at 818-19.

included Justice O'Connor's fourth "endorsement analysis" prong, it is only helpful in circumstances that include "longstanding practices."⁹² When those circumstances are not present, Tennessee should continue relying on *Lemon* as the proper lens in analyzing Establishment Clause cases involving a government regulation over primarily secular activities in which religious institutions participate.

IV. TENNESSEE'S ADOPTION STATUTE AND ITS LEGISLATIVE HISTORY

In January of 2020, Tennessee's Governor Bill Lee signed into law Tenn. Code Ann. § 36-1-147, which now regulates the relationship between state government and privately-operated child-placing agencies in Tennessee.⁹³ The bill states that "no private licensed child-placing agency shall be required to . . . participate in any placement of a child for foster care or adoption when the proposed placement would violate the agency's written religious or moral convictions or policies."⁹⁴ The bill allows child-placing agencies in Tennessee to discriminate against anyone when deciding whether or not to allow a child's adoption to proceed, so long as the discrimination is articulated in the agency's "written religious or moral convictions or policies" to "the extent allowed by federal law."⁹⁵

The child placement bill further protects private adoption agencies by preventing the department of children's services from denying licensure due to their "objection to . . . participating in a placement that violates the agency's written religious or moral convictions or policies."⁹⁶ It continues by stating that "a state or local government entity shall not deny to a private licensed child-placing agency any [financial assistance] because of the agency's objection to . . . participating in a placement that violates the agency's written religious or moral convictions or policies."⁹⁷ Finally, the bill states that an agency's refusal to participate in "a placement that violates the

⁹² Martin, 908 S.W.2d at 951.

⁹³ Tenn. Code Ann. § 36-1-147.

⁹⁴ *Id.*

⁹⁵ *Id.*

⁹⁶ *Id.*

⁹⁷ *Id.*

agency's written religious or moral convictions or policies shall not form the basis of a civil action for either damages or injunctive relief."⁹⁸

To restate, this bill allows a private child-placing agency to discriminate based on "written religious or moral convictions or policies."⁹⁹ It then prevents the department of children's services from denying licensure, the state and local governments from withholding financial support, and any civil litigation in Tennessee based on an agency's "written religious or moral convictions or policies."¹⁰⁰

As with many religious bills introduced in recent history, this child placement bill was written and advanced by the Congressional Prayer Caucus Foundation, a non-profit religious political organization.¹⁰¹ The foundation's vision includes preserving Judeo-Christian heritage and promoting prayer.¹⁰² Initiatives for carrying out this vision include the foundation's *American Prayer Caucus Network* to "promote prayer and use the legislative process to preserve our nation's Judeo-Christian heritage," and *In God We Trust, Put It Up!* to encourage the display of In God We Trust in schools and government buildings.¹⁰³

Another of the foundation's initiatives is known as Project Blitz, which proposes religiously motivated Christian heritage bills.¹⁰⁴ In 2018 alone, Project Blitz proposed over 200 Christian heritage bills in over 32 states and Congress. To date, over 60 such bills have been signed into law.¹⁰⁵

⁹⁸ *Id.*

⁹⁹ *Id.*

¹⁰⁰ *Id.*

¹⁰¹ Congressional Prayer Caucus Foundation, <https://cpcfoundation.com> (last visited April 20, 2020).

¹⁰² Congressional Prayer Caucus Foundation, Vision, <https://cpcfoundation.com/about/mission/> (last visited April 20, 2020).

¹⁰³ Congressional Prayer Caucus Foundation, Faith Impact Opportunities, <https://cpcfoundation.com/initiatives/> (last visited April 20, 2020).

¹⁰⁴ Congressional Prayer Caucus Foundation, Project Blitz, <https://cpcfoundation.com/first-freedom-coalition-project-blitz/> (last visited April 20, 2020).

¹⁰⁵ The Center for Public Integrity, *Adoption Centers: The Latest Battleground for Religious Freedom*, <https://publicintegrity.org/politics/state-politics/copy-paste->

One of the project's overarching priorities includes pushing for public policies in favor of biblical values concerning marriage and sexuality.¹⁰⁶ This category includes legislation allowing state occupational license holders, such as barbers, lawyers, health care providers, and adoption agencies to discriminate on the basis of their sincerely held religious beliefs.¹⁰⁷

In 2020, Tennessee became the latest state to utilize the foundation's language when it passed its child placement bill.¹⁰⁸ Rep. Tim Rudd from Murfreesboro sponsored the bill in the House. He said the child placement bill did not originate with Project Blitz, but rather was based on Virginia's law.¹⁰⁹ Rudd continued that it was given to him by John Bumpus, a trustee on the board for Tennessee Baptist Children's Homes, a private child-placing agency that vets prospective parents based on religion.¹¹⁰ Despite Rudd's assertion as to the bill's origin, Virginia's religious adoption bill was written by the Congressional Prayer Caucus Foundation as part of Project Blitz.¹¹¹

In the House Children & Families Subcommittee, Rep. Rudd first introduced the child placement bill for consideration.¹¹² He said the bill's purpose was to protect faith-based child-placing agencies from frivolous lawsuits so they may continue operating as they currently do.¹¹³ There was

legislate/adoption-centers-the-latest-battleground-for-religious-freedom/?fbclid=IwAR2r2cG9oz-sQvwZJFfJPJNLc--De9gXP2BLO8DFIBgb7ZAN59p3x-JS9_c (last visited April 20, 2020).

¹⁰⁶ *Id.*

¹⁰⁷ *Id.*

¹⁰⁸ Tenn. Code Ann. § 36-1-147.

¹⁰⁹ The Center for Public Integrity, *Adoption Centers: The Latest Battleground for Religious Freedom*, https://publicintegrity.org/politics/state-politics/copy-paste-legislate/adoption-centers-the-latest-battleground-for-religious-freedom/?fbclid=IwAR2r2cG9oz-sQvwZJFfJPJNLc--De9gXP2BLO8DFIBgb7ZAN59p3x-JS9_c (last visited April 20, 2020).

¹¹⁰ *Id.*

¹¹¹ *Id.*

¹¹² The Child-Placement Law, Hearing on H.B. 0836 Before the Children and Families Subcommittee, 2019 Leg., 111th General Assembly (Tenn. 2019), http://tnga.granicus.com/MediaPlayer.php?view_id=414&clip_id=16680 (last visited April 20, 2020).

¹¹³ *Id.*

immediate pushback from attorney Stacey Odneal, a Tennessee specialist in child law, who pointed out that there were nearly 8,000 foster children in Tennessee, half of which do not currently live in stable households.¹¹⁴ After concluding, the bill was voted out of the committee.¹¹⁵

The bill then went to the Judiciary Committee. There, Rep. Karen Camper spoke next. She asked if a faith-based adoption agency can deny an atheist the ability to adopt.¹¹⁶ Rep. Rudd responded that it would only occur if the agency had a written statement to that effect.¹¹⁷ She followed up by asking if there was a level of proof required for a faith-based adoption agency to prove that an individual does not conform to their beliefs.¹¹⁸ Rep. Rudd admitted that the bill does not address that question, but simply gives rights to faith-based agencies.¹¹⁹

Once on the House floor, Rep. Bo Mitchell spoke up. He said he was concerned that if he had a Jewish family in his district, they would be unable to adopt from an agency with moral convictions when there are so many kids in need of a good home.¹²⁰ Rep. Rudd responded that he could not predict what a religious agency would do because it wasn't in his bill.¹²¹ Rep. John Ray Clemmons then asked to what extent federal law allowed adoption agencies to discriminate based on their religious beliefs.¹²² Rep. Rudd stated that he could not talk about things outside the bill.¹²³

Between March of 2019 and January of 2020, the child-placement bill sat in limbo before finally being presented in the

¹¹⁴ *Id.* (statement by Stacey Odneal Esq.).

¹¹⁵ *Id.*

¹¹⁶ The Child-Placement Law, Hearing on H.B. 0836 Before the Judiciary Committee, 2019 Leg., 111th General Assembly (Tenn. 2019),

http://tnga.granicus.com/MediaPlayer.php?view_id=414&clip_id=16847 (statement by Rep. Karen Camper) (last visited April 20, 2020).

¹¹⁷ *Id.* (statement by Rep. Tim Rudd).

¹¹⁸ *Id.* (statement by Rep. Karen Camper).

¹¹⁹ *Id.* (statement by Rep. Tim Rudd).

¹²⁰ The Child-Placement Law, Hearing on H.B. 0836 Before the House Floor Session, 2019 Leg., 111th General Assembly (Tenn. 2019),

http://tnga.granicus.com/MediaPlayer.php?view_id=414&clip_id=17025 (statement by Rep. Bo Mitchell) (last visited April 20, 2020).

¹²¹ *Id.* (statement by Rep. Tim Rudd).

¹²² *Id.* (question by Rep. John Ray Clemmons).

¹²³ *Id.* (response by Rep. Tim Rudd).

Senate. There, bill sponsor Sen. Paul Rose began debating Sen. Jeff Yarbrow about the merits of a proposed amendment.¹²⁴ Sen. Yarbrow wanted to remove the provision extending the legislation to government contracts, grants, and programs.¹²⁵ His concern was for the separation of church and state, suggesting that the bill only apply to private religious institutions that do not rely on public tax-payer dollars.¹²⁶

Sen. Rose was not amused by the proposal, stating that the amendment “is insidious and hostile by wiping out the intent of this bill.”¹²⁷ Sen. Yarbrow asserted that private actors become public actors when they use public dollars to do a public function on behalf of the public.¹²⁸ He argued that there is no right to enter into a contract with the government and urged passage of his amendment because we should not allow the bill to extend to protected taxpayer dollars.¹²⁹ Sen. Rose moved to table the amendment, and it was promptly seconded.¹³⁰

Sen. Steven Dickerson spoke next, asking “what’s the intent of this bill?”¹³¹ Sen. Rose initially evaded the question by responding it was to codify existing practices in the State of Tennessee.¹³² Sen. Dickerson pushed back and asked Sen. Rose to cite an example of a family or family structure where an agency felt compelled to place children against their will.¹³³ Sen. Rose responded, “this prevents an agency that based on their stated religious moral convictions do not choose to place a child with a non-conventional, in my opinion a conventional home, which is a married mother and father, cannot be forced to do so.”¹³⁴ When asked if a Muslim adoption agency could refuse

¹²⁴ The Child-Placement Law, Hearing on H.B. 0836 Before the Senate Session, 2020 Leg., 111th General Assembly (Tenn. 2020), http://tnga.granicus.com/MediaPlayer.php?view_id=414&clip_id=21093 (last visited April 20, 2020).

¹²⁵ *Id.* (amendment proposal by Sen. Jeff Yarbrow).

¹²⁶ *Id.*

¹²⁷ *Id.* (statement by Sen. Paul Rose).

¹²⁸ *Id.* (statement by Sen. Jeff Yarbrow).

¹²⁹ *Id.*

¹³⁰ *Id.* (motion by Sen. Paul Rose).

¹³¹ *Id.* (question by Sen. Steven Dickerson).

¹³² *Id.* (statement by Sen. Paul Rose).

¹³³ *Id.* (statement by Sen. Steven Dickerson).

¹³⁴ *Id.* (statement by Sen. Paul Rose referencing homosexual couples at “non-conventional”).

services to an Episcopalian family or vice-versa, Sen. Rose responded "I'm not a lawyer, but that's my understanding."¹³⁵ Sen. Dickerson then brought up the humanitarian impact on those children who could have a forever home but will now have to wait a longer period of time.¹³⁶ Dickerson closed by saying this was bad for public policy.¹³⁷

Towards the end of the debate, Sen. Mike Bale asked how many agencies across the state are religious versus secular based.¹³⁸ Sen. Rose did not know the answer but guessed the majority were faith based.¹³⁹ Finally, Sen. Rose moved for the bill's third and final consideration. It passed the Senate 20 ayes to 6 nays.¹⁴⁰

V. TENNESSEE'S ADOPTION STATUTE UNDER *LEMON*

The *Lemon* test is the appropriate test to analyze the constitutionality of Tennessee's recent child placement law. Created to determine the constitutionality of legislative acts concerning the Establishment Clause, there is no better lens when applied to legislative acts involving government regulations over a primarily secular activity.

Tennessee's child placement law falls into this category. Codified at the end of Tennessee's chapter on adoption, the act regulates the relationship between government and private child placement agencies.¹⁴¹ The threshold question then is whether a private child-placing agency primarily conducts a secular activity or function. This is easily answered in the affirmative.

Tennessee's adoption statute clearly states that its primary purpose is to "effectuate to the greatest extent possible the rights and interests of persons affected by adoption, especially those of the adopted persons, which are specifically protected by the constitutions of the United States and the state of Tennessee."¹⁴² The statute continues by stating that actions

¹³⁵ *Id.* (response by Sen. Paul Rose).

¹³⁶ *Id.* (statement by Sen. Steven Dickerson).

¹³⁷ *Id.*

¹³⁸ *Id.* (question by Sen. Mike Bale).

¹³⁹ *Id.* (response by Sen. Paul Rose).

¹⁴⁰ *Id.*

¹⁴¹ Tenn. Code Ann. § 36-1-147.

¹⁴² Tenn. Code Ann. § 36-1-101.

should be done “consistent with the best interest of the child,” recognizing “[t]he rights of children to be raised in loving homes.”¹⁴³ The statute’s section concludes, “[i]n all cases, when the best interests of the child and those of the adults are in conflict, such conflict shall always be resolved to favor the rights and the best interests of the child.”¹⁴⁴ Clearly, adoption services constitute a primarily secular state function.

Having determined that *Lemon* is the appropriate test, the next question becomes which version should the courts rely on. Should Justice O’Connor’s fourth line of inquiry be included in the analysis? The appropriate situations to utilize the “endorsement analysis” prong involve situations which include a longstanding practice.¹⁴⁵ Here, there is no longstanding state practice of condoning religiously motivated adoption policies by private child placing agencies. The adoption statute’s purpose as stated above indicates as much.¹⁴⁶ Therefore, the *Lemon* test’s original three prongs remain the best tool to analyze Tennessee’s child placement law.

Starting with the secular purpose prong, the focus is on the rationale underlying the state action or statute.¹⁴⁷ Looking at the statute, a plain reading indicates that it protects a “private licensed child-placing agency” from both governmental and private actions on the basis of “the agency’s written religious or moral convictions or policies.”¹⁴⁸ This runs counter to the stated constitutional protections “consistent with the best interest of the child” codified in Tennessee’s adoption statute.¹⁴⁹ There is no secular purpose in protecting a private child-placing agency based on its religious convictions when the protections come at the expense of constitutionally protected children’s rights.

In contrast, *Christ Church Pentecostal* is Tennessee’s best example of a statute upheld as having a clear secular purpose.¹⁵⁰ The taxation statute’s primary purpose is to raise revenue for Tennessee.¹⁵¹ By applying the tax to all retail

¹⁴³ *Id.*

¹⁴⁴ *Id.*

¹⁴⁵ Martin, 908 S.W.2d at 951.

¹⁴⁶ Tenn. Code Ann. § 36-1-101.

¹⁴⁷ *Lemon*, 403 U.S. 602.

¹⁴⁸ Tenn. Code Ann. § 36-1-147.

¹⁴⁹ Tenn. Code Ann. § 36-1-101.

¹⁵⁰ *Christ Church Pentecostal v. Tenn. State Bd. Of Equalization*, 428 S.W.3d 800 (Tenn. Ct. App. 2013).

¹⁵¹ *Id.* at 818.

establishments, including the church in question, the statute operates equitably under its constitutional mandate.¹⁵² There is no religious purpose to taxing retail establishments uniformly regardless of their ownership. The same cannot be said of Tennessee's child placement law.

Should the purpose still be in dispute, diving into the child placement law's legislative history is instructive. The bill's language is derived from a non-profit religious political organization whose stated vision includes the preservation of Judeo-Christian heritage.¹⁵³ Despite Rep. Rudd's assertion that he does not know about Project Blitz, he acknowledged receiving the bill from a trustee on the board for Tennessee Baptist Children's Homes.¹⁵⁴ Regardless, Tennessee's child-placement law was written and advanced by religious organizations.

More telling still, Rep. Rudd clearly stated on the House subcommittee that the purpose of his sponsored bill was to protect religiously affiliated adoption agencies.¹⁵⁵ In the Senate, bill sponsor Sen. Paul Rose initially stated the bill's intent was to codify existing practices in the state of Tennessee.¹⁵⁶ After being nudged for further insight he continued, "this prevents an agency that based on their stated religious moral convictions do not choose to place a child with a non-conventional, in my

¹⁵² *Id.* at 815.

¹⁵³ Congressional Prayer Caucus Foundation, Vision, <https://cpcfoundation.com/about/mission/> (last visited April 20, 2020).

¹⁵⁴ The Center for Public Integrity, *Adoption Centers: The Latest Battleground for Religious Freedom*, https://publicintegrity.org/politics/state-politics/copy-paste-legislate/adoption-centers-the-latest-battleground-for-religious-freedom/?fbclid=IwAR2r2cG9oz-sQvwZJFfJPJNLc--De9gXP2BLO8DFIBgb7ZAN59p3x-JS9_c (last visited April 20, 2020).

¹⁵⁵ The Child-Placement Law, Hearing on H.B. 0836 Before the Children and Families Subcommittee, 2019 Leg., 111th General Assembly (Tenn. 2019), http://tnga.granicus.com/MediaPlayer.php?view_id=414&clip_id=16680 (last visited April 20, 2020).

¹⁵⁶ The Child-Placement Law, Hearing on H.B. 0836 Before the Senate Session, 2020 Leg., 111th General Assembly (Tenn. 2020), http://tnga.granicus.com/MediaPlayer.php?view_id=414&clip_id=21093 (last visited April 20, 2020).

opinion a conventional home, which is a married mother and father, cannot be forced to do so.”¹⁵⁷

As a plain reading of the child-placement law and its legislative history suggests, the purpose to this bill is to protect religious child-placing agencies. Specifically, it is to protect them from actions adverse to the Tennessee adoption statute’s secular purpose to act in ways “consistent with the child’s best interests.”¹⁵⁸ Thus, the bill’s purpose is religiously motivated and has no secular purpose. Since the sole purpose of the act is religious, it is unconstitutional under *Lemon* and requires no further inquiry.¹⁵⁹

For the sake of a thorough analysis, however, the next prong to be utilized is the effect prong. Asking whether the child-placement law has the “principal or primary effect” of “advanc[ing or] inhibit[ing] religion,” leads to two difficult questions.¹⁶⁰ The first question is whether an act advances or condemns a *specific* religion.¹⁶¹ If this prong is to be interpreted so narrowly, then the child-placement law might pass this prong of the test.

Turning again to legislative history, Sen. Rose was asked if a Muslim adoption agency could refuse services to an Episcopalian family or vice versa.¹⁶² In response he stated that was his understanding.¹⁶³ Thus, the legislative history suggests that the bill does not on its face advance a specific religion over others. Further, the bill mentions no specific religion, sect, or denomination, but simply “the agency’s written religious or moral convictions or policies.”¹⁶⁴

However, the second prong’s question does not ask whether the *intent* of an act advances a specific religion, but whether an act has the *effect* of advancing a specific religion.¹⁶⁵

¹⁵⁷ *Id.* (statement by Sen. Paul Rose referencing homosexual couples as “non-conventional”).

¹⁵⁸ Tenn. Code Ann. § 36-1-101.

¹⁵⁹ *Jaffree*, 472 U.S. at 56.

¹⁶⁰ *Lemon*, 403 U.S. at 612.

¹⁶¹ *Allen*, 392 U.S. at 243.

¹⁶² The Child-Placement Law, Hearing on H.B. 0836 Before the Senate Session, 2020 Leg., 111th General Assembly (Tenn. 2020), http://tnga.granicus.com/MediaPlayer.php?view_id=414&clip_id=21093 (last visited April 20, 2020).

¹⁶³ *Id.* (response by Sen. Paul Rose).

¹⁶⁴ Tenn. Code Ann. § 36-1-147.

¹⁶⁵ *Allen*, 392 U.S. at 243.

Answering this question is more difficult, but not wholly unanswerable. When Sen. Bale asked how many private licensed agencies were religious as opposed to secular, Sen. Rose admitted he did not know specifically but guessed the majority were faith based.¹⁶⁶ If this is the case, then based on Tennessee's demographics the majority of faith-based child-placement agencies are likely Christian.¹⁶⁷ While this question goes beyond the scope of this writing, there is a reasonable chance that the child placement law has the effect of advancing a specific religion, and would fail the second prong.

The second question in the second prong asks whether the act advances or inhibits religion *generally* against non-religion.¹⁶⁸ Here again, the legislative history is helpful. When asked by Rep. Karen Camper whether a faith-based adoption agency can deny an atheist the ability to adopt, Rep. Rudd responded that it would so long as the agency had a written statement to that effect.¹⁶⁹ Even if faith-based adoption agencies were in the minority of private adoption agencies statewide, the child-placement bill has the effect of allowing religiously affiliated agencies to discriminate but does not allow secular agencies to do the same. Thus, the bill fails *Lemon's* second prong requirement that a bill's effect be neutral to religion generally.

Turning now to *Lemon's* third prong, whether a statute promotes excessive government entanglement with religion, the answer is again yes. Focusing on the "the resulting relationship between the government and religious authority,"¹⁷⁰ this bill invites the kind of regulation on religion

¹⁶⁶ The Child-Placement Law, Hearing on H.B. 0836 Before the Senate Session, 2020 Leg., 111th General Assembly (Tenn. 2020), http://tnga.granicus.com/MediaPlayer.php?view_id=414&clip_id=21093 (last visited April 20, 2020).

¹⁶⁷ 81 percent of Tennessee's adults are Christian, Pew Research Center, Religious Landscape Study, <https://www.pewforum.org/religious-landscape-study/state/tennessee/> (last visited April 20, 2020).

¹⁶⁸ *Allen*, 392 U.S. at 243.

¹⁶⁹ The Child-Placement Law, Hearing on H.B. 0836 Before the Judiciary Committee, 2019 Leg., 111th General Assembly (Tenn. 2019), http://tnga.granicus.com/MediaPlayer.php?view_id=414&clip_id=16847 (last visited April 20, 2020).

¹⁷⁰ *Lemon*, 403 U.S. at 615.

that the Establishment Clause was meant to prevent. For instance, Rep. Camper asked what level of proof was required for a faith-based adoption agency to prove that an individual does not conform to their beliefs.¹⁷¹ Rep. Rudd declined to answer, saying that the bill does not address that question, but simply gives rights to faith-based agencies.¹⁷²

Rep. Camper's question was prescient, as it is one Tennessee courts will be forced to confront. If there is no level of proof required for a private adoption agency to deny their services, then it need not limit its discrimination to its "written religious or moral convictions or policies."¹⁷³ If an agency has a written statement that they do not accept atheists, they have no requirement to prove that an adoptive family is atheist. A prospective parent could take a pledge of faith, have their pastor write a note, or even consent to a baptism and it wouldn't amount to sufficient proof to force an agency to abide by its own written policy.

If there is a level of proof required to demonstrate that an agency is abiding by its "written religious or moral convictions or policies,"¹⁷⁴ then the courts will be in the awkward position of dissecting what does and does not count as a religious moral conviction. This is the very "wall between church and state" that the Establishment Clause was meant to uphold.¹⁷⁵ The government should not position itself such that it will be forced to determine what counts as a religious conviction. Determinations over theology tread on the freedom of conscience and should only be done when there is a compelling state interest, such as in Tennessee's snake handling case.¹⁷⁶

There is no better example of a law which fails the third prong than in the original *Lemon* case.¹⁷⁷ There, the degree of

¹⁷¹ The Child-Placement Law, Hearing on H.B. 0836 Before the Judiciary Committee, 2019 Leg., 111th General Assembly (Tenn. 2019), http://tnga.granicus.com/MediaPlayer.php?view_id=414&clip_id=16847 (statement by Rep. Karen Camper) (last visited April 20, 2020).

¹⁷² *Id.* (statement by Rep. Tim Rudd).

¹⁷³ Tenn. Code Ann. § 36-1-147.

¹⁷⁴ *Id.*

¹⁷⁵ Thomas Jefferson, Jefferson's Letter to the Danbury Baptists Para. 2 (U.S. 1802).

¹⁷⁶ Swann, 527 S.W.2d 99.

¹⁷⁷ *Lemon v. Kurtzman*, 403 U.S. 602 (1971).

state supervision and surveillance necessary to ensure compliance with the statutory requirement separating secular and religious education was found to foster excessive governmental entanglement.¹⁷⁸ It is hard to imagine a more entangled government than when a court considers doctrinal theology for the purposes of deciding whether an adoption agency's "written religious or moral convictions or policies" are sincere or applied honestly.

Another intersection that could lead to entanglement was highlighted when Rep. John Ray Clemmons asked to what extent federal law allowed adoption agencies to discriminate based on their religious beliefs.¹⁷⁹ Rep. Rudd again stated that he could not talk about things outside the bill.¹⁸⁰ This oversight by Rep. Rudd signals that it will be the courts' task to balance these interests. May a faith-based child placing agency discriminate on the basis of race or other protected classes? Would gender be protected as a basis for discrimination by a religiously motivated adoption agency? These questions are likely to come up due to this legislation and foster additional entanglement.

Further entanglement can be gleaned from Sen. Yarbro's rejected amendment calling for the bill to only apply to private religious institutions that do not rely on public tax-payer dollars.¹⁸¹ Sen. Rose's outright condemnation of this amendment acknowledges that under this bill, the government subsidizes religious institutions with taxpayer money for performing a secular function while retaining the right to discriminate based on its religious beliefs.¹⁸² Thus, Tennessee's child-placement law fosters excessive government entanglement by placing the state in a position where it is regulating religion.

¹⁷⁸ *Id.* at 620-21.

¹⁷⁹ The Child-Placement Law, Hearing on H.B. 0836 Before the House Floor Session, 2019 Leg., 111th General Assembly (Tenn. 2019), http://tnga.granicus.com/MediaPlayer.php?view_id=414&clip_id=17025 (question by Rep. John Ray Clemmons) (last visited April 20, 2020).

¹⁸⁰ *Id.* (response by Rep. Tim Rudd).

¹⁸¹ The Child-Placement Law, Hearing on H.B. 0836 Before the Senate Session, 2020 Leg., 111th General Assembly (Tenn. 2020), http://tnga.granicus.com/MediaPlayer.php?view_id=414&clip_id=21093 (last visited April 20, 2020).

¹⁸² *Id.*

Tennessee's recently passed child-placement law is unconstitutional. *Lemon* is the appropriate test for an Establishment Clause case relating to government regulations over secular activities, and the child-placement law's regulation over child placement agencies clearly involves a secular activity. Applying *Lemon* shows that the law has no secular purpose, the primary effect advances religion generally, and it encourages excessive government entanglement. Thus, Tennessee's child-placement law failed all three of *Lemon's* prongs and is unconstitutional.

VI. CONCLUSION

Tennessee's recently passed child-placement law is unconstitutional under both the Establishment Clause of the First Amendment and under Article 1 § 3 of Tennessee's Constitution. After a careful determination that *Lemon* is the appropriate test for this kind of Establishment Clause case, one where the government regulates a secular activity in which religious establishments participate, the law failed all three of *Lemon's* prongs. The law has no secular purpose, the primary effect advances religion generally, and it encourages excessive governmental entanglement.

Thankfully, Sarah and David are a fictitious couple and will never know the pain of being turned away due to circumstances outside of their control. More thankfully still, there is no child on the other side of their story, waiting for a loving home. But for thousands of children in Tennessee's foster system today, the threat that they will be kept in unstable situations away from a loving forever home is all too real.¹⁸³

Tennessee's child-placement law continues to allow similar situations to flourish at the expense of a constitutionally protected class.¹⁸⁴ Further, it runs counter to the Tennessee adoption statute's promise that, "[i]n all cases, when the best interests of the child and those of the adults are in conflict, such

¹⁸³ Agencies approved by the Department of Children's Services served 8,499 children during the 2019 fiscal year; Tennessee Department of Children's Services, Annual Report 2019, https://www.tn.gov/content/dam/tn/dcs/documents/quality_improvement/annual-reports/AnnualReport_2018-2019.pdf (last visited April 20, 2020).

¹⁸⁴ Tenn. Code Ann. § 36-1-101.

conflict shall always be resolved to favor the rights and the best interests of the child.”¹⁸⁵ For these reasons, Tennessee Code Ann. § 36-1-147 is unconstitutional.

¹⁸⁵ *Id.*