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QUESTION

The State of Acrimony's current troubles began with a single phone call to the state Department of Children and Families Services (DCFS). The caller said that she was 15 years old, and that she and her two infant children were being held against their will in the compound of a fundamentalist religious sect. DCFS immediately sent a SWAT team of heavily armed social workers to the compound of the Fundamentalist Piscopopalian Church. When the SWAT team battered down the gates of the compound, they discovered 172 infants and toddlers who appeared to have been the children of underage mothers, but who could not (or perhaps, in some cases, refused to) identify their parents. No men were found in the compound.

The Fundamentalist Piscopopalian Church (FPC) is a small denomination that broke away from the Episcopal Church. (While the Episcopal Church has more recently experienced other schisms stemming from its acceptance of a gay bishop and the ordination of female priests, the FPC separated because of its members' strong belief in the future resurrection of the career of the comedian Joe Piscopo, a subject on which the mainstream Episcopal Church remains agnostic. FPC doctrine also teaches the spiritual imperative of polygamy and the marriage of very young girls to older men.) At the compound in Acrimony, there were 150 girls between the ages of 12 and 15 who had bogus marriage licenses with much older men, and who appeared to be the mothers of many or all of the 172 small children. (The "licenses" had been issued by the patriarch of the sect, and were not issued or approved by state authorities.) The social workers were unable to ascertain whether the original caller and her children were in the compound at the time of the raid.

The SWAT team took all the children into custody and turned them over to the bureau of child protective services within DCFS, who placed them in foster care. They also took the teenage girls into custody and placed them with separate foster families. None of the girls was allowed to have any contact with any of the younger children, since none was willing to admit to being the mother of any particular child. (Each of them said that to give information to agents of the state would involve "assisting the devil.") In order to identify which of the individual girls was the mother of each child, the DCFS social workers, without obtaining individual consent, took a DNA sample from each of the children and each of the putative mothers in order to make it possible to establish genetic matches.

Lawyers for the Acrimonious Civil Liberties Union (ACLU) filed a class action in state court, claiming to represent all the teenagers in custody. (Assume that they have the necessary standing and that the class has been properly certified under state law.) The lawsuit seeks a preliminary injunction to prevent DCFS from examining the DNA results in an effort to match mothers with their children. The complaint alleged that the DNA information had been obtained in violation of the mothers' and children's procedural and substantive due process rights under the state constitution and the Fourteenth Amendment of the U.S. Constitution.

The lawsuit also claimed that the children and their mothers were being separated in violation of due process and freedom of religion, and that the state must allow the mothers, as a collective entity, to care for their (collective) children. The ACLU complaint asserted that the Piscopopalians believe in collective child-rearing, and that their faith requires that, since all

children are the responsibility of every community member, it would be sacrilegious to pair any child with his or her individual mother. "The third verse of the second chapter of the sacred Book of Piscopo teaches that 'it takes a compound to raise a child.'" The complaint demanded that all the children be returned to the custody of the teenagers, "in groups no smaller than 20 mothers and 30 children."

In its answer, DCFS argued that the injunction would be improper, since the state was merely trying to reunite individual children with their biological mothers. The state also noted that none of the purported marriages were recognized under state law, because the minimum age for marriage is 17, and none of the girls was of that age. The state further asserted that its *parens patriae* interest in both the mothers and young children was strengthened by the fact that the children appeared to be the product of statutory rape, since the age of consent for sexual activity under state law was 16, and "each of the children was obviously conceived before the mother attained that age."

DCFS then arranged for an inspection visit by ACLU attorneys to the foster homes where the children were being cared for (none of which had more than three children, and none of which involved any of the mothers). Following the visit, the ACLU amended its complaint to include a demand that the foster families be prohibited from dressing any of the children in red clothing, since according to the church's beliefs, red is the color that Christ will wear on His return to Earth, and therefore all others are forbidden from wearing it.[1] It was pointed out that DCFS had already made accommodations to the religious beliefs and practices of other denominations, such as following kosher dietetic rules for the children of Jewish parents. The ACLU's amended complaint also asked the court to strike down Acrimony's statutory rape statute and marriage statute as facially unconstitutional because of the irrebuttable presumption that individuals under the age of 16 were incapable of consenting to sexual activity and that individuals under the age of 17 were too immature to marry.

The state's amended answer responded that compliance with the clothing request would be expensive and administratively inconvenient because it would require overburdened foster parents to acquire more clothing of other colors. The department also noted that none of the infants and toddlers had objected to the red garments, and some of them seemed to prefer them. The department also argued that the statutory rape and marriage age statutes are traditional state prerogatives and that it would be an extraordinary burden on the state and its courts to require individual adjudication of the competence of every teenager who wanted to have sex or to get married. The state also argued that striking down the presumption regarding consent in the statutory rape law would greatly undermine its intended deterrent effect on older men who were sexual predators.

Meanwhile, the 150 teenagers encountered legal problems of their own. All were placed in foster homes, and the foster parents insisted that they attend public high school. Twenty of the girls refused to go to school, claiming that mandatory attendance law interfered with their belief that their proper place was at home (in the compound) with their children. The foster parents notified DCFS social workers, who, in turn notified truant officers and asked them to force the

[1] An effort by UNM President Schmidly to intervene in the lawsuit as amicus curiae was denied, and thus forms no part of this examination.

girls to go to school. The ACLU, upon learning of this, sought an injunction against DCFS and the truant officers, claiming that forcing the girls to attend school violated their constitutional rights. In response, the Department claimed that they had authority to require school attendance since it was the *de facto* parent of the girls in its custody, and the statute required parents to make sure that their children attended school.

The other 130 girls did attend classes under protest. When they arrived at school, each was wearing a T-shirt that proclaimed "Plural Marriage is the Command of the Lord God Jehovah." A number of other students were offended by the message on the girls' shirts, and scuffles broke out in six classrooms. In response, the principal pronounced the shirts to be disruptive and told the girls they could not wear the shirts on school grounds. The following day, other students showed up at school wearing recently-prepared T-shirts with the message "God's Will: Marriage is One Man and One Woman." Since the wearing of these shirts caused no disruption, the principal did not intervene against those students. The ACLU sued the principal for infringing the free expression rights of the first group. (The ACLU also announced that it would gladly have represented the second set of students had any action been taken against them.) In response, the principal said the school's policy was to permit students to wear any T-shirt that did not cause a disruption of school activities, but that it could not permit student expression to interfere with the school's educational mission.

The Acrimonious Legislature responded to the controversy over the manner in which the children were being treated in foster care by passing a bill to reform foster care. Under this law, the foster care system is to be privatized. The Legislature created and chartered a new private entity, Foster Care Inc. (FCI), which is to formulate and implement the policies which will shape foster care in the state. The FCI Board consists of three *ex officio* members (the Governor, the Attorney General, and the Chief Justice of the Acrimonious Supreme Court), and 14 other members. The first 14 members are to be selected by the *ex officio* members; thereafter, vacancies are to be filled by the entire Board. The funding for the foster care system will come entirely from appropriations by the state Legislature, but the policies of the FCI Board are not subject to review by legislators or the Governor, whose only recourse regarding policies of which they might disapprove would be to de-fund FCI. All social workers and other employees of DCFS who dealt with foster care, if they wish to continue their employment, must now apply for jobs with FCI. The Board enacted a policy that in hiring social workers, a 10-point "bonus" in the scoring of an applicant's experience is to be awarded to an applicant who is, or has been, the biological parent of a child. The policy also dictates that at least 50% of the positions must be filled by women. An unsuccessful gay male applicant, who has not fathered a child, has sued FCI for violating his constitutional rights to be free from discrimination. The ACLU has filed a lawsuit on his behalf.

Several citizens of Acrimony, although they were not supporters of polygamy or under-aged marriage, believed that the teenagers were being treated shabbily. They decided to seek the recall of members of the school board who had voted for the T-shirt disruption policy. (Under state law, a petition bearing the signatures of 10% of the registered voters in a district can trigger a recall election, and the public official will be removed from office if a majority of the voters approve the recall at the next election.) They called themselves "Citizens for Free Speech"

(CFS), printed lawn signs and fliers, started an on-line discussion group, and canvassed neighbors, urging fellow citizens to sign the petition to recall the board members.

Soon they received a notice from the state Level Playing-field Elections Commission (LPEC), informing them that their activities were governed by the state campaign laws. Under those laws, "when two or more people associate to advocate a political position they shall constitute an Issue Committee." Committees must register with the LPEC; they must fund their activities from a bank account opened solely for that purpose; they must report to the LPEC the names and addresses of all persons who contribute more than $20; they must also report the employers of donors who contribute more than $100; they must report non-cash contributions such as marker pens and wooden dowels for yard signs. (They were informally advised by the clerk at the LPEC that they should probably hire a lawyer, since the paperwork involved in compliance was pretty tricky.) The ACLU agreed to represent Citizens for Free Speech, and have sued the LPEC, claiming that the state campaign law is unconstitutional as applied to the free speech group. The LPEC responded that the regulations in question were necessary to assure that voters knew who was behind political activities in the state.

You are the law clerk to the state trial judge who has been assigned to hear all of the lawsuits. She has asked you to prepare a memo explaining the state and federal constitutional issues involved.

[Proceed to Appendix.]

APPENDIX

ACRIMONY STATE CONSTITUTION (portions)

Article I. Freedom of expression has always been one of the most cherished rights in our State. Every citizen shall have the right to express his opinions and viewpoints, being responsible for the abuse of that right. Similarly, since our State was founded by pious men seeking freedom to worship the One True God, all citizens shall have the right to their own religious beliefs and practices, provided that those practices do not harm other citizens.

Article II. Every citizen shall have the right to personal liberty and autonomy, which cannot be denied without due process of law. Every citizen shall also be free from discrimination based on race, religion, or national ancestry, and from arbitrary, capricious or unreasonable discrimination based on age, sex, or physical disability.

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Acrimony Public Welfare Code (portions)

Section 21. All minors between the ages of 6 and 18 shall be enrolled in and shall attend public or private school. Parents are responsible for the attendance of their children, and failure to meet this responsibility shall be a fourth degree misdemeanor. Parents are absolved from this obligation if their minor child has been emancipated by order of the Family Court or if the minor is married.

Section 43. Marriage shall consist of the lawful union of one man and one woman. No individual may be issued a marriage license unless that person has attained the age of 17.

Acrimony Penal Code (portion)

Section 261.5. Statutory rape is an act of sexual intercourse accomplished with a person who is not the lawful spouse of the perpetrator, if the person is under the age of 16. Statutory rape is a felony punishable by imprisonment for five years. Neither a defendant's alleged mistake of fact regarding the minor's age, nor the purported consent of the minor shall constitute a defense to the charge of statutory rape.

END OF EXAMINATION