



Why children have the most to lose in the latest battle over LGBT and religious rights

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Shamber Flore was 5 years old, home alone in the bleak Michigan winter.

She rummaged through the kitchen cabinets in search of food, finding nothing but crackers and mustard. She had no idea where her mother was.

On days she wasn't left alone, she would go with her mom to long meetings with strange men (Shamber would only realize years later her mom worked as a prostitute). She would sit outside the door, confused and anxious, and wait for her mom to come back.

Then, on a warm summer day in 2003, there was a knock on the door. The woman said she was from Child Protective Services. She took Shamber into state custody.

For more than a year, the 5-year-old bounced from one foster home to another, fearful that she would never see her brother and sister again.

In 2005, when Shamber was 7, St. Vincent Catholic Charities, an adoption agency in Lansing, Michigan, reunited Shamber with her siblings, who were living with the Tamal and Jerry Flore family in a big rambling barn of a house with a pond in the front yard. Eventually, the Flore family would adopt all three children.

“My adoption agency saved me,” says Shamber. “They ... gave me the chance to know what it feels like to be loved and cherished by my parents.”

Shamber, now a self-confident 20-year-old high school graduate, finds herself at the center of a lawsuit that could have ramifications for adoption agencies and religious organizations around the country and the children they serve.

The ACLU sued the state of Michigan on Sept. 20, 2017, arguing that by contracting with agencies like St. Vincent, which refuse to serve same-sex couples, the state is violating the equal protection clause of the U.S. Constitution. St. Vincent, represented by the Becket Fund for Religious Liberty, argues that serving same-sex couples would compromise its religious convictions.

The arguments reflect a growing national debate over the place of faith in the public square. Conservative Christians and their Republican allies see the issue as one of religious freedom and (in some cases) free speech; Democrats and LGBT rights activists as one of equal treatment under the law.

But in this case, the care for children lies in the balance. As one of the first cases of its kind on this issue, experts say it's likely to set a legal precedent with national implications in courts and state legislatures across the country.

Michigan contracts with a number of private agencies, some faith-based, to provide adoption and foster care services for the nearly 13,000 children in the state's system. Some of those state-contracted agencies, including St. Vincent Catholic Charities, refuse to work with same-sex couples on religious grounds.

"If the state cannot turn away same-sex couples or use religious criteria when making decisions related to child welfare, then neither should agencies which receive government funding," says Jay Kaplan, staff attorney for the LGBT Project of the ACLU of Michigan.

Flore asked to intervene in the case alongside St. Vincent Catholic Charities, both of whom are represented by the Becket Fund for Religious Liberty, a non-profit law firm. They counter the ACLU argument by claiming there are legal exemptions which allow for state money to be used while respecting religious belief and seeking the best interest of children.

That's perhaps the most difficult question to resolve: what is best for children in need of safe and loving homes?

Stephanie Barclay, legal counsel for Becket, says if the ACLU prevails, St. Vincent would lose its contract with the state and have to shut down its adoption and foster care programs. A spokesman for the Michigan Department of Health and Human Services declined to comment on the case, citing the ongoing litigation.

Becket and the state of Michigan have asked the court to dismiss the lawsuit, and a hearing on that motion is scheduled for Thursday.

The Michigan court case mirrors similar legal and legislative battles around the country triggered by the Supreme Court's 2015 decision legalizing same-sex marriage.

The 2015 ruling was a "legal change with profound consequences" and state legislatures are still wrestling with its implications, according to Robin Fretwell Wilson, director of the Family Law and Policy Program at the University of Illinois College of Law.

In 2018, Kansas and Oklahoma passed laws that allow a faith-based agency to refuse to participate in the placement of a child for foster care and adoption if doing so would contradict the agency's religious or moral convictions. But similar bills have died in Colorado and Georgia.

Wilson says if things continue this way, with both sides of the adoption debate increasingly polarized, it will paralyze the American child welfare system and leave children without families.

"The two sides are only looking at one side of the ledger at a time, unwilling to compromise," says Wilson. "And because of this, we're getting nothing done nationally on the vital issue of child welfare."

Meanwhile, 400,000 children nationally stand in need of foster care and 20,000 kids per year reach adulthood never having had a family to call their own.

A high-stakes lawsuit

St. Vincent, known for its highly successful recruitment of new families willing to foster and adopt children, is one of the oldest agencies in its tri-county service area, and is well-regarded for its work with minorities, its emphasis on keeping large sibling groups together, and for its support of families who adopt children with special needs.

In order to understand St. Vincent's reasoning for refusing service to same-sex couples, it's important to first grasp how the foster care and adoption application process works in Michigan.

When a couple approaches St. Vincent expressing an interest in foster care or adoption, the agency conducts a home study evaluating the potential parent's qualifications.

St. Vincent then makes a recommendation to the state, which decides whether to license a couple as foster and adoptive parents. The recommendation includes a written statement evaluating the strengths and weakness of the couple's relationship.

Barclay says that as a religious organization, St. Vincent cannot endorse the relationship between same-sex married couples and unmarried couples in a written statement without violating deeply held religious beliefs, which it would be required to do under the current process.

Those religious beliefs are rooted in the Catholic teachings that marriage is a sacred union between a man and a woman, Barclay says.

When asked whether it was the agency's view that same-sex couples are unfit to be foster and adoptive parents, Barclay said that "St. Vincent would not want to give unmarried or same-sex couples a negative recommendation to the state, potentially harming their chances of being licensed by the state. Instead, on this sensitive and important issue, St. Vincent would simply rather stand aside, and allow other qualified agencies to make recommendations on behalf of unmarried or same-sex couples."

Barclay adds that St. Vincent has never stood in the way of an adoption taking place, and has not prevented same-sex couples from adopting children that were in St. Vincent's care.

Once a gay couple has been endorsed by another agency and licensed by the state, it can still adopt a child in St. Vincent's custody — and gay parents have done so in the past, Barclay says.

According to legislation signed in Michigan in 2015, a child-placing agency is not required to provide "services" that conflict with its "sincerely held religious beliefs."

Twelve states have religious exemptions that allow faith-based child placement agencies to turn away prospective parents based on the agencies' beliefs, including Minnesota, Rhode Island, Maryland, Connecticut, Texas, Oklahoma, Kansas, South Dakota, North Dakota, Michigan, Virginia and Alabama, according to Wilson.

Kaplan says the ACLU takes no issue with the state contracting with faith-based agencies, and does not challenge the right of any private child-placing agency to practice its religion. He says the ACLU's case rests on the fact that the agencies are receiving state funding, and are using religious criteria to turn away applicants.

“When the state of Michigan hires private child-placing agencies to provide child welfare services for children in state custody, it must ensure that those services are provided based on the needs of children and in accordance with the United States Constitution,” the ACLU’s court brief states.

The state contracts explicitly prohibit agencies from discriminating on the basis of sexual orientation, Kaplan said. The state is aware that St. Vincent and other faith-based agencies are violating the contract (which St. Vincent has signed), but not doing anything about it, he says.

But Barclay says this argument fails to recognize a key caveat: Michigan law protects the ability of faith-based agencies to operate consistent with their religious mission, and that this law is incorporated in the contract, providing an exemption.

She adds that while the organization does receive government funding — nearly \$8 million, constituting about 81 percent of its budget, according to tax filings — it does not receive any public dollars to conduct home studies that determine if prospective parents are qualified to foster and adopt children, the very service at the heart of the ACLU’s case. It’s therefore inaccurate to say the organization is refusing to provide a government-funded service, Barclay says.

Kaplan says regardless of whether the funding is for that specific service, receiving any government money puts an organization on the hook for abiding by its contract. “When you’re receiving government funding to provide a panoply of services related to foster care and adoption on behalf of the state, you can’t pick and choose which of those services you’re going to provide to particular groups of people,” he says.

When the state contracts with an agency on its behalf, it essentially becomes a state actor, Kaplan says. And if that state actor refuses to provide services to same-sex couples based on its religious beliefs, it is in violation of the separation of church and state.

“No court has ever ruled that way, that if you get a dime for anything you do, you essentially become the state,” Barclay says in response. That would be a “totally novel trailblazing argument” that would “put religious charities across the country at risk, from homeless shelters to soup kitchens.”

Kaplan argues there is nothing stopping St. Vincent from becoming a private service provider, operating without state funding and thus free to use religious criteria as it sees fit.

The issue isn’t really about funding, Barclay says. It comes down to the state contract, without which they cannot provide public adoption services. If the ACLU prevails, Barclay says St. Vincent would lose that contract and no longer be able to help foster kids find permanent homes — work that the agency has been performing since it was founded 70 years ago.

“Religious faith has motivated and guided charitable work from the founding era until today,” Barclay says. “Faith-based organizations were often the first groups historically to provide foster and adoption services to vulnerable children, and they continue to be some of the best at providing these services. Their religious mission inspires them to provide the services that the most vulnerable in society benefit from.”

Turned away

Just 10 miles from St. Vincent Catholic Charities, Kristy and Dana Dumont curl up on the couch with Penny and Pixie, their two dogs.

Strangers often mistake the women for sisters, noting their similar appearance and their air of easy intimacy.

In 2017, they moved to Dimondale, a suburb of Lansing, Michigan, with a population of 1,235, because the neighborhood was safe and quiet, and they liked the school district.

When they first saw their red brick house, they dreamed of kids filling up the two empty bedrooms, and running out to play with their dogs in the backyard.

Kristy, an administrator in Michigan State University's College of Education, met Dana, a property specialist with the Michigan Department of Natural Resources, in 2006, began dating and five years later they married in Vermont.

Neither was interested in having biological children, and they both liked the idea of adopting an older foster child, between age 5 and 18, because they are harder for agencies to place.

The couple furnished and decorated their home, painting their rooms bright colors and filling them with toys, so it would look warm and inviting to a kid who had moved from one house to another.

Then, they picked up the phone to call St. Vincent Catholic Charities, which was located close by.

The woman who answered at St. Vincent said the agency didn't work with same-sex couples. The same news came from Bethany Christian Services, another faith-based adoption agency located 15 miles away.

"It felt like the wind got knocked out of me," Kristy, 40, remembers. "I was speechless."

Kristy says her family, friends and colleagues had always been supportive of her sexual identity, and she had never felt discriminated against before.

"This was the first time I was ever told right to my face that I couldn't do something because I was gay," said Kristy. "It really hurt."

Dana and Kristy say the most painful and frustrating part of the process was being rejected outright.

"They said no without getting to know us at all," Dana says. "It made us feel like second-class citizens."

After being turned away from the two agencies, the Dumonts contacted the ACLU, which was considering filing a lawsuit challenging the state's practice of contracting with faith-based adoption agencies that don't work with same-sex couples.

They became plaintiffs, along with Erin and Rebecca Busk-Sutton of Detroit, a married same-sex couple, and Jennifer LuDolf of Detroit, a former foster child.

The Dumonts said St. Vincent and Bethany were willing to refer them to other agencies, but there were no other agencies in their county that met their needs.

This is a point of disagreement in the case. Becket argues that there were other agencies willing to work with the Dumonts closer to them than St. Vincent. For this reason Becket argues the Dumonts and the ACLU are “targeting” St. Vincent to score “cheap political points at the expense of kids,” rather than simply utilizing another agency nearby.

But the Dumonts and the ACLU deny that characterization. They maintain that on the date they made the call, no agencies other than St. Vincent and Bethany were the right fit for them: one agency could only offer babies, another worked only with Native Americans, and a third had a long waitlist.

And while there were agencies that could have been a good match in other parts of the state, such as Detroit, located nearly two hours away, the Dumonts insisted on staying local.

“We really wanted to adopt a kid locally,” Kristy said. “These kids have had so much happen to them in their lives, so much instability. We didn’t want to take them away from their schools, their friends.”

The Dumonts say they are not targeting St. Vincent and do not want to see the agency shut down. On the contrary — they would like to benefit from its services as well, citing St. Vincent’s outstanding reputation.

“We don’t want them to shut down, that is not our intention. Our intention is to get the same high-quality services and to be able to adopt a child,” says Kristy. “And for other families, like us, to be able to do that too.”

Kaplan adds that it is incorrect to characterize the Dumonts or the ACLU as “anti-religious freedom,” as some of their opponents have done.

“At the ACLU, we have always fought for freedom of religion,” he says. “But we don’t think freedom of religion should be used as a sword to discriminate against or harm someone else, or that our Constitution and courts have condoned the use of religious freedom as a weapon.”

But Barclay says there are plenty of reasons why a couple would be referred to another agency, just as the Dumonts were, that are secular and have nothing to do with sexual orientation.

“Agencies in Michigan refer families elsewhere for many reasons, including closer proximities to other agencies or long waiting lists,” says Barclay. “St. Vincent will always make sure that any family who wants to foster or adopt will be able to do so, whether St. Vincent works with them directly or refers them to one of seven nearby agencies who can better serve their needs.”

Kristy and Dana say the pain of the agencies’ rejection hasn’t faded.

“We see our friends having kids and watching them grow,” says Kristy. “It’s so hard, knowing that we’re ready, and all we can do is wait.”

Becket has called attention to the fact the Dumonts have not adopted children since they got involved with the lawsuit, calling into question their sincerity.

“We’re in this lawsuit because we feel we were discriminated against, and we’re not giving up now,” says Dana. “We’re willing to wait to adopt, if it means we could make a positive impact for other same-sex couples in the future.”

Looking forward

Both sides will have a chance to press their positions on Thursday in the U.S. District Court for the Eastern District of Michigan. Becket and the state of Michigan have asked the court to dismiss the lawsuit. The ACLU formally opposed their motion.

Both Barclay and Kaplan said the judge is unlikely to rule immediately.

For Shamber, the case is personal. She heard about the ACLU's lawsuit when she was working with St. Vincent Catholic Charities to mentor current foster kids, and she decided to get involved. She says she wants to share her story so that the court can consider the perspective of those personally affected by St. Vincent's work.

"St. Vincent saved me from a life of abuse and neglect," she says. "They are the reason I know my siblings, that I have had a good education, that I know what it means to be loved and to give love. I'm worried that because of this lawsuit, they won't be there for kids like me in the future."

Shamber sees St. Vincent's religious principles as integral to its success as an agency.

The basic principles of most faiths have to do with love, sacrifice, and service, she says. And because they are a faith-based agency, they see their work as a ministry, not a 9-5 job.

Shamber says that's what inspired her caseworkers to work tirelessly to reunite her with her siblings.

"When you're a kid who's lost everything — your parents, your home — all you want is someone to care for you and love you," says Shamber. "St. Vincent gives love to children who have no one else to love them. That shouldn't be taken away."

Barclay says that for St. Vincent Catholic Charities, violating religious principles is simply not an option.

But Kristy and Dana Dumont, while affirming their respect for the agency's religious beliefs, say they don't believe public money should be used to fund an agency that denies them equal treatment.

"I shouldn't have to pay taxes to support an organization that discriminates against me, that treats me as a second-class citizen," says Dana.

Both sides in the upcoming case are motivated by powerful convictions. According to Wilson of the University of Illinois College of Law, the only way to find common ground is for both sides to get back to focusing on the best interests of children.

"We need to start over and have a model that has all hands on deck," she says. "Every gay couple who wants to adopt needs to be able to be helped in that process without feeling humiliated, and every agency needs to stay in the market to provide homes for children."

For the past year, Wilson has been putting together an alternative approach that she believes could solve the conflict at hand. She suggests a plan modeled on the Child Care and Development Block Grant Program, which would give money directly to families ready to adopt, allowing them to choose the agency — religious or secular — that best fits their needs.

On July 19, Wilson will present her idea at a Cato Institute conference in Washington, D.C. entitled "Solomon's Decree: Conflicts in Adoption and Child Placement Policy," that will bring together experts and stakeholders on all sides of the issues, in attempt to find solutions.

"Both sides must stop fighting for their team to win, and figure out a plan where everybody wins" says Wilson. "That means putting children first."