

# **Two Cheers for Charitable Choice**

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*April 18, 2001*

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## **Executive Summary**

In 1996 Congress passed the Personal Responsibility and Work Opportunity Reconciliation Act (PRWORA) in response to years of debate regarding the success of current methods in addressing the problem of poverty. Congress sought to give states more control over the implementation of welfare programs, with the assumption that state and local governments would be better able to address problems than a distant federal bureaucracy and that they would be freer to attempt innovative programs. Charitable Choice, a small but integral part of this approach to welfare reform, was also based on this logic. Written into Section 104 of the PRWORA, the Charitable Choice provision aims to bring faith-based organizations (FBOs) who are generally more integrated into the community and more flexible in their ability to deliver social services into a closer partnership with governments. More specifically, Charitable Choice legislation permits FBOs to provide a variety of social services by authorizing them to apply to state or local governments for federal block grant funds or by accepting government payment vouchers. While FBOs such as Catholic Charities and Goodwill have long been partnering with government, Charitable Choice now protects the religious character of these FBOs providing government-financed services.

Due to the contentious debate surrounding the passage of the PRWORA, the Charitable Choice provision received little attention until the 2000 presidential campaign when both major party candidates voiced their approval of exploring partnerships between states and FBOs. Shortly after his inauguration, President George W. Bush (who had implemented state partnerships with FBOs during his tenure as governor of Texas) announced an Executive Order to create a White House Office of Faith-Based and Community Initiatives (OFBCI). A second Executive Order established Centers for Faith Based and Community Initiatives in the cabinet departments of Justice, Health and Human Services, Labor, Education and Housing and Urban Development, to encourage such partnerships nationwide. Many in the religious community, however, have spoken out against the OFBCI and the Charitable Choice concept because of fears that FBOs in partnerships with governments could be

forced to weaken or abandon their religious character. Civil libertarian groups like the American Civil Liberties Union, Americans United for Separation of Church and State, and others have raised objections against Charitable Choice and the OFBCI because of their fear of Establishment Clause violations. This paper argues that the OFBCI should direct implementation of Charitable Choice in a manner that minimizes concerns about constitutional challenges and the loss of FBO religious integrity.

Since the PRWORA passed in 1996, few states have implemented Charitable Choice. Only four states – Texas, Indiana, Ohio, and Wisconsin – have made any significant progress towards incorporating the reforms into their attempt to administer welfare programs. The fact that so little has been done to implement Charitable Choice in the five years since its passage hints that there are barriers to implementation. First, the PRWORA was an enormous piece of legislation that demanded massive changes in state welfare bureaucracies, with Charitable Choice requirements getting “lost in the shuffle.” Next, Congress offered little in the way of punitive measures against states not in compliance. Additionally, both states and FBOs are unsure of the constitutional implications of Charitable Choice. Finally, FBOs fear losing their religious mission and being overtaken by government regulations.

Given the intent of Congress in passing the PRWORA and the identifiable barriers to implementation of Charitable Choice, our implementation suggestions will be guided by criteria aimed at minimizing the potential pitfalls of the legislation. The first criterion is the constitutionality of the proposed implementation. Despite the objections of several groups, enough Supreme Court case law exists to give Charitable Choice proponents legitimate reason to believe that the concept is acceptable. Nevertheless, proposals to implement Charitable Choice must be crafted in such a way as to avoid potential Supreme Court challenges. Next, because Congress had a specific policy purpose for devolving control of welfare programs to states, any proposed implementation must respect the balance between state and federal control Congress built in to the legislation. Additionally, the major concern of the FBOs in collaborating with government bodies is the threat that the government would require them to change or abandon their religious missions; any implementation proposal must protect the integrity of FBOs. Also, because states have been reticent to implement Charitable Choice, they must be made accountable for complying with

the legislation both with respect to permitting FBOs to apply to offer social services and ensuring that states respect FBOs rights to maintain their religious character. Finally, proposals should be feasible. They should be designed so as not to be unwieldy from an administrative standpoint, and they should be as politically benign as possible.

To encourage the implementation of Charitable Choice we recommend that OFBCI address three key policy areas: education, enforcement, and funding. For performing its role as an educator, we recommend the OFBCI establish liaisons within HHS charged with educating states while the OFBCI serves more passively as an information clearinghouse for FBOs interested in entering the market for provision of social services. In developing a framework for educating welfare administrators at the state and local level, the OFBCI will remove ignorance of the law as a barrier to implementation. The passive role of the OFBCI with respect to FBOs minimizes potential entanglements between government and FBOs and reflects the limits that exist on OFBCI's resources.

In the event that education fails to achieve full implementation of Charitable Choice, enforcement measures will be necessary. Because Section 104 contains narrow enforcement requirements, the OFBCI's ability to require state implementation of Charitable Choice is limited. Nevertheless, some efforts must be made to pressure recalcitrant states to comply with the legislation. We recommend that the Department of Health and Human Services (HHS) assist the OFBCI in monitoring states for compliance. Due to the structure of the federal block grants to the states, HHS already has an oversight role related to state implementation of the PRWORA. Furthermore, President Bush has required HHS to assist the OFBCI in removing obstacles to the voluntary participation of FBOs in delivering social services. Should HHS become aware of possible violations of Charitable Choice regulations, it would inform the OFBCI which would work with state and/or federal officials to pressure them to comply. Absent a change to the Charitable Choice legislation that would add punitive measures, this "soft" enforcement is all that is available to the OFBCI.

The final recommendation we make regarding the implementation concerns the methods of funding Charitable Choice programs. Section 104 describes two available funding methods: grant funding or vouchers; grant funding encompasses both grants made directly to the social service provider (FBO) or indirect grants made to large social service providers who subcontract with smaller providers (FBOs). Because

constitutional case law has affirmed the principle that religious organizations may receive federal money when that money is directed to them as the result of private individual choices, we recommend that vouchers be used whenever possible. Vouchers have the additional benefit of minimizing the administrative complexities that may prohibit FBOs from entering the market for delivery of social services. Indirect grant funding, while not having the benefit of as much constitutional case law supporting it as voucher funding has, shares the benefit of minimizing administrative complexity. Direct grant funding, which is currently the prevalent form of funding for social service programs, lacks these important benefits.

In sum, we recommend that Charitable Choice be implemented in a manner that raises the fewest constitutional concerns and protects the religious character of FBOs. Since President Bush has established the OFBCI for promotion of partnerships between FBOs and government, we recommend that this structure be used to facilitate the implementation. In order to avoid or minimize the legitimate concerns of those in religious communities or of civil libertarians, we recommend that the OFBCI coordinate state education regarding state responsibilities and restrictions and educate interested FBOs as to their rights under Section 104. Next, we recommend that the Department of HHS use its existing oversight authority to ensure that states comply with Charitable Choice law. Finally, we suggest that the OFBCI work with states and FBOs to encourage the development and implementation of programs funded by vouchers, since voucher programs are most likely to protect client liberties and FBO integrity. These recommendations facilitate the implementation of Charitable Choice while accomplishing what the program was designed to do, best serve and protect those providing and receiving social services.

## Introduction

After years of debate about the failure of the federal government's various welfare programs to significantly ameliorate the problems of poverty in the United States, Congress passed the Personal Responsibility and Work Opportunity Reconciliation Act of 1996 (PRWORA). The legislation reflected the prevailing feelings amongst members of Congress (and in much of the public as well) that welfare programs might be more successful if administered at a level closer to the recipients and if the states were allowed to employ innovative approaches towards addressing the problems of poverty. One provision of the Act, the Charitable Choice provision, was designed to permit faith-based social service providers to offer certain social services authorized under the terms of the PRWORA.

Due to the contentious debate about the PRWORA, however, the Charitable Choice provision gained little attention until it was made a significant issue during the recent presidential campaign. While then-Governor Bush (who authorized similar programs in the state of Texas) and Vice President Gore both endorsed the concept of Charitable Choice, few states have actually implemented the program as required by law. Moreover, many faith based organizations (FBOs) fear that by becoming involved in administering government programs they will jeopardize their religious mission; while constitutional watchdog groups fear that the program violates the Establishment Clause as well as the constitutional rights of beneficiaries and employees of FBOs.

Despite these concerns, in one of his first Presidential acts, President George W. Bush authorized the creation of a White House Office of Faith Based and Community Initiatives (OFBCI) designed to promote a wide range of partnerships between government and FBOs.<sup>1</sup> This action was bound to be controversial, and groups like Americans United for the Separation of Church and State and the American Civil Liberties Union

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<sup>1</sup> His order broadened the scope of collaborations authorized under Section 104 of the PRWORA.

are making a vigorous opposition, while religious groups quarrel over whether or how President Bush should proceed.<sup>2</sup>

The strong opposition shown by both civil liberties and religious groups points to the many risks associated with Charitable Choice. Due to the potential constitutional and institutional hazards connected to these government and FBO collaborations, President Bush should proceed very cautiously. This paper argues that the OFBCI should direct implementation of Charitable Choice in a manner that ensures it receives a reasonable trial and is implemented in a way that best serves and protects those providing and receiving social services. Our recommendations propose the most appropriate means by which Charitable Choice can be implemented towards these ends.

## **What Is Charitable Choice?**

Charitable Choice is a provision of Section 104 of the PRWORA, which authorizes FBOs to compete for government contracts for the delivery of welfare services. The Charitable Choice provision was passed with three primary goals: 1) to encourage the participation of the community and faith-based organizations in efforts to fight poverty, 2) to protect the religious integrity and character of those FBOs that accept government funds to provide welfare services, and 3) to protect the civil liberties of welfare beneficiaries by providing religious and non-religious alternatives in welfare disbursement.<sup>3</sup> Charitable Choice does not require that FBOs be selected or even be allowed to compete to offer social services – a state may choose to use state agencies to provide all social services authorized under PRWORA and thereby avoid being subject to Charitable Choice provisions – but if state law allows non-governmental entities to bid on any such projects or services then FBOs must be allowed to bid as well.

Many supporters view Charitable Choice as a leveling of the playing field, allowing faith-based non-profits to enter into competition against secular social service agencies to provide social services through

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<sup>2</sup> “Faith Initiative May Be Revised,” Washington Post, March 12, 2001, Page A1.

<sup>3</sup> Center for Public Justice: A Guide to Charitable Choice. From introduction by Stanley Carlson-Thies, p. 1.



disbursements from the state and federal government.<sup>4</sup> Though larger FBOs such as Catholic Charities have long partnered with government to provide social services, prior to Charitable Choice legislation they had to develop a separate non-profit corporation without a religious mission statement in order for them to qualify to compete for this government funding. In many cases, FBOs had to open new facilities, or modify existing ones, to ensure that beneficiaries were not exposed to religious articles, such as crucifixes or religious artwork. These restrictions made it difficult, not to mention undesirable, for smaller FBOs to participate as they were unable to develop a separate corporation, and unwilling to change the religious character of their organization. Charitable Choice stipulates, however, that FBOs may not be required to “(A) alter [their] form of internal governance; or (B) remove religious art, icons, scripture, or other symbols” in order to provide social services authorized by the PRWORA.<sup>5</sup> Additionally, Section 104 allows FBOs to maintain their exemption from the provisions of the 1964 Civil Rights Act that prohibit hiring discrimination so that FBOs can ensure that their employees hold beliefs consistent with the teachings of the FBO. Thus, Charitable Choice not only provides those FBOs that have always partnered with the government new protections, it also makes it far more attractive for smaller FBOs to enter such collaborations.

While FBOs are given numerous protections, client civil liberties are not compromised. Grant funds provided under Charitable Choice are to be used for provision of authorized social services only and may not be used to finance “sectarian worship, instruction, or proselytization”. If a beneficiary objects to “the religious character of an organization or institution” providing a given service, the state must ensure that the beneficiary is able to receive similar services at an acceptable provider.<sup>6</sup> Client civil liberties are protected by providing a broad spectrum of religious and non-religious alternatives in welfare disbursement.

Nonetheless, despite these benefits, some difficulties remain. Should the Supreme Court rule some of the provisions unconstitutional, faith-based organizations could find themselves in a “bait-and-switch” situation,

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<sup>4</sup> This does not however mandate that FBOs are selected or have to be allowed to compete at all. If the state government allows non-governmental entities to bid on projects or services then FBOs must be allowed to bid as well. However, if a state chooses to run everything by governmental entities, then that state does not have to comply with the charitable choice provisions.

<sup>5</sup> Quoted in Center for Public Justice: A Guide to Charitable Choice, p. 29.

<sup>6</sup> Ibid. p. 30.

having entered into contracts under a certain set of protections that were later revoked. This could potentially jeopardize both the religious nature of these institutions or undermine the organizations entirely by encouraging them to build an infrastructure for service provision, then denying them the funds to support it. On a more philosophical level, there is also the concern that encouraging churches and other faith-based organizations to utilize government funding for providing services might fundamentally alter the identity of the FBO. Embedded in the foundation of many religious organizations is an understanding that it is the responsibility of the church to share their resources with the poor. Partnering with government could have the effect of subtly relocating the perceived locus of responsibility to the government.

For these reasons it is necessary to implement Charitable Choice cautiously, both in considering whether collaborations are desirable at all, and in determining how they should be pursued logistically in terms of funding and other administrative issues.

## **What Is the Office of Faith-Based and Community Initiatives?**

Encouraging faith based and community groups to participate in the administration of social welfare services was a popular plank in both Democrat and Republican Party platforms during the 2000 election, and each party's Presidential candidates praised the idea on the campaign trail. President George W. Bush was particularly interested in this program while Governor of Texas and he has taken this attachment with him to the White House. Within weeks of his inauguration, President Bush issued two Executive Orders to encourage the use of Charitable Choice as a means of "Rallying the Armies of Compassion".<sup>7</sup>

The first Order established a White House Office of Faith-Based and Community Initiatives (OFBCI) that was designed to coordinate and encourage partnerships between state and local governments and community-based organizations to "realign Federal policy and programs

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<sup>7</sup> This is the title of the pamphlet the White House issued simultaneously with the issuance of the Executive Orders authorizing Charitable Choice.

to better use, empower, and collaborate with grassroots and non-profit groups.”<sup>8</sup> More specifically, the Executive Order established twelve functions that the office would be responsible for, ranging from breaking down regulatory and bureaucratic hurdles to implementing charitable choice, providing policy and legal education to the states and the faith based organizations, to encouraging private charitable giving.

The second Executive Order created Executive Department Centers for Faith-Based and Community Initiatives (Centers) in five cabinet departments. The Departments of Justice, Health and Human Services, Education, Labor, and Housing and Urban Development were ordered to establish these Centers charged with reducing regulatory barriers between local faith-based and community organizations and government so as to encourage their participation in providing social services. Each department was ordered to begin with a department-wide audit to determine its level of compliance. Upon completion of the audit, the departments are to take steps incorporate faith-based organizations into the provision of social services. Once each Center is operational, a liaison will be assigned to communicate directly with the OFBCI in the White House. Each cabinet department center will be responsible for creating an annual report of their efforts to incorporate faith based and community organizations into its operations. This report will include remedies that have already taken place, as well as strategies for the future.<sup>9</sup>

The promise of OFBCI, with access to and support from the cabinet department offices, is that this office “will be the Federal Government’s lead agency in promoting a policy of respect for and cooperation with religious and grassroots groups. It will identify barriers to such groups in Federal rules and practices, propose regulatory and statutory relief, and coordinate new Federal initiatives to empower and partner with faith-based and community problem solvers.”<sup>10</sup>

Given the recent controversy surrounding the creation of the OFBCI, however, it is beginning to look like the President overestimated the level support he would receive from the religious community. Additionally, by attempting to broaden Charitable Choice to include programs not

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<sup>8</sup> Bush, George W. “Rallying the Armies of Compassion.” January 2001, p. 2.

<sup>9</sup> Ibid

<sup>10</sup> Bush, George W. “Rallying the Armies of Compassion.” January 2001.

authorized by Congress in the PRWORA, Bush may have moved too quickly as there are legitimate practical and constitutional questions that remain unanswered. Our recommendation is that Bush move cautiously and limit the OFBCI to implementing solely the Charitable Choice programs authorized under the PRWORA.

When referring to the OFBCI throughout this paper, we mean the White House Office *as well as* the Centers in the various cabinet departments.

## **Current State of Charitable Choice Implementation**

### **Survey of the States**

Since Charitable Choice requirements are binding on a state when it accepts its federal welfare block grant, one would expect to find states moving toward implementation. However, the impact of the legislation has been moderate at best. According to a state “report card” issued by the Center for Public Justice, a watchdog group for Charitable Choice implementation, most states remain out of compliance. The report card shows that only four states have made significant steps toward bringing laws and procurement processes into compliance – Texas, Indiana, Ohio, Wisconsin<sup>11</sup> – and as of March 2000, only Texas and Wisconsin had codified Charitable Choice guidelines in their formal contracts.<sup>12</sup> The remaining states are located somewhere on the continuum between introducing state legislation to protect FBOs or update procurement practices and refusal to comply.<sup>13</sup>

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<sup>11</sup> Center for Public Justice. “Charitable Choice Compliance, A National Report Card.” [www.cpjustice.org/stories/storyreader\\$296](http://www.cpjustice.org/stories/storyreader$296)

<sup>12</sup>Sherman, Amy. The Growing Impact of Charitable Choice: A Catalogue of New Collaborations Between Government and Faith-based Organizations in Nine States. Center for Public Justice: March 2000. In Texas, a number of laws have been passed directing that regulations be changed to reflect Charitable Choice legislation, including updating RFPs and building protection for FBOs into state contracts. Additionally, the Texas legislature has directed the Department of Human Services’ regional offices to appoint liaisons with the faith community. See also “Charitable Choice: How is it doing? The Philadelphia Inquirer. October 29, 2000.

<sup>13</sup> See appendix A for a synopsis of state activity to date. [Sources: CPJ Ibid; Sherman Ibid]

Though implementation is largely in the nascent stages, a review of activity in the four years since the PRWORA was passed reveals that Charitable Choice is already having a modest impact on the social service sector in some areas.<sup>14</sup> A recent in-depth audit of nine states revealed a total of 125 new financial<sup>15</sup> and non-financial collaborations involving hundreds of congregations and FBOs and thousands of welfare recipients. Over half (57%) of these collaborations aimed at serving the poor have been undertaken by FBOs with no history of working formally with the government. These FBOs are broadening the social service network by providing low-income citizens with new options for services.<sup>16</sup>

Wisconsin boasts the most collaborations at forty-two, followed by California and Texas, each with nineteen. However, these raw numbers can be deceiving – though Mississippi only reports only one collaboration, it is a statewide mentoring initiative involving over 800 churches. Mentoring collaborations are the most common (representing 46 of the 125 studied), followed closely by job training programs (34). The remaining programs included “Life Skills” training, alcohol or drug addiction programs and various other services such as mental health counseling or provision of emergency housing.<sup>17</sup>

Eighty-four of these initiatives are financial, where the FBO either receives direct funding from the government or acts as a subcontractor for an agency that is directly funded.<sup>18</sup> FBOs expressed particular enthusiasm for indirect funding arrangements, believing these arrangements gave them increased freedom to engage in spiritual ministry and simplified administrative burdens. Additionally, indirect funding allows FBOs with limited caseload capacity to gain access to

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<sup>14</sup> Sherman Ibid: Monsma, Stephen, Interview.

<sup>15</sup> Information was only collected on financial relationships involving TANF funds or the Department of Labor's Welfare-to-Work funds, as Charitable Choice guidelines are binding on these two welfare funding streams. Since 1998, Charitable Choice guidelines also govern the expenditure of Community Service Block Grant Funds as well. Sherman, Ibid at 11, 12.

<sup>16</sup> Typically, the shift has been from providing clothes and food (commodities) to a focus on intense one-on-one mentoring (i.e. job training,) providing both support and accountability.

<sup>17</sup> Sherman, Ibid, pg. 23.

<sup>18</sup> The remaining forty-one were non-financial in nature, but were included because they were spurred by the climate created by Charitable Choice legislation. In addition, the FBO and government staffs are looking to Charitable Choice legislation for guidance, despite the fact that Charitable Choice refers to financial collaborations.

federal funds—with contracts ranging in size from under \$25,000 annually to \$500,000 or more.<sup>19</sup>

Interestingly, it has been observed that collaboration is not confined to strictly construed financial collaborations between government and social service providers, but rather Charitable Choice is understood in the community to encompass all forms of government-FBO partnerships occurring under welfare reform.<sup>20</sup> The remaining forty-one relationships identified were non-financial in nature, but had been spurred by the Charitable Choice legislation and interpreted according to Charitable Choice guidelines. Though this expanded definition may prove problematic for those seeking to track Charitable Choice as strictly construed by the legislation, it nonetheless points to an increased willingness to explore options for increased collaborations in social service delivery between government and FBOs.

While proponents of Charitable Choice look to these emerging collaborations as indicators of success, the reality remains that few states have made any substantial attempts to implement Charitable Choice programs. The fact that so many states have all but ignored the Charitable Choice provision of the PRWORA points to potential implementation problems.

## **What Stands in the Way of Implementation?**

Implementation of Charitable Choice has been slowed due to a variety of concerns. These include structural problems inherent in the PRWORA, constitutional issues, and concerns about FBO integrity.

Some implementation problems can be attributed to structural limitations of the legislation itself. To begin with, Charitable Choice is but one small aspect of the 1996 PRWORA, which mandates that states institute sweeping changes in the way welfare services are delivered. Much of the energy in the social service sector has been focused on fulfilling other requirements of the PRWORA, such as moving over 50% of their

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<sup>19</sup> Sherman, *Ibid.*, p. 14. Of the 125 collaborations identified, 43% were small contracts, (under \$25,000 annually); 32% were mid-sized contracts (\$25,000-\$99,000); 18% were large contracts (\$100,000-500,000); 7% very large contracts (\$500,000+).

<sup>20</sup> Sherman, *Ibid.*

caseloads from welfare to work.<sup>21</sup> Additionally, initial Charitable Choice legislation established no regulatory provisions to ensure that states were in compliance, nor penalties (besides offering aggrieved parties the right to sue for injunctive relief in state court) for failing to comply. This lack of regulatory structure has likely contributed to the sluggish implementation. Faced with the overall size and complexity of the Act, and having no incentives to implement Charitable Choice, many states have simply failed to heed the provision.

Charitable Choice has encountered further resistance due to concerns about the proper relationship between the state and religious entities. Both states and FBOs (who often operate under the “wall of separation” paradigm) have concerns related to the constitutionality of Charitable Choice. Fearing lawsuits, actors on both sides (state & FBO) exhibit a general reluctance to break with conventional modes of operation. Evidence of this can be seen in the fact that many states have continued to maintain a clause in their welfare provider grant applications forbidding application by sectarian organizations, despite the Charitable Choice legislation.<sup>22</sup>

In addition to the uncertainties related to the constitutionality of Charitable Choice and its application under Establishment Clause jurisprudence, challenges have also been raised by constitutional watchdog groups like Americans United for Separation of Church and State and the American Civil Liberties Union. These groups have several concerns about Charitable Choice programs, including issues such as the protection of religious liberties of beneficiaries, the ability of FBOs that receive government funds to retain their exemptions from Title VII of the Civil Rights Act of 1964, and state Constitutional issues (in many states the lines of demarcation between church and state are much clearer and more restrictive of religion than is the federal Constitution).<sup>23</sup>

For FBOs, the generally untested Charitable Choice legislation not only carries the risk of constitutional violations and subsequent litigation, but also raises the specter of excessive government involvement that could

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<sup>21</sup> In addition, states were given an implementation grace period for Charitable Choice implementation, allowing a few years before compliance was mandated, which had the effect of making Charitable Choice implementation a low priority for the states.

<sup>22</sup> Center for Public Justice, State Report Card, *ibid*.

<sup>23</sup> For a more thorough discussion of the constitutionality of the Charitable Choice provisions, see Appendix B.

undermine the integrity of their institution. Many fear that as implementation plays out, the result will be government control rather than cooperation, compromising the independent, innovative, and religious nature of the FBO that made cooperation attractive in the first place. As Senator Dan Coats, an early proponent of Charitable Choice, wrote, “Expanding charitable giving...runs the risk of changing the essence of those institutions, attracting a different breed of person to work in them and distorting their missions.”<sup>24</sup> These FBOs may begin to lose some of their religious function as they are given a more formal role within the social welfare structure.

Not only are the FBOs afraid of their religious missions being altered, many face a steep learning curve when trying to navigate through the regulations associated with the numerous and sometimes overlapping government funding streams. Much of this learning curve deals with the intensive process of grant writing and the documentation process, budgetary process, and the application of the grant guidelines for future projected measurements that accompany any grant an FBO would receive. The grant-writing process leads to the most often cited complaint by non-profits – the stringent reporting requirements mandated by the government. Depending on the grant, the FBO may have to send numerous reports documenting everything from receipts, sign in sheets, services administered, measurements of success, statistics and any other information the government requests. This reporting can be costly and time consuming, taking away from the ability of the FBO to complete its mission, and often deterring many FBOs from even applying for grants.<sup>25</sup>

The combination of these concerns has resulted in a situation where Charitable Choice has often been overlooked, avoided or misunderstood by the states and often neglected by FBOs. Clearly, what exacerbates

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<sup>24</sup> Coats, Dan; *Mending Fences: Renewing Justice between Government and Civil Society*; pg. 49. A warning from Coats at the implications of an expanded tax system which would make the FBNP sector much more lucrative and run the risk of compromising in hiring situations because persons with the expertise or a higher level of expertise apply but may not hold the faith or religious views in regard.

<sup>25</sup> Currently, due to the devolution of welfare, there is no overall reporting mechanism which tracks state compliance with Charitable Choice. States do keep track of their grants, however grant requirements vary depending on which office the grant is associated with, the level of government where the grant originates and the level of funding the social service entity receives to run programs. With differing units of measure based on outcomes for the social services and the providers, comparing this information across state lines is also problematic.



most of these concerns is a general lack of information regarding what Charitable Choice is and how the states and FBOs are expected to comply. Failure to educate states has led to a devolution process clouded by a great deal of confusion and misinformation. Due to the enormity of the PRWORA, states remain unaware of their responsibility to act, or if they are aware, mistakenly assume they are in compliance. Others are persuaded that the federal or state constitutions preclude action, based on entrenched understandings regarding the separation of church and state. Meanwhile, FBOs often remain concerned that contracting with the government will compromise their identity and lead to state control. These problems point to the need for education regarding Charitable Choice. States must understand that the legislation forbids discrimination against FBOs if they contract out services. Meanwhile, FBOs need to be informed of the provisions for protecting the unique nature of their organizations.

## **What Criteria Should a Solution Meet?**

In the foregoing analysis, we have identified that impediments to implementation exist as a result of: a lack of understanding of Charitable Choice at a state level; FBO fears of excessive governmental burdens (including the possibility that religious missions might have to be diluted or jettisoned in order to comply with governmental regulations); and the uncertain status of Charitable Choice with respect to various constitutional provisions. The combination of these factors has led to something of a political problem as well; groups that would be expected to show support for Charitable Choice have in many cases joined the opposition. Given that the goals of Charitable Choice provision were to encourage local and community cooperation in the fight against poverty while protecting the religious integrity of organizations that choose to participate and to protect the civil liberties of beneficiaries, it is critical that the solutions recommended speak to these needs. Thus, we have developed the following criteria by which any option should be evaluated before recommendation.

- Constitutionality
- Federalism (Maintain State Control)
- Maintenance of FBO Integrity
- Accountability
- Feasibility

## Constitutionality

Since the landmark 1947 Supreme Court decision *Everson v. Board of Education*, the constitutionality of any state-sponsored program that benefits religious organizations has come under intense scrutiny. The decision seemed to simultaneously prohibit all contact between church and state while permitting such contact under certain conditions. In *Everson*, the Court upheld a state program that paid for bus transportation for students, including students of Catholic schools, while remarking that “[t]he First Amendment has erected a wall between church and state. That wall must be kept high and impregnable.”<sup>26</sup> This decision provided ample support for citizens (and Supreme Court Justices) partial to a doctrine of strict separation between church and state and for those partial to a doctrine that permits church-state interaction provided that these interactions have only a neutral effect. Indeed, many of the Court’s Establishment Clause decisions since have lunched back and forth between those two poles of strict separation and neutrality. Further confusing the issue, the Supreme Court reversed one of its own Establishment Clause decisions (*Aguilar v. Felton* (1985)) in the 1997 case *Agostini v. Felton*,<sup>27</sup> and several Justices seem ready to reject the framework (provided in the 1971 case *Lemon v. Kurtzman*) through which

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<sup>26</sup> *Everson v. Board of Education of Ewing Tp.*, 330 U.S. 1 (1947).

<sup>27</sup> Justice O’Connor wrote for the Court that “[p]etitioners maintain that *Aguilar* cannot be squared with our intervening Establishment Clause jurisprudence, and ask that we explicitly recognize what our more recent cases already dictate: *Aguilar* is no longer good law. We agree with petitioners that *Aguilar* is not consistent with our subsequent Establishment Clause decisions...” *Agostini v. Felton*, 521 U.S. 203 (1997).

the Court decided virtually all of its subsequent Establishment Clause cases.<sup>28</sup>

Despite this confusion, a few seemingly solid guidelines can be inferred from the Court's decisions. First is that a program will likely pass the Court's scrutiny provided that the program serves a legitimate public purpose and that it is not designed as a veiled attempt to advance a particular religious organization or denomination; most Charitable Choice programs that comply with Section 104 of the PRWORA would likely meet this guideline. Next, the Court has consistently ruled that religious organizations can legally accept public funds if those funds are directed to the organization by the choices of the government program's individual beneficiaries.<sup>29</sup> Since the strictest constitutional scrutiny has been given to elementary and secondary school programs (whose students, it has been reasoned, are young, impressionable, and generally without choice in which school they attend) while programs for university students or adults who are more competent to make choices on their own behalves have been treated more leniently, it seems that Charitable Choice programs which allow adult beneficiaries a range of

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<sup>28</sup> A number of scholars have begun to question whether the Lemon test retains any authority; one such scholar remarked that "[t]he much-battered doctrinal test...has not supplied the basis for overturning a law in over ten years, and at least five members of the court think it should be replaced. The trend, if anything, is towards less stringent demands for separation of church and state than Lemon implied.... The Court has not yet, however, rejected the Lemon test, nor has it approved an alternative single doctrinal framework." Minow, Martha. "Choice or Commonality: Welfare and Schooling After the End of Welfare as We Knew It," 49 *Duke L.J.* 243.

<sup>29</sup> *Mueller v. Allen*, 463 U.S. 388 (1983) upheld a Minnesota statute that permitted taxpayers to deduct tuition, textbook, and transportation expenditures related to the education of their children because the benefit was available to all parents (in spite of the fact that "the bulk of deductions taken...will be claimed by parents of children in sectarian schools"), that it was one of many deductions available (and thereby not a "thinly disguised 'tax benefit'"), and because "under Minnesota's arrangement, public funds become available only as a result of numerous private choices of individual parents of school-age children." *Witters v. Washington Department of Services for the Blind*, 474 U.S. 481 (1986) stated that a blind individual who qualified for state vocational rehabilitation assistance was within his rights to use program funds to pay his tuition to a Christian college to be trained to be a pastor, missionary, or youth minister. The Court opined, "[a]ny aid provided under Washington's program that ultimately flows to religious institutions does so only as the result of the genuinely independent and private choices of aid recipients." Additionally, the Court held that "nothing in the record indicates that...any significant portion of the aid expended under the Washington program as a whole will end up flowing to religious education. The function of the Washington program is hardly to 'provide desired financial support for nonpublic, sectarian institutions.'" *Zobrest v. Catalina Foothills School District*, 509 U.S. 1 (1993) held that a deaf high school student who had been provided (under the terms of the Individuals with Disabilities in Education Act and a similar state statute) with a sign-language interpreter during his years at a public high school could expect the school district to provide him with an interpreter after he decided to attend a parochial high school. It reasoned that the IDEA was a "general government program that distributes benefits neutrally to any [qualifying] child," and that "[b]y according parents freedom to select a school of their choice, the statute ensures that a government-paid interpreter will be present in a sectarian school only as a result of the private decisions of individual parents."

choices will likely be treated more leniently as well. In addition, programs that include religious and non-religious providers can avoid creating potential problems associated with beneficiary religious rights by allowing beneficiaries several choices.

### **Federalism (Maintain State Control)**

One of the major legislative goals of the PRWORA was to devolve the administration of welfare policies to the state level. Congress recognized that federal anti-poverty programs had been largely disappointing and reasoned that states and localities would be better able to devise innovative and effective solutions if given the autonomy to do so. The Charitable Choice provision supports this concept by allowing FBOs, which are already actively involved in their communities and better aware than any state agent could be of their neighbors' needs, to participate in the administration of social welfare services. In keeping with the spirit of the original legislation, our recommendations will be focused on keeping the administration of welfare programs at the state or local level.

### **Maintenance of FBO Integrity**

Many FBOs fear the possibility that government involvement may undermine the religious character of the organization. While recognizing that there are many positive effects of government-FBO cooperation, the risk of cooptation remains a real threat. Our recommendations will be constructed to provide maximum protection to the autonomy and character of FBOs.

### **Accountability**

Another primary concern when devolving these programs to the state and local level relates to ensuring the accountability of both states and FBOs. First, state welfare officials responsible for implementing the Charitable Choice provisions of the PRWORA must be held accountable.

FBOs that believe their rights under Section 104 have been violated should have some means to seek a remedy. Similarly, beneficiaries who suspect that their religious rights have been endangered by participation in a Charitable Choice program must have channels to seek redress.

Additionally, FBOs charged with providing services to beneficiaries must be held accountable for appropriating funds in accordance with their public purpose. Any government entity offering funds to a private organization will be interested in how those funds have been used. Therefore, it is important to ensure that reporting requirements provide states and localities with the necessary information to ensure the integrity and monitor the results of their programs but that these requirements not create such a burden on FBOs as to prohibit them from offering social services under Charitable Choice.

## **Feasibility**

Any recommendations for the implementation of Charitable Choice must be politically acceptable (or they must at least have a reasonable chance of being so). Although both the Democratic and Republican parties showed support for the Charitable Choice programs during the 2000 campaigns, some legislators and interest groups have been hostile toward any implementation of the program. In order for any proposal to be successful, the concerns of FBOs and religious groups who are withholding support due to fears of losing their religious missions to government regulations must be addressed. Ideological opponents of Charitable Choice will not be swayed, but proposals will have a greater chance for success if they try to account for these opponents' criticisms. (It is doubtless that ideological opponents will challenge Charitable Choice programs in court, but to the extent that programs can be designed in such a way to sidestep likely avenues for legal challenges, Charitable Choice can be tried not in court but on its merits.)

The aforementioned criteria will be applied to the potential functions of the OFBCI in its efforts to encourage the implementation of Charitable Choice. Now, we will discuss the functions that we suggest that the OFBCI coordinate. These include the coordination of education and enforcement efforts, and funding recommendations.

# Implementation of Charitable Choice

## Chapter 1: Education

One of the primary factors inhibiting implementation of Charitable Choice is widespread ignorance on the part of both states and FBOs. States have a variety of misconceptions that have led them to believe they are in compliance or can ignore the provision; FBOs are unused to collaborating with government and are unaware of the provisions protecting them. Thus FBOs remain leery, and rightfully so – as long as states remain out of compliance there is little opportunity for FBOs to apply for federal funds, and no formal protections written into their contracts if they do apply.

With this in view it appears that simply passing the legislation does little to encourage widespread community involvement in ameliorating poverty; there must be an educative component as well. We recommend that the OFBCI take on the primary role of directing education efforts towards the states and FBOs, to ensure that the legislation is implemented. There are many possible roles the OFBCI could play as an educator of state welfare officials and FBOs, ranging from a passive role of serving as an information clearinghouse for FBOs and states interested in Charitable Choice to a more aggressive educative role in which the OFBCI gives clear recommendations as to actions an FBO or state can (or should) take. The following is an evaluation of three education options.

### ***Option #1: Passively Educate States and FBOs***

As an information clearinghouse, the OFBCI would serve as a resource for both states and FBOs interested in pursuing collaborations. It would collect information for the states regarding what action states must take to be in compliance. Should states request assistance, the OFBCI could recommend funding measures and programs that would best insulate the state from constitutional challenges. FBOs could access information regarding their rights to compete for grant funding and about the protections built in to Section 104 that permit them to administer programs consistent with their mission while maintaining the integrity of

the organization. FBOs experiencing discrimination would be able to lodge a complaint with the OFBCI, which would decide whether to investigate the claim further (see enforcement section below). Specific informational tasks the OFBCI would undertake include: publishing a guide to understanding and implementing Charitable Choice, maintaining information about successful programs in operation, disseminating information to states and FBOs about legislative changes, and providing staff to answer questions.

The clearinghouse model is feasible, establishing a baseline educational structure, without intruding into the affairs of the states or FBOs. States are given full responsibility for their compliance with Charitable Choice and the OFBCI's passive role would prevent government entanglement with religious organizations. However, as evidenced by the current lack of implementation, continuing to allow states to educate themselves regarding Charitable Choice is too passive. The ignorance factor would remain high, with states still out of compliance. FBOs would continue to be denied access to government grants due to unchanged RFPs. Additionally, they would be vulnerable to state interference if protections were not written into their social service contracts. Because this model allows for the least dissemination of knowledge, it would result in comparatively minimal participation by FBOs and States

**Constitutionality:** There are no apparent constitutional problems.

**Federalism:** This option impinges least on the abilities of states to implement their own Charitable Choice programs; however, states would be free to ignore or only weakly implement Charitable Choice requirements.

**FBO Integrity:** Because this option is non-intrusive, FBOs would not face significant threats to their missions from the OFBCI, but without changes made to existing contracts between states and FBOs, the FBOs are vulnerable to state interference.

**Accountability:** While the education function of any Charitable Choice implementation plan is only minimally related to accountability, one drawback of this education option is that states are not required to participate in the education programs, maintaining the ability of states to claim ignorance of their responsibilities under Section 104.

**Feasibility:** Being the most passive role the OFBCI could play; this option is the easiest to implement and the least controversial.

***Option #2: Voluntary Education for FBOs and Mandatory Education for States***

The second option would be to have the OFBCI direct voluntary education for FBOs and mandatory education for the states. It would serve as a passive clearinghouse of information for FBOs, providing the same kind of educational resources described in the first option. The communication with the states would be more formal, including establishing federal liaisons to various state officials and departments to educate them regarding the legislative requirements. Specific areas of education for the states would include instructing states on how to comply with the legislation, defining constitutional issues, explaining acceptable and unacceptable RFP language, and discussion of successful models from other states.

This model prevents excessive entanglement with FBOs while giving them the benefit of access to information through the clearinghouse. On the state level, it addresses the problem of ignorance about Charitable Choice that currently contributes to state non-compliance. Formally educating the states should lead to higher levels of compliance, which should increase access for FBOs. Additionally, as states codify the protections directed by the Charitable Choice guidelines, the integrity of the FBOs contracting with the states will be better protected. Finally, this model provides accountability, as the states can no longer claim ignorance as the source of their non-compliance.

Because this model does impose some federal interference on the states, it does not meet the federalism criteria as well as the passive education model. In addition, because FBOs are not actively educated, many will remain ignorant of the opportunities and provisions for government collaboration, likely resulting in lower participation. This ignorance will also compromise the FBOs' ability to hold the states accountable for proper implementation.

**Constitutionality:** This option poses few constitutional issues. It minimizes government interference with FBOs, avoiding charges of excessive entanglement, and protects the civil liberties of clients by



educating the states regarding their responsibility to provide options for welfare recipients.

**Federalism:** Because this option presents more federal interaction with states, it does not meet the federalism criteria as well as the first option. However, the OFBCI's role has been designed to allow maximum state autonomy while directing states how to comply with existing legislation. States are merely informed of their obligations but retain the responsibility of implementation as well as outreach to FBOs.

**Maintenance of FBO Integrity:** This option better protects FBO integrity by instructing states to include protective provisions in contracts with FBOs. Should an FBO pursue a partnership, they have access to information that will allow them to fashion programs that are constitutional and protect the organization from state interference.

**Accountability:** Education promotes accountability by removing the state's ability to claim ignorance and by fostering two-way communication, allowing the OFBCI to gather information and respond to concerns regarding implementation.

**Feasibility:** Balances the need for education with the available resources necessary to undertake this task. It takes advantage of the administrative structure already available in the states, while avoiding the impractical task of creating an outreach structure within the OFBCI for FBOs.

### ***Option #3: Mandatory Education for States and FBOs***

The final option would be to create a formal communication model for educating both the states and the FBOs. Federal liaisons would be assigned to actively seek out and educate FBOs as well as educating state officials. Additionally, the OFBCI would retain the role of information clearinghouse.

Under this model the states and FBOs would be the best informed. This should decrease the number of states out of compliance, instructing them both why and how they should implement the Charitable Choice reforms. In addition, the more aggressive education of FBOs would likely encourage otherwise reticent FBOs to enter the social service provision market. A more educated private sector would likely exert soft pressure on the state to comply as well, creating another incentive for Charitable Choice implementation.

Nonetheless, this model presents problems as well. It is the least sensitive to state autonomy, giving more control to the federal actors involved than the other options. The proactive stance in relation to the FBOs might be construed as an “excessive entanglement.” In addition to the constitutional concerns, there are resource considerations. While educating the states would only require the addition of a few liaisons, it would be necessary to create a new personnel structure to educate FBOs. This would be considerably more expensive, and require far greater manpower. For these reasons as well as others, it is clear that an aggressive education effort at the federal level is an impractical and inefficient means to deal with FBOs on a local level.

**Constitutionality:** An aggressive policy of educating FBOs about Charitable Choice might be construed as “excessive entanglement,” potentially creating a violation of the Establishment Clause.

**Federalism:** This option allows the least state autonomy, not only because the federal government is in the position of directing the states to implement Charitable Choice but also because it usurps their role in outreach to the FBOs, extending the federal arm down to the local level.

**Maintenance of FBO Integrity:** This option is most likely to protect FBOs, as both states and FBOs would be notified of the state’s duty to include protective provisions of the Charitable Choice legislation.

**Accountability:** By formally educating states regarding their obligations under the legislation, this option removes any claims to ignorance and creates accountability. Additionally, FBOs would be aware of the provisions and would exert soft pressure on the states to comply.

**Feasibility:** This option is undermined by serious logistical constraints. The federal government is not well positioned to deal with FBOs on the local level. The expense and staffing are prohibitive, and even if it were practical, it would not be advisable to try to micromanage from the federal level.

***Recommendation: Mandatory Education for States and Voluntary Education for FBOs***

Our recommendation would be to have the OFBCI direct voluntary education for FBOs and mandatory education for the states. Serving as a passive clearinghouse of information for FBOs, the OFBCI would simply provide educational resources. Communication with the states would be more formal, assigning liaisons to educate them in regards to the legislative requirements. Specific areas of education for the states would include instructing states on how to comply with the legislation, defining constitutional issues, explaining acceptable and unacceptable RFP language, and discussion of successful models from other states.

**Constitutionality:** Minimizes entanglement and protects client civil liberties.

**Federalism:** Provides some federal interference through federal direction of states regarding how to comply; however, some state autonomy is preserved by their choice of the method of implementation.

**FBO Integrity:** Protects FBO integrity by instructing states to include protective provisions in contracts with FBOs.

**Feasibility:** Balances the need for education with the available resources necessary to undertake this education.

**Accountability:** By formally educating states regarding their obligations under the legislation, this option removes any claims to ignorance.

***Implementation: Educational Content***

The first step in setting up an educational arm for the OFBCI is determining the educational content to be provided. For states, this content should include the information regarding the terms and guidelines of the legislation and how it should be implemented. First, they should be informed that compliance is required, that states are not exempted due to provisions of their state constitutions or misperceptions regarding separation of church and state. Once this is established, states

should then be familiarized with the Charitable Choice guidelines for implementation, specifically the requirement that RFPs be updated to provide access for FBOs, and that protective provisions are written into contract. The OFBCI could provide sample RFPs and contracts for states to emulate. Finally, the OFBCI could advise states regarding constitutional issues, including updates on the current status of litigation and recommendations regarding ways to prevent lawsuits, such as vouchers. Similarly, the OFBCI could provide resources to inform interested FBOs regarding the provisions and protections of the legislation, resources for enforcement, and constitutional issues.

### ***Implementation: Communication Structure***

Our recommendation is to empower the White House branch of the OFBCI to develop the content of the information to be communicated and then direct its Center in HHS to disseminate this information through liaisons to the states. In this manner, the OFBCI can insure that the education is consistent and complete. We recommend that the states add additional liaisons for further facilitation of information on the state and or county level as needed. These liaisons would serve the social service providers and recipients as an informational resource.

For FBOs, the HHS Center will also serve as an information resource. Personnel should be made available to answer questions, maintain an updated website, and have information available to send out upon request. It will supply the FBOs with information detailed in the content section above, including how to apply for grants, parameters of eligibility, and the protections included for FBOs that undertake a partnership. The HHS Center should also encourage state departments to create a similar information hub for FBOs at the state level.<sup>30</sup>

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<sup>30</sup> For a graphical representation of this communication structure, see Appendix C.

## Chapter 2: Enforcement

An aspect of Section 104 that has contributed to its slow implementation is that it includes no enforcement provisions other than in subsection (i) which provides that “[a]ny party which seeks to enforce its rights under this section may assert a civil action for injunctive relief exclusively in an appropriate State court against the entity or agency that allegedly commits such violation.”<sup>31</sup> This is a very limited enforcement measure, and so far, no FBO has been willing to take a state or municipality to court to establish their right to bid for services. FBOs, by virtue of their small size, limited resources, religious orientation, and community relationships, are understandably reluctant to enter into a lawsuit that could devastate their reputation, financial status, or both. Nevertheless, it seems that some type of enforcement is necessary in order to ensure that states are motivated to comply with the legislation. Though education should bring states to a higher level of compliance, there must be a means by which to motivate the more recalcitrant entities. The following section discusses three enforcement options.

### *Option #1: OFBCI Audits and Punitive Measures*

Many would expect the enforcement provisions to issue solely from the White House Office of Faith Based and Community Initiatives. Under this scenario, the White House OFBCI could exert pressure on states to implement Charitable Choice by requiring periodic audits of state RFP processes and other social service provision procedures to ensure compliance. Because of the OFBCI’s limited size, the organization could perform routine audits on a sample of states annually, while performing audits that are more specific only if substantive allegations of non-compliance arise. If an audit revealed that a state was out of compliance, the OFBCI could recommend that the state have its block grant reduced or direct that other punitive measures be taken. Though these enforcement measures were not explicitly included in Section 104, punitive measures are viable option because the Executive branch does have some discretionary authority over resources.

By empowering the OFBCI in this way, the FBOs would have a much stronger guarantee that their ability to provide social services would not

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<sup>31</sup> Center for Public Justice. *A Guide to Charitable Choice*. p. 30

be abridged. However, such an option could run counter to the original intent of the legislation, which was to remove the inefficiencies of federal controls by devolving control to the state level. Also, extending the OFBCI's audit powers might alienate state welfare officials, with whom the office must work closely to ensure that Charitable Choice is implemented. However, the greatest weakness of this option is that the White House OFBCI, due to its small size and limited scope, simply does not have the capacity to handle this task.

**Constitutionality:** While this option does not grant the OFBCI explicit punitive authority, it does give the OFBCI some discretionary powers. Though most executive departments already undertake procedural audits and punitive measures, affording the OFBCI the discretion to apply punishment may create some constitutional problems.

**Federalism:** This option subjects the states to an increased level of federal authority, by adding another federal office with audit powers.

**FBO Integrity:** The strength of this provision better protects FBOs by compelling compliance.

**Feasibility:** The White House OFBCI was designed to be small and this provision far exceeds the capacity and desired scope of this office.

**Accountability:** Given the relative strength of this provision, states would be more likely to comply with Charitable Choice provisions.

### ***Option #2: Department of Justice Enforcement***

Because the only enforcement provision included in Section 104 of the PRWORA is through state court action, we should consider how to enhance enforcement under the legal system. The Department of Justice (DOJ) could empower the DOJ Center for Faith-Based and Community Initiatives (DOJ Center) to operate in a manner similar to its Equal Employment Opportunity Commission (EEOC), which works together to investigate and prosecute employment discrimination claims. The DOJ Center could likewise investigate claims of violations of Section 104 of the PRWORA and prosecute the most substantive claims.

This option offers stronger enforcement of Charitable Choice law than OFBCI-based enforcement options do, but it raises significant questions

about legal controversies between the federal government and the states, particularly if the federal government is arguing on behalf of religious entities' rights to administer federal programs.

**Constitutionality:** Because the DOJ would be working on behalf of religious organizations (as opposed to individuals in the case of the DOJ's employment discrimination enforcement effort), there would certainly be charges that such a program violated the establishment clause, potentially jeopardizing the future of Charitable Choice.

**Federalism:** This option would constitute a serious abridgment of state autonomy.

**FBO Integrity:** This enforcement provision is very strong and would likely ensure that FBOs religious identities were protected.

**Feasibility:** This option would be politically problematic because of the constitutional concerns.

**Accountability:** This provision would likely ensure state compliance due to fears of DOJ prosecution.

### ***Option #3: Department of Health and Human Services***

The Department of Health and Human Services (HHS) has been given the authority and the responsibility to oversee several aspects of the PRWORA including TANF and Charitable Choice. Opting to locate an enforcement arm within HHS would be an acceptable and feasible alternative because HHS already has agencies active in each state overseeing the administration of social welfare. The main goal of the office within HHS would be to monitor the states and pressure non-compliant states to comply. This pressure would entail making an authoritative party (for instance, the state's Department of Health and Human Services director) aware of the violation and recommend that remedial measures be taken. However, it is unclear whether HHS has any authority beyond pressuring states to comply with the provisions. Though HHS has a limited range of discretionary punitive authority, it is not apparent whether this authority is applicable to enforcing compliance with Charitable Choice. For this pressure to be effective additional legislation may be required to strengthen the weak enforcement provisions of Section 104.

**Constitutionality:** No aspect of this enforcement provision proceeds beyond the guidelines of Section 104 of the PRWORA. Additionally, the specific and limited nature of the enforcement provision minimizes the possibility of entanglement claims.

**Federalism:** This structure will maintain the balance between states and the federal government. The primary role of HHS will be to work with local officials to correct the problem before resorting to federal solutions.

**FBO Integrity:** Empowering HHS to enforce Charitable Choice implementation should bring states further into compliance resulting in a codification of the protective guidelines of Section 104. Additionally, identifying HHS as the responsible agency would provide FBOs somewhere to turn if they feel shut out of the social service provision market or if they perceive that state officials have improperly attempted to attenuate their religious character.

**Feasibility:** Under this option, the OFBCI remains within the parameters of Section 104, which makes it politically and practically feasible. Should stronger enforcement be desired, new legislation would likely be required to retain this level feasibility.

**Accountability:** This option increases accountability through monitoring and pressure. In the event that a state is informed of what to do and chose not to act, HHS could resort to contacting a higher-level state official or a federal official to request that they hold the non-compliant agency accountable.

### ***Recommendation: HHS Enforcement***

We recommend that the enforcement function of the OFBCI be facilitated through the Center for Faith Based and Community Initiatives within the Department of Health and Human Services (HHS). Locating the enforcement function within HHS is the most workable option both politically and practically. HHS is already in communication with states (and some FBOs) as part of its role in overseeing the TANF program, and the OFBCI will be in contact with HHS through its Center for Faith Based and Community Initiatives. In the event that HHS learns of possible violations of Charitable Choice law, it could initiate procedural audits of states to determine whether a violation in fact exists. Because HHS has



minimal punitive authority, the purpose of such investigations would be principally to educate recalcitrant state or municipal governments about how to come into compliance with the law. In the event that a violator of Section 104 fails to come into compliance with the law, even after being instructed how to do so, HHS would make an authoritative party (for instance, the state's Department of Health and Human Services director) aware of the violation and recommend that remedial measures be taken.

**Constitutionality:** HHS currently has oversight powers and it is acceptable if they use these powers to monitor Charitable Choice compliance in a limited fashion.

**Federalism:** Since states are already subject to HHS oversight and this option adds nothing to their oversight or enforcement powers, there is no diminution of state autonomy with respect to the federal government.

**FBO Integrity:** Having the Department of HHS monitor states for compliance with Charitable Choice legislation will help FBOs protect their religious missions.

**Feasibility:** HHS already has an established infrastructure throughout the states and OFBCI could utilize these existing channels.

**Accountability:** This option increases accountability through monitoring and pressure on the states into compliance.

### ***Implementation***

There are two major components of the OFBCI's responsibility under this enforcement structure: monitoring state implementation and pressuring states towards compliance. The monitoring function would utilize the current channels of communication between HHS and the states. HHS should ensure that states have received information about their legal rights and duties under Charitable Choice law and are made aware of the consequences for non-compliances.

This monitoring would reveal those states that have not complied. HHS officials can then seek to inform officials responsible for the alleged violation about the complaint and try to pressure these officials to remedy the problem. If unsuccessful in convincing a non-compliant state agency to revise its practices, HHS could then present this violation to a higher level of state authority (proceeding up to the federal government if necessary) and recommend a course of action.

## Chapter 3: Funding

While it is mandatory that states allow FBOs to compete for contracts where other non-state service providers compete, states do have some flexibility concerning methods of funding. The three primary funding options the states may employ are 1) Direct Grant funding, 2) Indirect Grant funding, and 3) Voucher payments. The constitutional debate may be influenced by which type of funding is utilized; funding measures also determine FBO ability and willingness to participate in the Charitable Choice initiatives. Additionally, funding affects the degree to which the civil liberties of the welfare clients are preserved. Each option, with its attendant costs and benefits, is discussed in the following section.

### *Option #1: Grant Funding: Direct Collaborations*

As the name implies, direct funding collaborations involve the government entering into contract for services with an FBO. At times, this contract is sufficient to fund the entire program, while other contracts require the FBO to supplement the funding with resources from non-governmental sources. These contracts can take on two primary forms: cost reimbursement contracts, where the FBO spends the funds and submits receipts to government for reimbursement, and performance based contracts, where funding is transmitted to the FBO from the government once certain goals, such as job placement or graduation from a program, are achieved.<sup>32</sup> When services are funded by government contract, funds may not be used for worship services, doctrinal instruction or proselytization.

At this time, government contracts are primarily administered in the form of direct grants. The primary advantage of funding initiatives in this way is that an infrastructure exists, has been tested over time, and possesses built in communication and management networks, as well as systems of monitoring and accountability. This being the case, it should not be surprising that many of the new collaborations spurred by Charitable Choice legislation are funded by direct contracts; a recent study noted that approximately 75% of the Charitable Choice ventures since 1996 are funded in this manner.<sup>33</sup>

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<sup>32</sup> Sherman, *Ibid.* Pg. 12-13

<sup>33</sup> Sherman, *Ibid.* Pg. 64

However, direct funding is not without its problems. The process is fraught with barriers that prevent many FBOs from participating—including funding streams too large to tailor to small programs, difficult grant writing, and burdensome reporting. Programs that are able to secure funding are confronted with the reality that government payments often arrive several months after services are rendered, making it difficult (especially for small organizations) to maintain the necessary infrastructure. In addition to these concerns, there are the more difficult questions of FBO identity and protection. In the short term, the attendant religious restrictions may compromise the FBO programs. In the long term, the unsettled constitutional questions leave both FBOs and states vulnerable to lawsuits. If the funding was determined unconstitutional due to possible entanglement, establishment, or equal protection challenges, the FBO could find itself in a “bait and switch” situation. Having hired a staff and built a program, the funding could become contingent on restrictions that would compromise the nature of the organization, leaving FBOs in a difficult position.

**Constitutionality:** Because funds go directly to FBOs, the government may be construed as establishing religion, especially if the funds provided to religious organizations are not segregated.

**FBO Integrity:** Under a direct contract, the FBO may be forced to follow certain guidelines from the state to receive the grant. This may compromise their religious mission. Additionally, should Charitable Choice be ruled unconstitutional, the potential remains for religious character of FBOs to be jeopardized by changing regulations.

**Feasibility:** Politically, this may be the most popular option because the state government controls the amount of money that is flowing to each religious organization and can control their programs to a certain extent. Practically, this government control may alarm the FBOs and discourage their involvement in social welfare functions.

**Accountability:** Accountability is primarily provided through the stipulations placed in the contract. The contract ensures that the FBO will offer the proper services to the needy in accordance with the public purpose of the funding and that organizations can clearly demonstrate how they plan to meet their promised objectives.

***Option #2: Grant Funding: Indirect Collaborations***

Government funding is also transmitted to FBOs through indirect contracts. States are increasingly forging contracts with independent service providers (ISPs) (including, for example, non-profits like Goodwill Industries or for-profit organizations like Lockheed Martin) to administer a number of different social services over a broad area. These ISPs in turn sub-contract services to smaller organizations, including FBOs. Because this form of payment still involves a government contract, religious restrictions on programs remain, but some of the burdens on FBOs associated with direct government relations are minimized.

FBOs contracting with independent service providers have expressed a great deal of satisfaction with the relationship for a number of reasons. Working through an intermediary often increases the “comfort level” of FBOs collaborating with the government for the first time.<sup>34</sup> ISPs are typically more administratively skilled and have the experience and infrastructure necessary for administering government contracts. Administration by an intermediate party reduces the complexity of the grant writing and reporting processes for FBOs, making FBOs better able to meet governmental grant requirements and therefore more likely to bid on various grants. Obtaining grants and reporting to intermediary organizations is typically a far more streamlined process than if the FBO was contracting directly with the government. Intermediary organizations also enable FBOs to work at a scale that is appropriate; while the government typically administers large-scale block grants, indirect funding would allow a small FBO to serve just a few families or administer just one program funded by a large grant. Finally, the increased distance from government provides the FBOs a greater sense of freedom to implement programs consistent with their competencies and religious missions. Thus, indirect contracts remove many of barriers preventing FBOs from accessing direct government contracts.

While indirect contracts minimize many of the practical restrictions posed by direct contracts, funding in this manner nonetheless retains some of the constitutional haziness found with direct contracts. FBOs and government are still faced with the specter of lawsuits or changing legislation that might compromise the partnership. Another difficulty encountered is that an ISP is independent of the government and cannot

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<sup>34</sup> Sherman, *Ibid.*, at 18.

be created nor compelled to fill the role of middleman. Thus, this model is dependent on the availability and willingness of ISPs to manage contracts. Accountability is another concern; without direct control there is the question of whether states could adequately monitor the services of organizations that the ISP contracts.

**Constitutionality:** By contracting through intermediary organizations, the government entanglement is minimized; nonetheless, because government funds are flowing to religious organizations, establishment concerns remain.

**Federalism:** Not applicable.

**FBO Integrity:** Because this option still depends on contracting with the government, it retains the constitutional haziness of direct funding. The potential for changing legislation to remove some of the current protections for FBOs could jeopardize their religious mission, and leaves them open to future lawsuits.

**Feasibility:** Politically, this type of funding should be popular with constituents. In practice, it may be difficult for the state to find an intermediary organization of sufficient size that is willing to undertake the task presented.

**Accountability:** Accountability is provided through stipulations in the contract regarding benchmarks the FBO must achieve, or other measurements of success. The intermediary organization will determine the success of the programs and alter or expand them accordingly.

### ***Option #3: Vouchers***

Under a voucher system, the government first authorizes a variety of service providers according to their demonstrated ability to serve clients and promise to meet specific objectives, such as mentoring a certain number of welfare leavers in their transition to financial independence. Then, funds are issued in the form of vouchers to the clients, allowing clients to choose between the service providers in their area. With vouchers, there are no religious restrictions on the provider's social service programs.

Precedent exists for the use of vouchers in the social service sector – vouchers are already being used successfully in the delivery of day care services. Since 1990, religious organizations have been eligible to receive

federal funds in the form of vouchers for providing day care to the children of low-income families, while retaining the religious character and practices of their organization.<sup>35</sup> A more commonly used voucher system is food stamps. This is a federal program run by the states with numerous recipients and private providers of goods. Food stamps allow the recipient the ability to make decisions while also putting constraints on those decisions (an example being the inability to redeem food stamps for alcohol).

From the perspective of the client, vouchers offer a choice of organizations that best serve the clients needs and convictions. As Stanley Carlson-Thies (a noted Charitable Choice scholar) summarizes, “Vouchers institutionalize diversity.”<sup>36</sup> The client wishing to partake in an intensely religious program is served equally as a client preferring a program based on secular principles. Rather than being forced into a uniform mold, vouchers allow FBOs to maintain the characteristics that make them unique and clients are given the maximum opportunity to access appropriate and effective services.<sup>37</sup> When clients use vouchers to choose providers from a marketplace of services, clients, rather than government, serve as the main actors enforcing accountability and effectiveness.

Vouchers are especially appealing because they do not pose as many constitutional issues. Because funds are given directly to clients, the government cannot be construed as “establishing” religion and is less likely to be deemed “excessively entangled”. Similarly, vouchers are attractive to FBOs because they require less government entanglement in their affairs, and serve as a shield against constitutional challenges.

While vouchers are enthusiastically supported by many charitable choice advocates, they are not a cure-all. The strong feelings attached to the term “vouchers” in our ideologically charged political climate could serve as a barrier to implementing this form of payment. Also, with the

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<sup>35</sup> Again, FBOs would not have to change their character, level of autonomy, or religious and hiring practices. Tobin, William. *Lessons about Vouchers from Federal Child care Legislation*, Policy Papers from the Religious Social Sector Project (Washington, D.C.; Center for Public Justice, January, 1998.)

<sup>36</sup> Carlson-Thies, Stanley. *Faith-Based Institutions Cooperating with Public Welfare: The Promise of the Charitable Choice Provision*, in *Welfare Reform & Faith Based Organizations*. Derek Davis & Barry Hankins, Eds. Waco, Texas: J.M. Dawson Institute of Church-State Studies, Baylor University: 1999 at 45.

<sup>37</sup> Carlson-Thies, *Ibid.*

exception of the child-care cases, there are just a few examples in which vouchers have been used in the context of social service provision, establishing little precedent to guide implementation. Moreover, a successful voucher plan in any locale assumes there is a variety of organizations willing to accept the vouchers. Finally, the certification process required to authorize service providers may pose an entanglement issue, if not constitutionally, then from the perspective of the FBOs – the certification process may be too intrusive. There must be a reasonable balance struck between state certification requirements and the cultivation of a broad range of innovative yet effective service providers.

**Constitutionality:** Because funds go to individual clients, the government cannot be construed as establishing religion, and entanglement is minimized. For vouchers to work, however, it is imperative that clients are given a spectrum of choices, not just religious choices.

**FBO Integrity:** Vouchers also best preserve the integrity and character of FBOs since they are not compelled to remove any religious content from programs as required under direct and indirect contracts. Vouchers also protect FBOs against constitutional challenges and changing legal requirements.

**Feasibility:** Politically, vouchers may encounter resistance; practically, such plans will require municipalities to create a system of fund disbursement and control, and to devise a means by which service providers can be certified.

**Accountability:** Accountability is first provided through the careful scrutiny applied to organizations before they are certified. The certification process helps to ensure that FBOs will offer the proper services to the needy in accordance with the public purpose of the funding and that organizations can clearly demonstrate how they plan to meet their promised objectives. Once established, Accountability is then provided primarily through the market; clients will determine which programs meet their objectives by continuing to recommend and patronize these programs.

***Recommendations: Ranked in order of preference***

**1) Vouchers**

A system of administering charitable choice through the use of vouchers would likely best withstand Constitutional scrutiny while simultaneously offering the most protection to faith-based organizations, and giving clients access to the most appropriate options.

**Constitutionality:** No establishment issues, entanglement minimized.

**FBO Integrity:** Vouchers also best preserve the integrity and character of FBOs since they are not required to remove any religious content from programs, not subject to bait-and-switch.

**Feasibility:** Politically, vouchers may encounter resistance; practically, such plans will require municipalities to create a system of fund disbursement and control, and to devise a means by which service providers can be certified.

**Accountability:** Accountability is primarily provided through the market, as well as through the certification process.

**2) Indirect Funding**

Because of the unsettled nature of the constitutional debate, any type of grant funding, whether indirect or direct, will carry the risk of being ruled unconstitutional in pending cases. However, until vouchers are more widely implemented, indirect funding appears to be the second best option due to the benefits derived by FBOs. With this in view, we recommend that states encourage intermediary organizations to bid for contracts for administering services. In this manner, independent service providers could assume the role of “strategic intermediary organizations that buffer the relationship between government and the faith community.”<sup>38</sup> While indirect funding programs are in many ways appealing, states will need to be creative in working with potential ISPs to design mutually acceptable programs.

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<sup>38</sup> Quoted from Sherman, p. 18.



### **3) Direct Funding**

Currently, the vast majority of government-FBO partnerships are funded through direct grants. Clearly, this is a viable option; however, we rank direct grant funding last, largely because it remains most vulnerable to constitutional challenges. Moreover, from the perspective of the FBO, it lacks some of the advantages of vouchers or even indirect funding. Finally, many of the current contracts are based on an understanding or “gentlemen’s agreement” between the states and FBOs, and therefore lack provisions protecting the FBO. Our recommendation would be that legal protections be written into the contract to protect both parties.

### ***Implementation***

#### **Vouchers**

- OFBCI should encourage the states to implement voucher programs to supplement and replace programs currently administered through grants. To move states in this direction, we recommend that HHS use its discretion in allocation of funds to build in financial incentives for states to implement these voucher programs.
- HHS should encourage states to develop a way to certify social service providers eligible to offer welfare related services that both ensures the competency of its authorized providers while allowing for new organizations to enter the market for service provision. To assist states, OFBCI should provide sample certification criteria and program guidelines that states may emulate.
- For vouchers to work it is imperative that clients are given a spectrum of choices, both religious and secular. States need to actively monitor providers to ensure that this diversity exists. Clients should be informed of various service providers through their social worker or service provider.

#### **Grant Funding General**

Generally, contracts should include a clause stipulating protections for FBOs, as outlined in the charitable choice legislation. Informing states of this necessity should be part of the educative role of the OFBCI.

### **Indirect Funding**

- States should be instructed about the possibility of structuring programs using ISPs and should be encouraged to enlist more intermediary organizations from both the non-profit and for-profit sectors.
- The OFBCI could direct its HHS liaisons to educate their state colleagues on the best way to involve ISPs. For example, states could enlist ISPs in recruiting other competent organizations to collaborate with the state in managing contracts.

### **Direct Funding**

- OFBCI should counsel states about their legal obligations both to permit FBOs to participate in RFPs and to permit FBOs to maintain their religious character when under contract (given that FBOs do not engage in proselytization, sectarian worship or instruction).
- OFBCI should strongly recommend HHS mandate the contracts such as RFPs be rewritten to include protection for FBOs. To assist, they could provide states with sample RFPs and contracts to imitate.

## **Conclusions**

We have selected a combination of options that will provide Charitable Choice the best prospect for success, allowing for maximum impact on alleviating poverty in local communities. In our recommendations, we have been mindful of many of the many constraints currently inhibiting implementation, including political considerations, institutional fears and ignorance, and constitutional challenges.

One of the primary impediments we identified in attempting to implement Charitable Choice is the ignorance of the requirements and provisions of the legislation. Thus, the primary role we have assigned the OFBCI is the role of educating the various levels of government and the faith-based and community organizations. This will be facilitated through collaboration with HHS. By providing formal educational liaisons to the states within HHS, the OFBCI can address institutional

ignorance that currently inhibits compliance. In serving as an information clearinghouse for FBOs, the OFBCI can educate this audience regarding their rights and opportunities under Charitable Choice. This allows the government to encourage cooperation with community level organizations while minimizing government intervention in religious affairs.

Another impediment to implementation is the lack of punitive measures for non-compliance. Without additional legislative authorization, the enforcement of Charitable Choice must remain weak. To offset this weakness, we recommend increased education about Section 104 to spur voluntary compliance in the states. Should states fail to comply when educated about their obligations, we recommend HHS take a more active role in auditing states for compliance and recommending sanctions for non-compliance. This soft pressure, combined with the educative component should shift states towards observance.

Finally, to ensure that the collaborations forged will be successful, we recommend funding options that will best withstand constitutional scrutiny and preserve the integrity of participating organizations. Though aware that all manners of funding will be used, we give our strongest recommendation to a system of voucher payments, while still offering policies to implement other types of funding mechanisms. Vouchers avoid establishment concerns and allow FBOs the greatest independence, while respecting the civil liberties of clients by allowing them to choose providers with a philosophy most consistent with their own.

By implementing these recommendations, the OFBCI will best accomplish what Charitable Choice set out to do, serve and protect those providing and receiving social services.

## Appendix A: Summary of State Compliance

State	Not Protect Rights of FBO	Changed Legislation to permit contracting, but not to protect FBO rights	Do not allow hiring exemptions	Devolved Welfare to counties without Charitable Choice Requirements	Claim Charitable Choice can be ignored	Exempt due to State Constitution
AL						
AK			X			
AZ						
AR						
CA						
CO		X		X		
CT	X					
DE			X			
DC					X	
FL	X			X		
GA	X					
HI	X					
ID	X					
IL	X					
IN						
IA	X					

KS			X			
KY			X			
LA	X					
ME	X					
MD		X				
MA					X	
MI						
MN				X		
MS					X	
MO	X					
MT						
NE			X			
NV						
NH	X					
NJ	X					
NM	X					
NY						
NC						
ND						
OH						
OK						
OR			X			
PN						

RI			X			
SC			X			
SD						
TN			X			
TX						
UT	X					
VT					X	
VI						
WA		X				X
WV	X					
WI						
WY	X					
Guam	X					
Puerto Rico	X					
Virgin Islands	X					
<p><b>Source: Center for Public Justice, Charitable Choice Compliance: A National Report Card</b></p>						

## Appendix B: Summary of Legal Discussion

One significant obstacle to the implementation of Charitable Choice is its legal status. In addition to the uncertainties related to the constitutionality of the concept from an Establishment Clause standpoint, challenges have also been raised about the possibility of violations of the religious liberties of program beneficiaries, the ability of FBOs that receive government funds to retain their exemptions from Title VII of the Civil Rights Act of 1964, and the unconstitutionality of Charitable Choice programs under state constitutions whose lines of demarcation between church and state are much clearer and more restrictive of religion than is the Federal Constitution.

With respect to Establishment Clause jurisprudence, there is precious little settled doctrine, and that which was once settled now seems to be in flux. The first pillar of the Court's doctrine of Establishment Clause interpretation is the 1947 case *Everson v. Board of Education* in which a New Jersey taxpayer unsuccessfully challenged a state program that paid for bus transportation for students, including students of Catholic schools. The Court stated that "[t]he First Amendment has erected a wall between church and state. That wall must be kept high and impregnable."<sup>39</sup> Despite the high and impregnable wall between church and state, the Court held that New Jersey's policy of using the public treasury to finance busing services did not breach this wall of separation as it merely "provide[d] a general program to help parents get their children, regardless of their religion, safely and expeditiously to and from accredited schools"<sup>40</sup>; it was permissible because it served a public purpose. In the first significant Establishment Clause decision in modern America, the Court recognized two principles for construing the Establishment Clause that remain in contradiction to each other today.

The next significant step in modern Establishment Clause law was the 1971 decision *Lemon v. Kurtzman* in which the Court developed a formal, if clumsy, framework for deciding Establishment Clause cases.<sup>41</sup> The Lemon test, which essentially condensed the holdings in previous

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<sup>39</sup> *Everson v. Board of Education of Ewing Tp.*, 330 U.S. 1 (1947).

<sup>40</sup> *Ibid.*

<sup>41</sup> Gedicks, Frederick M. "Religion" in *The Oxford Companion to the Supreme Court*, ed. Kermit L. Hall, New York: Oxford University Press, 1992. p. 719.

Establishment Clause cases, required three lines of inquiry on a questioned policy: 1) does the policy have a secular public purpose that neither endorses nor disapproves of religion? 2) does the policy have an effect that neither advances nor inhibits religion? 3) does the policy foster an excessive entanglement of government with religion? Nevertheless, a number of scholars have begun to question whether the Lemon test retains any authority; one such scholar remarked that “[t]he much-battered doctrinal test...has not supplied the basis for overturning a law in over ten years, and at least five members of the court think it should be replaced. The trend, if anything, is towards less stringent demands for separation of church and state than Lemon implied...The Court has not yet, however, rejected the Lemon test, nor has it approved an alternative single doctrinal framework.”<sup>42</sup>

In the absence of such a clear doctrinal framework through which to evaluate the acceptability of Charitable Choice, it becomes important to examine the manner in which the Court has dealt with similar programs; to the extent that Charitable Choice programs are designed and administered similarly to programs that the Court has previously ruled favorably on, potential challenges will be muted. “One fixed principle,” that the Court offered in *Mueller v. Allen* (quoting from *Hunt v. McNair*), “is our consistent rejection of the argument ‘that any program which in some manner aids an institution with a religious affiliation’ violates the Establishment Clause.” *Mueller v. Allen* (1983) upheld a Minnesota statute that permitted taxpayers to deduct tuition, textbook, and transportation expenditures related to the education of their children because the benefit was available to all parents (in spite of the fact that “the bulk of deductions taken...will be claimed by parents of children in sectarian schools”), that it was one of many deductions available (and thereby not a “thinly disguised ‘tax benefit [ ]’”), and because “under Minnesota’s arrangement, public funds become available only as a result of numerous private choices of individual parents of school-age children.”<sup>43</sup> In *Witters v. Washington Department of Services for the Blind*, the Court ruled that a blind individual who qualified for state vocational rehabilitation assistance was within his rights to use program funds to pay his tuition to a Christian college to be trained to be a pastor, missionary, or youth minister. The Court opined, “[a]ny aid provided

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<sup>42</sup> Minow, Martha. “Choice or Commonality: Welfare and Schooling After the End of Welfare as We Knew It,” 49 *Duke L.J.* 243. See notes 54 and 55.

<sup>43</sup> *Mueller v. Allen*, 463 U.S. 388 (1983).



under Washington's program that ultimately flows to religious institutions does so only as the result of the genuinely independent and private choices of aid recipients." Additionally, the Court held that "nothing in the record indicates that...any significant portion of the aid expended under the Washington program as a whole will end up flowing to religious education. The function of the Washington program is hardly to 'provide desired financial support for nonpublic, sectarian institutions.'<sup>44</sup> In *Zobrest v. Catalina Foothills School District*, (1993), the Court ruled that a deaf high school student who had been provided (under the terms of the Individuals with Disabilities in Education Act (IDEA) and a similar state statute) with a sign-language interpreter during his years at a public high school could expect the school district to provide him with an interpreter after he decided to attend a parochial high school. It reasoned that the IDEA was a "general government program that distributes benefits neutrally to any [qualifying] child," and that "[b]y according parents freedom to select a school of their choice, the statute ensures that a government-paid interpreter will be present in a sectarian school only as a result of the private decisions of individual parents."<sup>45</sup>

From this discussion, we can infer some parameters helpful in establishing the boundaries Charitable Choice will have to exist in to avoid provoking Supreme Court scrutiny. First, Charitable Choice programs must be defined in such a way as to clearly indicate a secular public purpose as opposed to appearing to be a veiled attempt to fund religious organizations. As defined in the 1996 welfare reform bill, Charitable Choice would appear on its face to accomplish this task, merely offering alternative points of service at which social services formerly widely provided by the Federal government can be obtained. There is also a strong indication that the Court would accept a program that allowed individual beneficiaries of government aid to select providers given that beneficiaries had secular providers to choose from.

Apart from the broad question of the Charitable Choice concept's status under the Establishment Clause, questions remain as to specific applications of the program. Primarily, these concerns deal with the religious liberties of beneficiaries who may be subject to exposure to (or required participation in) religious teachings or practices that they

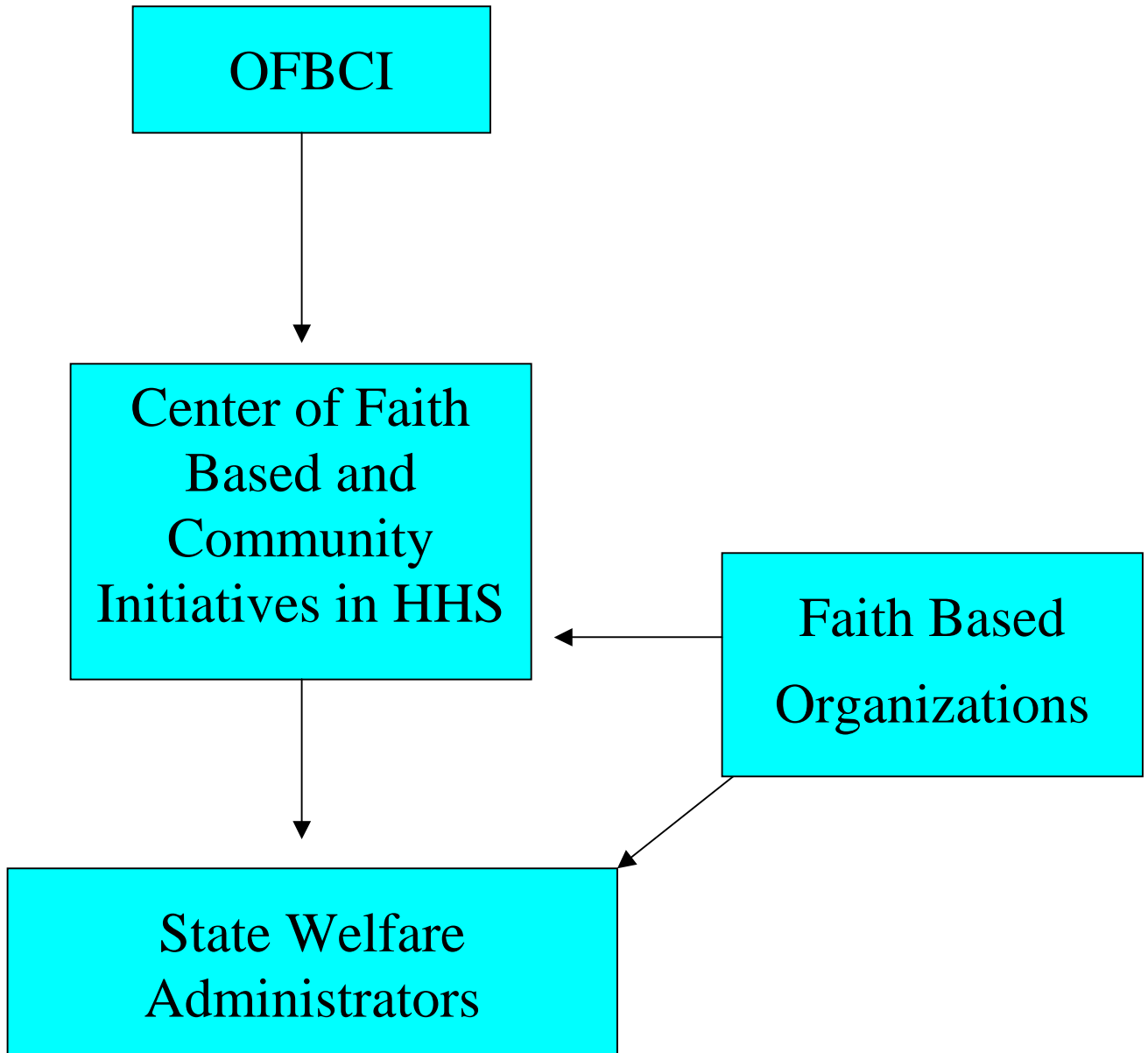
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<sup>44</sup> *Witters v. Washington Department of Services for the Blind*, 474 U.S. 481 (1986)

<sup>45</sup> *Zobrest v. Catalina Foothills School District*, 509 U.S. 1 (1993).

themselves do not subscribe to. Given a variety of acceptable alternatives, a beneficiary paying for services with a government voucher can simply avoid the offensive religious content by switching providers, but in the event a FBO is providing a service under a government grant and is the only provider in an area, such a claim might legitimately be made. Several cases are currently pending at state courts that will likely give the Court an opportunity to express its views on Charitable Choice: *Freedom from Religion Foundation v. Thompson*, a case dealing with Wisconsin's FaithWorks program that is designed to help troubled fathers through drug treatment and job training programs, is working through the Wisconsin courts; *American Jewish Congress v. Bost*, in which plaintiffs challenge the legitimacy of a state-funded welfare to work program in which Bibles are distributed, is being argued in Texas; and in California, plaintiffs in *American Jewish Congress v. Bernick* argue that the California Employment Development Department solicited \$5 million in funds earmarked for FBOs. Apart from these application questions is an important argument about the freedom of FBOs, which are generally exempt from federal employment discrimination laws, to discriminate in their hiring practices against candidates who do not hold beliefs consistent with the beliefs of the organization. A case pending in a Federal district court, *Pedreira v. Kentucky Baptist Homes for Children*, will likely settle this question; a loss for Kentucky Baptist Homes will place Charitable Choice in critical danger.

## Appendix C: Communication Structure



## About the Authors

**Kimberlee LaGree** – Kimberlee LaGree has recently been conferred a Masters Degree in Public Policy and International Studies from Pepperdine University in Malibu, California. This degree augments a Bachelors degree from Westmont College in Santa Barbara California. She has worked on Charitable Choice projects with the Center for Public Justice in Annapolis, Maryland and in development at City Impact, a faith-based non-profit located in Oxnard, California. Although currently residing in California, Kimberlee plans the move to Washington D.C. in July of 2001.

**Sara Lindgren** – Sara Lindgren received her Masters Degree in Public Policy with dual specialization in International Relations and American Politics in April 2001. She received her Bachelors degree in Sociology from Pepperdine University in 1994. Her work with faith-based organizations includes volunteering for the Union Rescue Mission, the Crisis Pregnancy Center, and international work in India. She resides in Sherman Oaks, California, with her husband and two sons.

**Jason Ross** – Jason Ross recently completed his Masters Degree in Public Policy with an emphasis on American Politics. He will begin Ph.D. studies in political theory at Georgetown University in Fall 2001. He has been a Public Affairs Fellow at the Hoover Institution at Stanford University. He was a National Merit Scholar and earned his Bachelors degree (summa cum laude) at Oral Roberts University.

**Matt Taylor** – Matt Taylor received his Masters Degree in Public Policy with a specialization in American Politics in April of 2001. He received his Bachelors Degree in Economics and Political Science from Linfield College in 1999. He has recently worked with the Reason Public Policy Institute, coauthoring policy studies and articles about efficiency in municipal government, government procurement and education reform.