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Protecting the Ministry of Restorative Shelter Care for Trafficking Victims

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SHIELD BEARERS serving faith-based shelter agencies

...and the one that bore the shield went before them... 1 Samuel 17:41

Introduction

One of the founding documents of the United States, the Declaration of Independence, recognizes the inherent dignity and worth of all people. It states that all men are created equal and that they are endowed by their Creator with certain unalienable rights. The right to be free from slavery and involuntary servitude is among those unalienable rights. Acknowledging this fact, the United States outlawed slavery and involuntary servitude in 1865, recognizing them as evil institutions that must be abolished. Current practices of sexual slavery and trafficking of women and children are similarly abhorrent to the principles upon which the United States was founded. 22 U.S.C. §7101(b)(22).

The crime of sex trafficking is defined as “the recruitment, harboring, transportation, provision, obtaining, patronizing, or soliciting of a person for the purpose of a commercial sex act.” 22 U.S.C. §7102(12). In this context, “the term ‘commercial sex act’ means any sex act on account of which anything of value is given to or received by any person.” *Id.* at §7102(4). The law further defines “severe” forms of sex trafficking as the solicitation of trafficked persons through inducement by force, fraud, or coercion,

although the latter inducements are not elements for the crime when involving minors (under 18 years of age). *Id.* at §7102(11). See also 18 U.S.C. §1591(a).

Unfortunately, sex trafficking is not a foreign dilemma unique to other countries but is a reality throughout all communities in America. Recent estimates suggest that over 300,000 individuals – women, men, girls, and boys – are either being trafficked or at risk of being trafficked in the United States.¹ And sadly, a vast number of cases of trafficked children involve familial trafficking, i.e., a child trafficked by a family member in exchange for drugs, cash, or material goods.² Adding to this tragedy, many individuals are victimized to facilitate the production of pornography.

As Congress recently declared, “as the 21st century begins, the degrading institution of slavery continues throughout the world. Trafficking in persons is a modern form of slavery, and it is the largest manifestation of slavery today.” 22 U.S.C. §7101(b)(1). In response, the federal Trafficking Victims Protection Act of 2000 advances a 4-pronged approach to this blight on our nation: prevention, protection, partnership, and prosecution. Of particular concern for this paper, the protection prong focuses on the identification of victims, and the referral to, provision of, and support through comprehensive restorative services to rebuild the lives of survivors.³

Today, there are over 200 shelter organizations in at least forty-one states providing restorative care for trafficking survivors.⁴ Over half of these shelters serve children or women with children, and many of these shelters are faith-based, providing

¹2021 *Annual Report*. National Trafficking Sheltered Alliance.

²Allert, J. (2022). *Domestic Minor Familial Sex Trafficking: A National Study of Prevalence, Characteristics, and Challenges Across the Justice Process*. Institute for Shelter Care.

³*Human Trafficking: An Overview of Services and Funding for Survivors*. National Conference of State Legislatures (April, 2018).

⁴<https://thesamaritanwomen.org/shelter-map/>

services according to religious principles. As might be expected, these shelter organizations require a variety of professionals to come alongside to compliment the collaborative nature of victim services and to protect their ministries in an increasingly challenging environment for faith-based organizations. Such collaborative services include housing, healthcare, counseling, social services, and legal services. Helpful legal services can include criminal expungement, victim/witness advocacy, immigration, custody, and protective orders. In addition, attorneys can help restore trafficking survivors through civil suits for damages and restitution.⁵

While each of these areas of legal services warrants considerable attention, this paper will focus on areas of legal service unique to shelter leadership and services that often are provided and managed in the context of a faith-based ministry. In that regard, Christian attorneys have ample opportunity to join the fight against sex trafficking by coming alongside restorative shelter leaders as “shield bearers” to protect the shelter mission and ministry in America.

Legal Issues Facing Shelter Leaders

Shelter organizations encounter various legal issues and often have need of an attorney who understands the legal landscape of restorative care ministries and the law related to religious liberties. Some of the areas where attorneys can assist faith-based shelter leaders include organizational governance, policies, employment matters, land

⁵For example, the *Trafficking Victims Protection Reauthorization Act of 2003* makes trafficking a chargeable crime under the federal RICO statute and provides a civil right of action for victims to sue traffickers.

use, and housing. In all these areas, attorneys can help shelter leaders facilitate public and government relationships with religious liberties protected.

So, let's begin at the beginning.

Nonprofit Governance

Many faith-based organizations begin at their Secretary of State's new business portal to "register" the new organization. Often, this is conducted through an online form populated to complete and submit articles of organization. Too often, however, these online forms do not contemplate or cover all the criteria necessary for a subsequent tax exemption application to the Internal Revenue Service. For example, some forms may have a "check the box" for the organization's purposes that do not include the language necessary to support the IRS Form 1023 when applying for tax exempt status to receive an IRS determination letter that donors expect. Often, however, these form articles require amending to meet IRS requirements.

To exist as a faith-based nonprofit organization with tax exempt status under Section 501(c)(3) of the Internal Revenue Code, the articles of organization must reflect the public charitable nature of the organization. In this regard, a 501(c)(3) organization must devote, and specifically articulate that it devotes, its resources to educational, religious, scientific, or other charitable activities. In addition, ensuring that the articles of incorporation expressly state the organization's *religious* purposes will help qualify for a religious exemption under Title VII. *See* 42 U.S.C. §2000e-1; EEOC Guidance EEOC-

CVG-2021-3, Section 12.⁶ The IRS Code also requires that the organizing document provide a provision for appropriate dissolution with any remaining assets used exclusively for Section 501(c)(3) exempt purposes, although in some cases the organization may rely upon operation of state dissolution law in the state where the organization is formed. *See, e.g.,* IRS Publication 557 (Rev. February 2021).

So, navigating the tax exemption application is an area where informed legal counsel can assist shelter leaders to facilitate success. For example, the Form 1023 application requires that an applicant include a copy of the organization's articles of incorporation and bylaws, which an attorney can help prepare. In addition, the IRS Form 1023 requires certain representations regarding the organization's policies, such as a conflict of interest policy and executive compensation policy, which an attorney can help prepare. *See* IRS Form 1023 (Rev. January 2020).

By way of further example, nonprofit shelter organizations must understand the restrictions on their activities that the IRS may construe as political or lobbying. Today, significant policy and legislative initiatives arise that might tempt shelter leaders to engage in the political process. However, as a 501(c)(3) organization, a shelter must avoid all appearances of political activity. While the organization may engage in limited lobbying activities, i.e., as long as those activities are insubstantial in relation to the organization's overall activities, it may not engage in partisan political activities, may not endorse candidates, may not make campaign contributions, and may not participate in

⁶As EEOC guidance states, a "religious organization" is exempted from certain prohibitions under Title VII, and courts look to a number of factors to determine if the exemption applies, including "whether the entity's articles of incorporation or other pertinent documents state a religious purpose." EEOC-CVG-2021-3, Section 12(C)(1).

electioneering. Engaging in such political activities endangers the organization's tax exempt status. *See, e.g.,* IRC 162; IRS Reg. 1.162-29

These and other issues related to gaining and maintaining the 501(c)(3) tax exempt status can raise complex and important risk management considerations for nonprofit shelters. For that reason, they represent just a few examples where informed legal counsel can help shelter leadership navigate a path from the beginning of formation to ongoing compliance with the IRS.

Essential Legal Documents

In today's shifting legal and litigious landscape, with new case decisions and new legislation highlighting the cultural challenges of religious liberties and organizational mission, attorneys can help faith-based shelters with the creation of essential legal documents for the organization. These documents include statements of faith and beliefs to clearly identify who the organization is and a statement of final authority to clearly identify who provides ultimate interpretive authority and application of these beliefs. In addition, essential legal documents should include standards of conduct consistent with the statements of faith and beliefs to articulate expectations for employees, volunteers, and clients.⁷ As the Supreme Court affirmed in *Burwell v. Hobby Lobby*, 573 U.S. 682 (2014), religious liberty "implicates more than just freedom of belief. . . . It means, too, the right to express those beliefs and to establish one's religious (or nonreligious) self-definition in the political, civic, and economic life of our

⁷*Maxon v. Fuller Theological Seminary*, No. 2:19-cv-09969-CBM-MRW (C.D. Calif. 2020)(reliance upon Community Standards policy to support student dismissal for violation of policy against "unbiblical sexual practices")

larger community.” Thus, essential legal documents build upon the faith-based foundation as a shield of protection for the organization’s practical operations and to help guide shelter leadership through consistent faith-based decision-making in a changing culture. Moreover, if later embroiled in litigation, these essential documents can serve as evidence supporting the rights of the organization to operate in the manner it chooses to operate. But why are such documents really essential?

To Demonstrate and Protect Who The Shelter Serves

In most cases, trafficking survivors have experienced significant trauma and restorative care services often incorporate trauma-informed care.⁸ For this reason, shelter leaders must make careful and often unique accommodations related to services. This may include lawful discrimination based on characteristics such as religion, sex, and bona fide occupational qualifications. However, such decisions are increasingly challenged today.

One case in point is the Downtown Hope Center, a faith-based shelter for women in Anchorage, Alaska. In 2018, a biological man identifying as a woman presented at the Hope Center shelter demanding a bed. The Hope Center Executive Director denied him admission. The Anchorage Equal Rights Commission subsequently charged the Hope Center with discrimination in violation of the Anchorage public accommodation ordinance, which prohibited discrimination based on gender expression. In response, the Hope Center, with the assistance of attorneys with Alliance Defending Freedom, filed a complaint against the Anchorage municipality seeking declaratory and injunctive

⁸See, e.g., National Practices Survey Report (20217). The Institute for Shelter Care. <https://thesamaritanwomen.org/research-library/>

relief. The Court granted an injunction, concluding that the public accommodation ordinance did not apply to the shelter.⁹ The parties subsequently resolved the matter through entry of a consent decree preserving the shelter’s right to provide a safe place for women based on its religious beliefs. *See* Order dated December 12, 2021, *Downtown Hope Center v. Municipality of Anchorage*, Case No. 3:21-cv-00155-SLG (D. Alaska 2021). With the assistance of counsel, the Hope Center recovered \$100,000 in attorney’s fees and costs.¹⁰

This case provides an illustration how attorneys can help protect shelter ministries by evaluating local and state laws related to “public accommodations” and so-called fairness ordinances that might relate to a shelter’s services and who it serves. Understanding this landscape, counsel can proactively guide the development of essential documents that clearly identify the organization as faith-based and set forth distinctions related to service consistent with the organization’s statement of faith, beliefs, and standards of conduct, i.e., decision-making based on biology instead of gender expression.

To Navigate Government Relationships

Some local governments conduct themselves in ways that discriminate against faith-based organizations. In these cases, as in the Hope Center case, Christian attorneys can serve a critical role in protecting the organization’s mission and ministry through the development of essential legal documents.

⁹*See also* *Fulton v. City of Philadelphia*, 141 S.Ct. 1868 (2021)(a “public accommodation” provides a benefit to the general public allowing members of the general public to avail themselves of the benefit).

¹⁰Joint Consent Decree (October 2, 2019), 406 F.Supp. 3d 776 (D.Alaska 2019).

A case in point is the discriminatory treatment by of a Catholic Social Services (CSS) organization who placed foster children based on a biblical worldview. The City of Philadelphia decided to stop referring children to the faith-based organization and not renew its services contract with CSS unless CSS agreed to certify same-sex couples for placement in contradiction to its faith beliefs. CSS sought legal recourse and the case eventually made its way to the U.S. Supreme Court and, in *Fulton v. City of Philadelphia*, 141 S.Ct. 1868 (2021), the Court held that the city violated the First Amendment by improperly burdening the organization's "religious exercise by putting it to the choice of curtailing its mission or approving relationships inconsistent with its beliefs." In essence, the city could not condition referral services on the nonprofit organization only if the organization violated its own statement of faith and beliefs.

Espinoza v. Montana Dept. of Revenue, 140 S.Ct. 2246 (2020) represents another important case restricting government discrimination against faith-based organizations. In that case, the state of Montana excluded faith-based organizations from its tax credit program, apparently for fear that allowing religious organizations to benefit would violate the Establishment Clause of the First Amendment. However, the Court explained that "disqualifying otherwise eligible recipients from a public benefit 'solely because of their religious character' imposes 'a penalty on the free exercise of religion that triggers the most exacting scrutiny.'" *Espinoza*, 591 U.S., at 8 (quoting

Trinity Lutheran, 582 U.S., at 9-10).¹¹ The Court explained further that “we have repeatedly held that the Establishment Clause is not offended when religious observers and organizations benefit from neutral government programs.” *Espinoza*, 591 U.S., at 7.

Yet another area where informed counsel, along with essential legal documents, can project shelters navigating government relationships involves zoning and land use. In 2000, Congress enacted the Religious Land Use and Institutionalized Persons Act (“RLUIPA”) to protect individuals and religious organizations from unduly burdensome, unreasonable, or discriminatory zoning and land use regulations. *See* 42 U.S.C. §2000cc. Specifically, the statute provides protection against 1) substantial burdens on the exercise of religious exercise, 2) unequal treatment of religious organizations, and 3) unreasonable restrictions on religious assemblies. Although the statute does not define a protected religious institution or religious assembly, case law and Department of Justice guidance¹² suggests an ordinary meaning of those terms to include not only churches and religious schools, but also religious camps, shelters, centers, and social services. *See Lighthouse Inst. For Evangelism, Inc. v. City of Long Branch*, 510 F.3d 252, 284 n.29 (3rd Cir. 2007). Therefore, a well-developed foundation of essential legal documents can support a faith-based organization’s protection in this area.

To Manage Employment and Staffing

Employment represents another key area where essential legal documents can provide needed protection to shelter leaders. In this area, much of the increased

¹¹In *Trinity Lutheran Church of Columbia, Inc. v. Comer*, 137 S.Ct. 2012 (2017) (a government grant helped nonprofit organizations pay for playground resurfacing but disqualified faith-based organizations from receiving benefits, a policy that the Supreme Court characterized as “odious to our Constitution.”)

¹²See DOJ Statement on RLUIPA: <https://www.justice.gov/crt/religious-land-use-and-institutionalized-persons-act>

scrutiny arises from the recent Supreme Court decision in *Bostock v. Clayton County*, 140 S.Ct. 1731 (2020). In that case, the Court held that discrimination prohibited under Title VII of the 1964 Civil Rights Act *because of sex* could encompass discrimination on the basis of an employee’s sexual orientation or transgender status. As Justice Gorsuch wrote in the majority opinion, “it is impossible to discriminate against a person for being homosexual or transgender without discriminating against that individual based on sex.” However, the majority opinion clarified what the Court did not hold:

- *“we do not purport to address bathrooms, locker rooms, or anything else of the kind. The only question before us is whether an employer who fires someone simply for being homosexual or transgender has discharged or otherwise discriminated against that individual ‘because of such individual’s sex.’”*
- *“other employers in other cases may raise free exercise arguments that merit careful consideration. We are also deeply concerned with preserving the promise of the free exercise of religion enshrined in our Constitution: that guarantee lies at the heart of our pluralistic society.”*

Importantly, the Court recognized that organizations may still raise religious liberty defenses to claims of employment discrimination, specifically noting Title VII’s religious exemption as a possible defense. This recognition is important for faith-based shelters because Title VII provides that its prohibition against discrimination shall not apply to religious organizations “with respect to the employment of individuals of a particular religion to perform work connected with carrying on by such” organization. 42 U.S.C. §2000e-1(a). And one factor courts use to evaluate application of the exemption is review of essential organizational documents. *See* EEOC-CVG-2021-3, Section 12(C)(1).

Nevertheless, notwithstanding its limiting language, the *Bostock* decision has been used to expand its application beyond its intended scope and threaten the autonomy of religious organizations. For example, on his first day in office, President Biden signed Executive Order 13988, which sought to apply the *Bostock* ruling across the entire federal regulatory landscape.

“Under Bostock’s reasoning, laws that prohibit sex discrimination – including Title IX of the Education Amendments of 1972, as amended (20 U.S.C. 1681 et seq.), the Fair Housing Act, as amended (42 U.S.C. 3601 et seq.), and section 412 of the Immigration and nationality Act, as amended (8 U.S.C. 1522), along with their respective implementing regulations – prohibit discrimination on the basis of gender identity or sexual orientation, so long as the laws do not contain sufficient indications to the contrary. . . .

In response, the Department of Housing and Urban Development announced that it will enforce the Fair Housing Act consistent with Executive Order 13988, enforcing protections for transgender persons seeking homeless and emergency shelter access.¹³ In addition, the EEOC responded with a *Fact Sheet* broadly applying the rationale of *Bostock* in the employment context, even going beyond *Bostock* by stating “that employers may not deny an employee equal access to a bathroom, locker room, or shower that corresponds to the employee’s gender identity.”¹⁴ To complicate matters for faith-based organizations, the EEOC guidance also takes the position that the religious exemption only permits a religious organization to lawfully discriminate based on religion, i.e., hiring co-religionist employees, but does not permit discrimination based on any other protected class, including sex, i.e., gender identity.

¹³But see *College of the Ozarks v. Biden* (filed in W.D. Mo. 4/15/21, challenging the HUD directive).

¹⁴EEOC OLC Control N. NVTA-2-21-1: *Sex Discrimination, Sexual Orientation, Gender Identity, Sex Harassment, Retaliation*.

See EEOC Guidance EEOC-CVG-2021-3, Section 12 (January 15, 2021).¹⁵ Fortunately, the law provides other protections for faith-based organizations who find tension with the affirmation of gender non-conformance and the provision of services for trauma survivors.

Ministerial Exception

One such protection is the ministerial exception related to certain staff positions at religious organizations. For example, in *Hosanna-Tabor Evangelical Lutheran Church and School v. EEOC*, 565 U.S. 171 (2012), the U.S. Supreme Court recognized that the First Amendment protects religious organizations from certain employment discrimination claims related to employees who serve in a ministerial role. This exception recognizes the importance of guarding the autonomy of religious organizations by allowing them to employ individuals who will personify the organization's faith-based beliefs.¹⁶ Toward that end, the exception is not limited to clergy or official ministers, and where applicable it protects the organization against a broader scope of discrimination claims, including alleged discrimination on the basis of sex, i.e., a Baptist church hiring only biological men as pastors. As Justice Alito recently wrote, quoting from *Hosanna-Tabor*, "[s]uch religious groups' 'very existence is dedicated to the collective expression and propagation of shared religious ideals,' and 'there can be no doubt that the messenger matters' in that religious expression." *Seattle's Union Gospel Mission v. Woods*, 595 U.S. ____ (2022). Certainly such

¹⁵But see *Bear Creek Bible Church and Braidwood Management, Inc. v. Equal Employment Opportunity Commission*, Civil Action No. 4:18-cv-00824-O (D. Tx. 2021)(Bostock reinforces the biological distinctions between the sexes; employers may promote privacy and safety policies and dress codes based on biological sex).

¹⁶See EEOC-CVG-2021-3 Section 12.

considerations are implicated in faith-based shelters where certain employees, regardless of title, are commissioned to serve and advance the gospel ministry of the organization.

Bona Fide Occupational Qualification

Another protection for lawful discrimination, i.e., based on sex, is referred to as the bona fide occupational qualification exception. For example, in an informal discussion letter dated November 22, 2013, the EEOC explained that the BFOQ allows sex-based hiring, referring, or classifying of workers in certain circumstances when such is “reasonably necessary to the normal operation of that particular business or enterprise.” 42 U.S.C. §2000e-2(e). For example, as the EEOC illustrates, lawful discrimination based on sex can represent a BFOQ when hiring an employee to attend to female residents at a nursing home due to privacy and safety concerns. Certainly similar considerations could arise in restorative care shelters, i.e., hiring certain staff for privacy and safety reasons at an all-women’s residential shelter.¹⁷

The Implications for Shelters

As this brief discussion concerning the legal landscape for shelters demonstrates, legal counsel can serve an important collaborative role assisting shelter leaders. In that regard, an informed attorney can assist shelter leaders with the development of organizing documents, exemption applications, statements of faith, beliefs, and authority, along with standards of conduct consistent with those statements, to provide

¹⁷See also *United States v. Virginia*, 518 U.S. 515, 533 (1996)(there are [p]physical differences between men and women” and the “two sexes are not fungible”).

protection for the mission and ministries. In addition, attorneys can serve shelters through other areas of risk mitigation and liability avoidance related to ongoing operations in a challenging ministry environment.

Postscript

Attorneys also serve an important role in advising shelter leaders about proactive preparation for tomorrow by evaluating proposed legislation and rule-making and illuminating the implications for the shelter's mission and ministries. In addition to serving as a watchman on the wall, attorneys also can serve as advocates to help provide important comments to proposed rule-making to ensure the voice of shelter care leaders are heard and considered. Some of these areas include the integration and expansion of the *Bostock* ruling through federal, state, and local legislation, regulations, and ordinances.

HHS Regulations

For example, the Department of Health & Human Services recently proposed regulations that could require insurance coverage of transgender affirming medical procedures that would conflict with religious and moral convictions of some shelters. Beyond just allowing access to certain care, the proposed regulations would add nondiscrimination provisions in the Patient Protection and Affordable Care Act regulations, such as hormone therapy and sex reassignment surgery considered "medically necessary gender-affirming care." See 87 Fed. Reg. 584. In response, a

number of faith-based advocacy groups, including the Christian Legal Society and the Christian Employers Alliance, submitted comments objecting to the proposed rule-making. HHS apparently listened and seemingly abandoned the transgender-related insurance provisions in the rule, suggesting the issue will be reserved for a later day. However, concern remains regarding to what extent the government can require religious non-profits to pay for gender-affirming surgeries, procedures, and treatments that violate their religious beliefs and implicate RFRA protections. Alliance Defending Freedom currently represents the Christian Employers Alliance seeking an injunction against such interpretation and application by the EEOC and HHS. *See CEA v. EEOC*, Civil Case No. 1:21-cv-00195-DMT-CRH (W.D. N.D. 2021)

The Equality Act

The proposed federal Equality Act, which would codify an expansion of *Bostock* to create sexual orientation and gender identity protected classes across the nation, represents another development to watch. The Act specifically includes “shelters” among public accommodations prohibited from discriminating based on gender identity in employment, healthcare, and housing, and also provides that “conversion therapy” (undefined but no doubt far reaching in the counseling context) itself is a form of gender discrimination. Further, the Act would eviscerate the BFOQ exception and otherwise significantly diminish religious liberty protections by providing that the Religious Freedom Restoration Act (“RFRA”) “shall not provide a claim concerning, or a defense to a claim under, a covered title, or provide a basis for challenging the

application or enforcement of a covered title.” This latter language is significant because RFRA provides a strong defense against government burdens on religious organizations. Indeed, in *Bostock* Justice Gorsuch recognized that RFRA “operates as a kind of super statute, displacing the normal operation of other federal laws” and that “it might supersede Title VII’s commands in appropriate cases.”

Shield Bearers

Sex trafficking is increasingly impacting the lives of too many individuals and families in our communities today. But in response, committed faith-based shelter organizations are rising up to provide restorative care for trafficking survivors. As they do, they need equally committed attorneys to come alongside as “shield bearers” to protect their mission and ministries. The Christian Legal Society and the Alliance Defending Freedom represent organizational efforts to raise up Christian attorneys who will serve faith-based organizations. In addition, the Joseph Project represents organizational efforts to build a coalition of attorneys who can serve trafficking victims and their specific legal needs. To join this fight, the Institute for Shelter care is building an alliance of Christian attorneys who specifically will support the work of shelter leaders and their organizations in the many unique legal challenges discussed in this paper.

Please contact Jeff Shaw or Clint Elliott to enlist in this shield bearer alliance and receive additional information and training.