# CONSTITUTIONAL VIOLATIONS IN STATE LAWS REGARDING PRIVATE DOMESTIC ADOPTIONS

LAUREN GINDI

## INTRODUCTION

State legislatures are now deciding if an infertile couple that has suffered through years of futile infertility treatments, financial devastation, or discrimination can adopt a baby from a credible attorney or adoption professional with thousands of adoption placements to his or her credit.[1] If this attorney or adoption professional is located out-of-state, some state laws take issue with interstate adoptions by banning out-of-state advertising and/or banning out-of-state professionals from helping their constituents in the adoption process.[2] These state laws that impede their constituents' opportunities to successfully adopt should be viewed under strict scrutiny,[3] because these laws arguably violate the First Amendment,[4]

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1. *See* Child Welfare Info. Gateway, *Use of Advertising and Facilitators in Adoptive Placements*, CHILDWELFARE.GOV 3-4, https://www.childwelfare.gov/pubPDFs/advertising.pdf (last visited Mar. 16, 2015).

2. *Id.* at 2.

3. *See generally* Richard H. Fallon, Jr., *Strict Judicial Scrutiny*, 54 UCLA L. REV. 1267, 1271 (2007) ("[I]n a case in which the government attempts to justify a challenged statute as necessary to protect national security, is the pertinent interest a general one in national security overall or a narrower interest in achieving the kind or degree of enhancement of national security that a challenged measure might plausibly achieve? A similar question could be asked in any case in which the government asserts a compelling interest in protecting children: protecting how many children from precisely what?"); Interview with Erwin Chemerinsky, Dean, Univ. of Cal., Irvine Sch. of Law, in Irvine, Cal. (Feb. 28, 2014) ("[S]uch laws are clearly unconstitutional. . . . [T]hey violate the dormant commerce clause and the privilege and immunities clause.").

Fourteenth Amendment,[5] and the Dormant Commerce Clause.[6]

We are living in the 21st century—the digital age—a time of advanced technology when a majority of business transactions take place solely via the internet. The reality today is that prospective adoptive parents and birth-parents find each other through this medium. Sadly, Google, Yahoo, and other search engines have driven the pricing of adoption advertising sky- high.[7] Only the few larger adoption entities in the country can afford to advertise and market themselves properly and safely to birth-parents, and have the staff to adequately serve all parties in a meaningful and secure manner.

If prospective adoptive parents do not retain these entities to protect their interests, the likelihood of actually becoming parents is not favorable.[8] State-licensed adoption agencies—two-thirds of which have closed their doors over the past decade[9]—have prospective adoptive parents on their books for years without success, merely because they do not have the resources, nor the online presence, to find enough birth-mothers for their clients.[10] These agencies do not have the funds to market adequately for their clients.[11] These unfortunate prospective adoptive parents have spent their money and energy on the process and yet, have no baby to show for it. This is why prospective adoptive parents all over the country want to use an adoption entity with a conspicuous media presence that can adequately market for

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4. *See infra* Part II.

5. *See infra* Part IV.

6. *See infra* Part III.

7. *See generally* Bo Xing & Zhangxi Lin, *The Impact of Search Engine Optimization on Online Advertising Market*, *in* PROCEEDINGS OF THE 8TH INTERNATIONAL CONFERENCE ON ELECTRONIC COMMERCE: THE NEW E-COMMERCE: INNOVATIONS FOR CONQUERING CURRENT BARRIERS, OBSTACLES & LIMITATIONS TO CONDUCTING SUCCESSFUL BUSINESS ON THE INTERNET 519, 519–27 (ACM, 2006) (showing the increase in advertising costs that directly effect and increase the cost adoption advertising online).

8. *See generally* Kathleen Kingsbury, *Longer Wait Times, Higher Costs for U.S. Adoptions*, REUTERS.COM (Jan. 15, 2013, 5:42 PM), http://www.reuters.com/article/2013/01/15/us-adoption-domestic-waits-idUSBRE90E15Y20130115 (showing how higher costs make it more difficult to these prospective adoptive parents to become parents).

9. Interview with Kris Yellin, Owner, Adoption Law Network, in Irvine, Cal. (Feb. 28, 2014).

10. *See* Kingsbury, *supra* note 8.

11. *See generally* Xing & Lin, *supra* note 7.

them, because they know that they will have a greater chance of successfully adopting a child with these kinds of efforts working for them.[12] Yet, some states want to impede their constituents' opportunities to successfully adopt and would rather see them waste their money, with very limited opportunities for success, by working within the narrow scope of their state, ultimately leaving them childless.[13] Prospective adoptive parents are cursed by the virtue of the state that they reside in and the sheer ignorance—or maybe even abusive power—of state legislators.

Part I of the paper will discuss how state laws prohibiting out-of-state for-profit adoption entities from advertising within states governed by such laws should not apply to entities that do not provide out-of-state adoption services. Part I will also discuss the implications of including internet advertising in state laws limiting out-of-state advertising, mainly due to the evolution of how a majority of business transactions today are conducted via the internet. Statutes that prohibit adoption entities from advertising do not take into consideration the differences in implementing such prohibitions, which have not been amended since entering the digital age.

In Part II, the paper will discuss the possible First Amendment violations resulting from state laws prohibiting out-of-state for-profit adoption entities from advertising in those states. Barring such entities from advertising at all is arguably a violation of the Commercial Speech Doctrine under the First Amendment.[14]

In Part III, the paper will discuss the possible Dormant

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12. *See generally* Kingsbury, *supra* note 8 (asserting that prospective adoptive parents would prefer using agencies that can bear the cost of advertising via the internet to ensure better results in marketing them).

13. Child Welfare Info. Gateway, *supra* note 1, at 2.

14. Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n of N.Y., 447 U.S. 557, 574-75 (1980) ("In commercial speech cases, then, a four-part analysis has developed. At the outset, we must determine whether the expression is protected by the First Amendment. For commercial speech to come within that provision, it at least must concern lawful activity and not be misleading. Next, we ask whether the asserted governmental interest is substantial. If both inquiries yield positive answers, we must determine whether the regulation directly advances the governmental interest asserted, and whether it is not more extensive than is necessary to serve that interest."); Bolger v. Youngs Drug Prods. Corp., 463 U.S. 60, 75 (1983) (state law at issue was unconstitutional because it was broader than necessary and also because "it denie[d] . . . truthful information bearing on the[] ability to discuss . . . and to make informed decisions").

Commerce Clause violations arising from state laws prohibiting out-of-state for-profit adoption entities from working with those states' constituents. The practical effect of such state laws is to regulate conduct outside of its state by discriminating against out-of-state for-profit adoption entities. Part III will also look into a state's interest in protecting child welfare and preventing fraud within the adoption process; key interests that a state would argue in rationalizing such laws. The key question in this section deals with whether the state's interests are being adequately served by its own laws.

In Part IV, the paper will discuss the possible Privilege and Immunities Clause violations stemming from state laws prohibiting nonresidents from participating in the adoption process with residents of that state. The confinement restricts the opportunity for prospective adoptive parents and birth-parents to be able to reach out nationally for the purposes of increasing their adoption opportunity exposure. Restricting a nonresident from being able to enter into the adoption process with a resident violates the nonresident's rights, as well as the resident's rights, to get their best opportunity to complete the adoption process successfully.

The difficulty in analyzing issues such as these is that these are not issues that have been clearly dealt with by the courts, especially not in the context of adoption. Therefore, this paper attempts to apply general legal precedent to specific examples of injustices, created by the state laws in question, inhibiting the adoption process.[15]

## PART I:
## State Laws Prohibiting Out-Of-State For-Profit Adoption Entities from Advertising in those States Should Not Apply to Entities that do Not Provide Adoption Services in those States.

Adoption Network Law Center ("ANLC")[16] is a California corporation, which helps create over 300 families per year through the miracle of adoption.[17] ANLC does not provide "adoption services" out-

15. What this paper aims to do, and hopefully will accomplish, is raise awareness of the burdens and injustices imposed on prospective adoptive parents and the adoption entities they wish to utilize.

16. This paper will be using this particular adoption entity as an example of how state laws negatively affect the adoption process.

17. *Adoption FAQ – Frequently Asked Questions about Adopting a Baby*, ADOPTIONNETWORK.COM, http://adoptionnetwork.com/adoptiveparents/adoption-

of-state because the performance of its services occurs in California.[18] Its website, which is maintained, hosted, and updated from California, does not "distribute" advertisements out-of-state, nor does ANLC have any office or employees outside of California.[19] ANLC has been sued by the People of the State of Illinois, because on Google, search terms involving adoption generate results that include ANLC's website.[20] The owner of ANLC has explained that, "[t]o the extent that services are required in Illinois, we defer to Illinois lawyers and licensed adoption agencies in Illinois to take over."[21] ANLC's performance of services—namely providing information about the adoption process to prospective adoptive parents and birth-parents—originates and occurs solely in California, not Illinois.[22]

Kris Yellin has the concern over:

[W]hether a state can restrict a birth mother's right from going anywhere she wants [in the United States] to pick a family. The people who want to adopt, in Illinois for example, want to use our services because they want to have as much help as they can get. Illinois says, "no, you can only use in-state entities or out-of-state non-profit entities to help you in the adoption process." There are states that restrict advertising. [Additionally,] there are some states that are currently restricting their residents, New Mexico being one of them, from using any out-of-state entity. Whether it be an out-of-state facilitator, attorney, or law center, they have to stay within the state of New Mexico . . . I have people calling me from New Mexico all the time and I have to say [to them], "your state is telling me that I am not allowed to work with you." A lot of states are doing this and a lot of states are waiting to see what happens with our company.[23]

Regarding adoption services, two states, Alabama and Kentucky, prohibit any use of advertising by any person or entity.[24] Thus, prospective adoptive parents, or the adoption entities in those states representing them, are strictly prohibited from trying to find a birth-

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faq.shtml (last visited May 19, 2015).

18. Interview with Kris Yellin, *supra* note 9.
19. *Id.*
20. *Id.*
21. *Id.*
22. *Id.*
23. *Id.*
24. Child Welfare Info. Gateway, *supra* note 1, at 2-3.

parent through any form of advertising.[25] As stated previously, advertising—specifically via the internet—is how most birth-parents find potential adoptive parents; so what are their chances of finding each other with advertising out of the adoption equation? Eleven states prohibit advertising by any person or entity other than a licensed agency or the state social services department.[26] Some of these states further limit advertising by entities that charge a fee for recommending an adoptive placement.[27]

For those who decide not to adopt through their state's social services or a licensed agency, the use of facilitators or intermediaries is often the preferred route.[28] Such facilitators are neither an approved, nor a licensed, agency;[29] they act as a middleman between birth parents and prospective adoptive parents in arranging independent adoptions.[30] Currently, approximately forty-one states have laws regarding the use of intermediaries or facilitators.[31]

The key questions in analyzing these state laws are: 1) What constitutes "advertising" and 2) What constitutes "providing adoption services" within a state? The implications to these questions are addressed below.

***State Laws Prohibiting Advertising of Adoption Services that do Not Expressly or Impliedly Include Internet Advertising Should Not Apply to Internet Advertising.***

In the digital age, when online transactions and communications are increasing exponentially, the law has not quite dealt with the evolution of interstate business transactions involving internet communications. Most advertising laws regarding adoption do not implicitly, nor explicitly, include internet advertising,[32] and have not been amended to account for this evolution. As such, state laws that do not expressly or impliedly include the internet in their advertising statutes should not be inferred to apply to internet advertising without also considering the issues that arise from such an inference.

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25. *Id.* at 2.
26. *Id.* at 2-3.
27. *Id.* at 2.
28. *Id.* at 3.
29. *Id.*
30. *Id.*
31. *Id.*
32. *E.g.*, 225 ILL. COMP. STAT. ANN. 10/12(a) (West 2005).

For example, Illinois' law states that "'advertise' means communication by any public medium originating or distributed in this State, including, but not limited to, newspapers, periodicals, telephone book listings, outdoor advertising signs, radio, or television."[33] The plain language of most state laws similar to Illinois' prohibit "advertising" of adoption services by unlicensed organizations, but the definition of "advertise" expressly omits any reference to internet advertising.[34]

The Court in *Zekman*, when confronted with the issue of whether to include an offense that was not expressly articulated in the statute, decided that "when a statute provides a list that is not exhaustive [with the phrase 'including but not limited to'], the class of unarticulated things will be interpreted as those that are similar to the named things."[35] Illinois' definition of "advertise" includes only traditional forms of communication: newspapers, periodicals, telephone book listings, outdoor advertising signs, radio, and television.[36] Applying the holding in *Zekman*, similar forms of communication like those listed above do not include internet-based communications.[37] Grouping internet-based communications together with the traditional forms of communication leads to problems regarding the stream of commerce and discerning between different forms of communication, such that businesses are constantly evolving to keep up with our economy's dependence on internet dealings.[38]

Internet communications are usually the most efficient, cost-effective way to conduct business today.[39] It is also a form of communication that should be distinguished from traditional forms of advertising, based on how internet advertisements are accessed compared to more traditional forms. For example, an advertisement on a billboard along a highway is something that its viewers have very

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33. 225 ILL. COMP. STAT. ANN. 10/12

34. *Id.*; Child Welfare Info. Gateway, *supra* note 1, at 2-3.

35. Zekman v. Direct Am. Marketers, Inc., 695 N.E.2d 853, 859 (Ill. 1998) (citing Bd. of Tr. of S. Ill. Univ. v. Dep't of Human Rights, 636 N.E.2d 528, 531 (Ill. 1994)).

36. 225 ILL. COMP. STAT. ANN. 10/12.

37. *Zekman*, 695 N.E.2d. at 859.

38. *See* Daniel Backer, *Choice of Law in Online Legal Ethics: Changing a Vague Standard for Attorney Advertising on the Internet*, 70 FORDHAM L. REV. 2409 (2002), *available at* http://ir.lawnet.fordham.edu/cgi/viewcontent.cgi?article=3839&context=flr.

39. *See id.* at 2412-13.

little choice in acknowledging or avoiding. Because it is physically there, viewable by the general public passing by, regulations must be implemented in regard to its content and legality. With internet advertising however, one must go out of his/her way to reach an advertisement on Google regarding adoption. The first step is to type an adoption-related search term into the search engine. The next step is to sift through all the different search results that come up, paid and non-paid results. This integral difference in the effort a consumer has to make in order to see the advertisement is only one of the reasons why internet-based advertisements must be distinguished from the more traditional forms of advertising. Applying the holding in *Zekman*, internet advertising should not be inferred to be included in a state's statute that only includes specific kinds of traditional advertising.[40]

Therefore, state laws restricting out-of-state businesses from certain forms of advertising should be specific as to what forms of advertising are included in such a restriction and whether the restriction includes internet advertising. If a state law expressly includes internet advertising in its restriction, it should specify what qualifies as internet advertising to avoid confusion and complications of applying such a law to search engine results, sponsored and not.

***In the Alternative, State Laws Prohibiting Out-Of-State For-Profit Organizations' Internet Communications Should Not Apply to Internet Communications that are Not Originated or Distributed in those States.***

Under Illinois' law, "advertise" encompasses enumerated communications "originating or distributed in [Illinois]."[41] ANLC's website is maintained and controlled in California.[42] Furthermore, the Illinois' Compiled Statutes do not provide a definition for the term "distribute" as is used in the statute, but according to Webster's Dictionary, "distribute" means "to divide among several or many : deal out : apportion esp. to members of a group or over a period of time[.]"[43] This interpretation plainly includes some affirmative act to

40. *Zekman*, 695 N.E.2d at 859 (deciding that "when a statute provides a list that is not exhaustive [with the phrase 'including but not limited to'], the class of unarticulated things will be interpreted as those that are similar to the named things").

41. 225 ILL. COMP. STAT. ANN. 10/12.

42. Interview with Kris Yellin, *supra* note 9.

43. WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY UNABRIDGED 660 (3d ed. 1993).

be considered "distribution." ANLC's website is not advertised through any medium outside of search engine results, and is therefore not distributed outside of California.[44] The website does not reach into Illinois, nor does it affirmatively target Illinois residents about adoptions.[45] At most, out-of-state citizens can make their way to ANLC's website—on their own—through searching on internet search engines or by going directly to the website. Even if a court were to find that internet advertising somehow falls under the state's law, any such advertising by ANLC originates in California and is not "distributed" out-of-state; arguing otherwise leads to a slew of problems regarding choice of law and personal jurisdiction, as defined by the Federal Rules of Civil Procedure.[46]

***A State Does Not Have Jurisdiction Over an Out-Of-State Corporation Merely Because its Advertisements are Accessible to the General Public Via Internet Search Engines.***

In order for a state, such as Illinois, to have jurisdiction over ANLC, such that it can require ANLC to defend itself in a hearing taking place in Illinois, courts follow the requirements set forth in *International Shoe*.[47] These requirements state that the defendant (ANLC) must have had minimum contacts with the forum state (Illinois) and requiring ANLC to defend itself in Illinois must not offend "traditional notions of fair play and substantial justice."[48] To satisfy the minimum contacts prong of the *International Shoe* test, ANLC must have deliberately reached out to Illinois.[49] Further, ANLC's contacts with Illinois must have either been continuous and systematic, or Illinois' cause of action must have arisen out of, or be related to, ANLC's contacts with Illinois.[50] Does ANLC's website,

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44. *See* Interview with Kris Yellin, *supra* note 9.

45. *Id.*

46. Backer, *supra* note 38; *See infra* Part IC.

47. *See generally* Int'l Shoe Co. v. State of Wash., Office of Unemployment Compen. & Placement, 326 U.S. 310 (1945) (establishing that in order for a federal court to have jurisdiction over the defendant, the defendant must have had minimum contacts with the forum state, such that he deliberately reached out or purposefully availed himself to the forum state, and either the defendant's contacts with the forum state are continuous and systematic or that the plaintiff's cause of action arises out of, or relates to, the defendant's contacts with the forum state).

48. *Id.* at 316 (citing Milliken v. Meyer, 311 U.S. 457, 463 (1940)).

49. *See id.*

50. ***Id.* at 318; Hanson v. Denckla, 357 U.S. 235, 253 (1958).**

which is accessible to every United States citizen with internet access, constitute ANLC deliberately reaching out to Illinois?

The general rule is that a state (Illinois) cannot exercise jurisdiction over a nonresident defendant (ANLC) if that defendant (ANLC) has only had sporadic and inadvertent contacts with the state (Illinois).[51] There must be some act by which the defendant (ANLC) purposefully avails itself of the privilege of conducting activities within the forum state (Illinois), thus invoking the benefits and protections of its laws.[52] It can be argued that since ANLC "advertises" throughout the United States by having their website accessible nationwide, it should reasonably expect to be called into any state to defend itself. However, it can also be argued that ANLC has not attempted to invoke the benefits and protections of Illinois' law, since all of its dealings take place in California, ANLC does not have a physical office in Illinois, nor does it engage in physical advertising in Illinois, and also does not send out employees at any time to Illinois.[53] Its internet-based communication is incidental to its nationwide online presence. Therefore, it is difficult to argue that ANLC has availed itself of the privilege of conducting activities within Illinois. ANLC's argument would fail, however, if it had clients in Illinois, as opposed to merely having a website available to view by Illinois' constituents. In such a case, Illinois would arguably have jurisdiction over ANLC, because it would be doing business and making money off of Illinois constituents.

In sum, state laws prohibiting out-of-state for-profit adoption entities from advertising in those states should not apply to entities that do not provide adoption services in those states. State laws prohibiting advertising of adoption services that do not expressly or impliedly include internet advertising should not apply to internet advertising. In the alternative, state laws prohibiting out-of-state for-profit organizations' internet communications should not apply to internet communications that are not originated or distributed in those states. Additionally, a state does not have jurisdiction over an out-of-state

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51. Helicopteros Nacionales De Colombia, S.A. v. Hall, 466 U.S. 408, 417 (1984) (citing *Hanson*, 357 U.S. at 253 ("The unilateral activity of those who claim some relationship with a nonresident defendant cannot satisfy the requirement of contact with the forum State.")).

52. *Hanson*, 357 U.S. at 253 (citing *International Shoe*, 326 U.S. at 310, 319).

53. Interview with Kris Yellin, *supra* note 9.

corporation merely because its advertisements are accessible via internet advertising.

## PART II:

### State Laws that Bar Out-Of-State For-Profit Adoption Entities from Advertising at all are Unconstitutional Because they Violate the First Amendment.

Assuming that ANLC's website is "advertising" under Illinois law,[54] such a finding would violate the Commercial Speech Doctrine under the First Amendment.[55] Thirty states currently have laws that, in some form or another, prohibit, limit, or regulate advertising by adoption entities.[56] Two states—Alabama and Kentucky—currently prohibit any use of advertising by any adoption entity.[57] Another eleven states prohibit advertising by an adoption entity, unless it is a licensed agency or the state's social services department.[58] Such state laws not only limit advertising by out-of-state for-profit entities, they prohibit it entirely.[59] Thus, any purported governmental interest behind such state laws is "more extensive than is necessary to serve that interest," which would deem such laws unconstitutional under the case of *Central Hudson Gas & Electric Corp. v. Public Service Commission of N.Y.*[60] In that case, the Supreme Court stated that in order for commercial speech to be worthy of protection under the First Amendment, the speech must concern lawful activity and cannot be misleading.[61] Like the facts in *Central Hudson*,[62] states prohibiting advertising by out-of-state for-profit adoption entities do not claim that such advertisements are "inaccurate or relate[] to unlawful activity."[63] In both situations, despite a state having a substantial interest in implementing such a prohibition, "no showing has been made that a more limited restriction

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54. This paper argues that ANLC's website is not "advertising" under Illinois law.

55. *See* Interview with Erwin Chemerinsky, *supra* note 3.

56. Child Welfare Info. Gateway, *supra* note 1, at 2.

57. *Id.*

58. *Id.* at 2-3.

59. *See id.*

60. *See generally* Cent. Hudson Gas & Elec. Corp. v. Public Serv. Comm'n of N.Y., 447 U.S. 557, 566 (1980).

61. *See id.* at 570.

62. *See generally id.* at 558-60 (appellants challenged a regulation that prohibited promotional advertising by electric utility companies.However, they "d[id] not claim that the expression at issue [was] either [] inaccurate or relate[d] to unlawful activity").

63. *Id.* at 566.

on the content of promotional advertising would not serve adequately the State's interests."[64]

The Supreme Court in *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc.* recognized advertising as a form of speech that falls under First Amendment protection.[65] More specifically, under the Commercial Speech Doctrine, and stated that:

Advertising . . . is . . . dissemination of information as to who is producing and selling what product [or service], for what reason, and at what price. So long as we preserve a predominately free enterprise economy, the allocation of our resources in large measure will be made through numerous private economic decisions. It is a matter of public interest that those decisions, in the aggregate, be intelligent and well informed. To this end, the free flow of commercial information is indispensible.[66]

However, there are limits to the extent that advertising is granted First Amendment protection.[67] The case of *In Re R.M.J.* held that states may impose appropriate restrictions under the First Amendment "when the particular content or method of advertising suggests that it is inherently misleading or when experience has proved that in fact such advertising is subject to abuse."[68] Additionally, there are limits to what restrictions a state may impose, such as absolute prohibitions on potentially misleading information.[69] According to the Court in *R.M.J.*, "restrictions upon such advertising may be no broader than reasonably necessary to prevent [] deception."[70]

Illinois may argue that an adoption entity in California that is not approved to work in Illinois acts deceptively when its website is accessible to Illinois' constituents, whom they cannot work with under Illinois law.[71] Only if the California entity expressly states in its advertising that it is approved to work in Illinois, would it be considered deceptive.[72] To be safe, adoption entities' websites usually

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64. *Id.* at 570.

65. Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc., 425 U.S. 748, 770 (1976).

66. *Id.* at 765.

67. *See In re* R.M.J., 455 U.S. 191 (1982).

68. *Id.* at 203.

69. *Id.*

70. *Id.*

71. *See infra* Part III.

72. *See* Ivan L. Preston, *A Comment on "Defining Misleading Advertising" &*

include a disclaimer as to which states they can or cannot work with.[73] A state may also argue that advertising linked with the adoption process is often "subject to abuse" because it can lead to baby-selling (a process of accepting payment directly in return for a placement of a child).[74] However, this argument is defeated by most state's implementation of federal law prohibiting the unauthorized placements and payments of children by prohibiting such a transaction.[75] If it is illegal in most states, and most adoption entities are held to the same standard of being prohibited from such a transaction,[76] why should one state ban an adoption entity from another with the same standard? It is somewhat analogous to a movie distributor in California being banned from distributing the newest blockbuster hit in New York in a legal, non-pirating manner merely because pirating movies, an activity illegal in every state, is in the realm of possibilities for an entity in the movie distribution business. If that were allowed, Hollywood blockbuster films would never hit theaters in states with such a regulation.

According to Chemerinsky, legal activities must meet intermediate scrutiny.[77] Meaning, the law must serve an important state interest and the means must be substantially related to the interest being served.[78] Keeping out-of-state entities from advertising in the

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*"Deception in Advertising,"* 40 J. OF MARKETING 54, 54 (1976) ("*[D]eceptive* is restricted to effects attributed to deliberate manipulation by the message source.").

73. *See generally In re* R.M.J., 455 U.S. 191, 201 (1982) (a disclaimer might be required "in order to dissipate the possibility of consumer confusion or deception") (citation omitted); *See* CAL. RULES OF PROF'L CONDUCT R. 1-400(D)(1)-(3) (2015); *See* MO. RULES OF PROF'L CONDUCT R. 4-7.1(g) (2015); *See* PA. RULES OF PROF'L CONDUCT R. 7.2(i), (k) (2015); *See* Backer, *supra* note 38, 2417-18 (noting that seven states "permit the use of testimonials or endorsements, as long as they include certain disclaimers") (citation omitted).

74. *See R.M.J.*, 455 U.S. at 203 ("[W]hen the particular content or method of the advertising suggests that it is inherently misleading or when experience has proved that in fact such advertising is subject to abuse, the States may impose appropriate restrictions.").

75. *See* UNIF. ADOPTION ACT § 7-102 cmt. ("[A]uthorizes civil penalties, injunctive relief, and other sanctions against persons who knowingly accept or make payments, directly or indirectly, for a placement, consent, or relinquishment–in other words, payments that are, or appear to be, for the 'purchase' of a child. Most States have similar provisions.") (2013).

76. *Id.*

77. Interview with Erwin Chemerinsky, *supra* note 3.

78. *See* U.S. v. Walker, 709 F. Supp. 2d 460, 466-67 (2010) (to pass intermediate scrutiny, the government must show that the law is "substantially related to an important governmental interest," such that there is a reasonable connection between

state is "not . . . a legitimate—[let alone an important]—purpose to satisfy intermediate scrutiny."[79] Prohibiting one of the largest adoption entities, such as ANLC,[80] which could arguably be deemed credible because of its successful adoptions per year and large media presence and state certification,[81] from advertising in a particular state does not seem substantially related to a state's interest in preventing baby-selling in a particular state. If anything, such a prohibition arguably encourages couples to turn to illegitimate and unsafe methods of obtaining a child for adoption because the prohibition limits access to information regarding out-of-state adoption entities, and instead encourages prospective adoptive parents to seek illegal routes for the sake of becoming parents. Are such state laws adequately serving the interest that they aim to protect? We need to give constituents their best chance in getting what they have long searched for; not limit them in ways that are unreasonably related to the state's interests.

State laws, such as Illinois', impose a license requirement: before an out-of-state organization can "advertise" in the state, it must be licensed.[82] To be licensed, more likely than not, such organizations must operate as a not-for-profit, meaning they cannot accept compensation for advertising costs incurred to promote prospective adoptive parents to potential birth parents.[83] Intrinsic in a license requirement is the state's ability to ban advertisements, such that state

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the government's interests and the means chosen to accomplish those interests) (citation omitted).

79. Interview with Erwin Chemerinsky, *supra* note 3.

80. *Avoiding the Dangers of Adoption*, ADOPTIONNETWORK.COM, http://adoptionnetwork.com/adoptiveparents/five_dangers_of_adoption.html (last visited June 18, 2015) ("Adoption Network Law Center is the largest law center, with approximately 50 employees[.]").

81. *Id.* ("Larger entities with strong and widespread Birthparent marketing efforts and a substantial advertising presence will be more successful in attracting a larger number of Birthparents, which means these entities can provide reduced [wait times]. . . . [A]nd [ANLC] successfully accomplished over 300 adoptions in 2009."); *See How are Adoption Organizations Regulated*, AM. ADOPTIONS, http://www.americanadoptions.com/adopt/how_are_adoption_organizations_regulated?cId=79 (last visited May 19, 2015) (law centers, such as ANLC, are owned by attorneys, such as Kris Yellin, that are licensed to practice law, and the companies themselves may be certified by a state).

82. 225 ILL. COMP. STAT. ANN. 10/12 (West 2005); Child Welfare Info. Gateway, *supra* note 1, at 4.

83. *See* Child Welfare Info. Gateway, *supra* note 1, at 4 (asserting that "[i]t is illegal for . . . agencies to receive any payment for the placement of the child").

government agencies that oversee the licensing process also act as gatekeepers in unilaterally allowing or blocking commercial speech from being disseminated in ways that state residents could access.[84] For example, Illinois prohibits any organization other than a state child welfare agency to accept compensation for providing adoption services and also prohibits such organizations from advertising in Illinois.[85] If a state were to argue that the interest of such a law is to eliminate for-profit organizations from the adoption equation in its state, such an interest is not "substantial" because "for-profit" and "not-for-profit" distinctions have no correlation to the quality of services offered.

As applied, such state laws have the effect of silencing all speech from out-of-state for-profit organizations. That is, they serve as a blanket prohibition of any advertising over the internet by out-of-state for-profit organizations, even though such an organization's internet activity originates in its home state. Such a general prohibition on advertising was deemed unconstitutional in *R.M.J.*, where the court held that "states may not place an absolute prohibition on certain types of potentially misleading information [] if the information may also be presented in way that is not deceptive."[86] The same reasoning in *R.M.J.* should be applied to state laws prohibiting all out-of-state for-profit organizations from advertising. As long as an adoption entity's advertisements are not deceptive, they should be protected under the First Amendment from state laws attempting to ban them.

Surprisingly, the Supreme Court has not yet dealt with issues regarding a state's ability to regulate interstate advertising, specifically advertising regarding adoption entities.[87] The most applicable case that dealt with such issues is *Bigelow v. Virginia*.[88] In that case, the court was dealing with whether a state has the ability to bar a citizen of another state from distributing information about an activity that is

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84. *Cf.* Backer, *supra* note 38, at 2429 (arguing that the creation of a national standard for lawyer communications providing clear guidance to lawyers, and adoption entities alike, on "how to disseminate information to the public" via the internet would provide the public with clear and consistent information about the adoption process and the availability of adoption services, thus "end[ing] the difficulties created by the a-jurisdictional nature" of licensing requirements for internet advertising).

85. Child Welfare Info. Gateway, *supra* note 1, at 10.

86. *In re* R.M.J., 455 U.S. 191, 203 (1982).

87. Interview with Erwin Chemerinsky, *supra* note 3.

88. *See generally* Bigelow v. Virginia, 421 U.S. 809 (1975).

legal in that state.[89] The court stated:

A state does not acquire power or supervision over another State's internal affairs merely because its own citizens' welfare and health may be affected when they travel to the other State, and while a State may seek to disseminate information so as to enable its citizens to make better informed decisions when they leave. But it may not, under the guise of exercising internal police powers, bar a citizen of another State from disseminating information about an activity that is legal in that State.[90]

Applying the *Bigelow* holding to state laws prohibiting adoption advertisements, or dissemination of information relating to adoption, states should not be allowed to bar ANLC, a citizen of California, from disseminating information about adoptions to residents of other states when they are legally permitted to operate and advertise in California and a majority of other states across the country. Thus, if, and when, the Supreme Court of the United States is confronted with state laws that bar out-of-state for-profit adoption entities from advertising at all, it should hold those laws unconstitutional because they violate the Commercial Speech Doctrine under the First Amendment.[91]

## PART III:

## State Laws Prohibiting Out-Of-State For-Profit Adoption Entities from Providing Adoption Services in Those States are Unconstitutional Because They Violate the Dormant Commerce Clause.

The Dormant Commerce Clause functions to promote a free-flowing economic market between the states.[92] A state's inherent police power allows the regulation of commerce.[93] However, state laws that

89. *Id.* at 811.

90. *Id.* at 824-25.

91. *See In re R.M.J.*, 455 U.S. at 203 ("States may not place an absolute prohibition on certain types of potentially misleading information . . . if the information also may be presented in a way that is not deceptive.").

92. Donald H. Regan, *The Supreme Court and State Protectionism: Making Sense of the Dormant Commerce Clause*, 84 MICH. L. REV. 1091, 1092 (1986), *available at* http://repository.law.umich.edu/cgi/viewcontent.cgi?article=1343&context=articles.

93. Pike v. Bruce Church, Inc., 397 U.S. 137, 142 (1970) (a state statute must be upheld if it "regulates even-handedly to effectuate a legitimate local public interest, and its effects on interstate commerce are only incidental . . . [U]nless the burden imposed on such commerce is clearly excessive in relation to the putative local benefits."); Chance Mgmt., Inc. v. South Dakota, 97 F.3d 1107, 1110-11 (8th Cir. 1996).

burden or discriminate against interstate commerce may be invalidated on the ground that they violate the Dormant Commerce Clause.[94] A state law violates the Dormant Commerce Clause if it either (1) tries to regulate interstate commerce or control out-of-state transactions, (2) discriminates against interstate commerce, or (3) causes a burden to interstate commerce.[95] In determining whether a state law violates the Dormant Commerce Clause, courts apply three tests;[96] and if a law fails any of the tests, it is deemed unconstitutional.[97] The first test, named the Practical Effects Test, considers whether the state law, in its effects, tries to regulate interstate commerce or control out-of-state transactions.[98] The second test determines whether the state law is facially discriminatory against interstate commerce.[99] The third test, named the Excessive Burden Test, weighs the benefits of the state law against the burden on interstate commerce.[100]

***The "Practical Effect" of Such State Laws is to Regulate Conduct Outside of its State.***

A state statute violates the Dormant Commerce Clause when its "practical effect" "control[s] [conduct] beyond the boundaries of the state."[101] The Clause also precludes a state's regulation of "commerce that takes place wholly outside the state's borders, whether or not the commerce has effects within the state."[102] As discussed above, ANLC's activities take place wholly outside of Illinois,[103] such that Dormant

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94. Associated Indus. of Mo. v. Lohman, 511 U.S. 641, 646-47 (1994).

95. Nat'l Ass'n of Optometrists & Opticians v. Harris, 682 F.3d 1144, 1148 (9th Cir. 2012).

96. Jack L. Goldsmith, & Alan O. Sykes, *The Internet and the Dormant Commerce Clause*, 110 YALE L. J. 785, 788-89 (2001), *available at* http://www.law.uchicago.edu/files/files/105.JG-AS.pdf.

97. *See id.* at 792 (addressing a New York law that violated the Dormant Commerce Clause because it failed the three tests by "impos[ing] costs on wholly out-of-state conduct[,] . . . [its] out-of-state burdens outweighed its local benefits[, and] it subjected out-of-state Internet users to inconsistent burdens").

98. North Dakota v. Heydinger, 15 F. Supp. 3d 891, 910 (D. Minn. 2014); Goldsmith & Sykes, *supra* note 96, at 788.

99. Am. Trucking Ass'ns, Inc. v. Whitman, 437 F.3d 313, 318-19 (3d Cir. 2006); Goldsmith & Sykes, *supra* note 96, at 788.

100. Or. Waste Sys., Inc. v. Dep't. of Envtl. Quality, 511 U.S. 93, 99 (1994); Goldsmith & Sykes, *supra* note 96, at 788-89.

101. Edgar v. Mite Corp., 457 U.S. 624, 643 (1982).

102. *Id.* at 642-43.

103. Interview with Kris Yellin, *supra* note 9.

Commerce Clause should preclude Illinois from regulating ANLC's activities, regardless of whether ANLC's business has effects within Illinois.[104]

Some state laws, such as Illinois, prohibit any out-of-state for-profit organization from providing "adoption services" in those states.[105] Currently, two states—Delaware and Kansas—strictly prohibit their constituents from using any adoption facilitators or intermediaries (non-licensed adoption entities).[106] Additionally, eight states—Georgia, Illinois, Massachusetts, Montana, New Mexico, North Dakota, Oregon, and Wisconsin—prohibit their constituents from using adoption facilitators or intermediaries by restricting the placement of children to licensed agencies only.[107] The problem with these latter eight states having a licensing requirement is that they, in effect, prevent out-of-state for-profit adoption entities from working in those states, because they only grant licenses to out-of-state not-for-profit entities and in-state entities (for-profit and not-for-profit).

In the case of *Edgar v. Mite Corp.*, the Supreme Court declared unconstitutional an Illinois' law that created registration requirements for takeover offers because it "applie[d] to corporations that [were] not incorporated in Illinois and ha[d] their principal place of business in other states."[108] In that case, the corporation in question—a Delaware corporation with its principal place of business in Connecticut—wanted to conduct business with an Illinois corporation, however, was prevented from doing so by Illinois' enforcement of state law.[109] The Court held that Illinois "ha[d] no interest in regulating the internal affairs of foreign corporations."[110] Just as the corporation in *Edgar*,[111] ANLC is not incorporated in Illinois, nor does it have its principal place of business there.[112] Therefore, just as the court held in *Edgar*,[113]

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104. *See generally Edgar*, 457 U.S. at 642-43 ("The Commerce Clause also precludes the application of a state statute to commerce that takes place wholly outside of the State's borders, whether or not the commerce has effects within the State.").

105. *Id.*

106. Child Welfare Info. Gateway, *supra* note 1, at 3.

107. *Id.*

108. *Edgar*, 457 U.S. at 645-46.

109. *Id.* at 642.

110. *Id.* at 645-46.

111. *Id.*

112. Interview with Kris Yellin, *supra* note 9.

113. *Edgar*, 457 U.S. at 645-46.

Illinois has no interest in regulating the internal affairs of ANLC, which is a California corporation.[114] Such laws have the practical effect of regulating out-of-state conduct and a court would rightly determine the Illinois' laws regarding adoption unconstitutional.

***Such State Laws are Facially Discriminatory Against Out-Of-State For-Profit Adoption Entities.***

A state law can discriminate against interstate commerce either on its face, in its effects, or where its intent or purpose discriminates.[115] Where a law is facially discriminatory, it is per se invalid and courts apply the strictest scrutiny in analyzing the law.[116] The only exception to the per se violation is where the law furthers a legitimate state interest that cannot be served by other non-discriminatory means,[117] and there are certainly non-discriminatory means that a state can utilize to serve their interests in protecting their constituents from a corrupt adoption process, as discussed in this paper.

When asked about the matter, Erwin Chemerinsky responded that when a law says that an "in-stater" has the right to do something, but an "out-of-stater" is not afforded that same right, such a law violates the Dormant Commerce Clause and the Privileges and Immunities Clause, unless the law serves an important purpose.[118] However, "hurting out-of-staters [is not] . . . an important purpose."[119] Furthermore, if a law discriminates against out-of-staters, a Dormant Commerce Clause challenge usually wins since the state would have a heavier burden must use a necessary and least restrictive means available to serve a compelling government interest.[120] If the state's interest is to protect their constituents from a corrupt adoption process,[121] is prohibiting out-of-state for-profit entities a necessary

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114. Interview with Kris Yellin, *supra* note 9.

115. Or. Waste Sys., Inc. v. Dep't. of Envtl. Quality, 511 U.S. 93, 100-01 (1994).

116. Hughes v. Oklahoma, 441 U.S. 322, 336 (1979).

117. *Id.*

118. *See* Interview with Erwin Chemerinsky, *supra* note 3.

119. U.S. CONST. art. IV § 2, cl. 1; C & A Carbone, Inc. v. Town of Clarkstown, 511 U.S. 383, 390 (1994) ("The central rationale for the rule against discrimination is to prohibit state or municipal laws whose object is local economic protectionism, laws that would excite those jealousies and retaliatory measures of the Constitution was designed to prevent."); Interview with Erwin Chemerinsky, *supra* note 3.

120. Interview with Erwin Chemerinsky, *supra* note 3.

121. *See generally* Joan H. Hollinger, *The Uniform Adoption Act*, 5 THE FUTURE OF CHILD. 205, 207 (1995).

means to prevent a corrupt adoption process?

Perhaps some other options could provide the necessary steps in serving a state interest. Such as, rather than banning out-of-state for-profit entities entirely, would it not be possible for a state to require an entity to undergo some type of an accreditation process that does not discriminate against an entity solely based on its location or its for-profit status? Just because an organization is for-profit does not necessarily mean that it offers a corrupt adoption process. With such limited options available for adoption entities, states should look at each adoption entity carefully, and in an unbiased manner, before telling their constituents that they are prohibited from utilizing those entities to assist them in their adoption process, rather than having a blanket prohibition. Therefore, based on the fact that there are other options, prohibiting out-of-state for-profit entities from conducting adoptions in a particular state is not the necessary means to protecting constituents from a corrupt adoption process. There are certainly several less-discriminatory means to serve such an interest, including the ones just mentioned. Therefore, such a law would fail the discriminatory tests.

***Such State Laws Impose an Excessive Burden on its Constituents and on Out-Of-State For-Profit Adoption Entities.***

A state law is deemed unconstitutional if the imposed burdens exceed the benefits.[122] A state statute that "directly interferes with or burdens [interstate] commerce is a prohibited regulation and invalid, regardless of the purpose with which it was enacted."[123] State laws that prohibit out-of-state for-profit adoption entities from working with constituents of such states violate the right of the citizens of that state to do business with out-of-state companies. Therefore, such state laws place a heavy burden on both the adoption entity, the birth-parent(s), AND the prospective adoptive parent(s).

The burden of such state laws is that they limit the options available for prospective adoptive parents and birth-parents in obtaining critical information about the adoptive process. Such state

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122. Or. Waste Sys., Inc. v. Dep't. of Envtl. Quality, 511 U.S. 93, 99 (1994); Goldsmith & Sykes, *supra* note 96, at 788-89.

123. *See* Shafer v. Farmers' Grain Co. of Embden, 268 U.S. 189, 199-201 (1925) (deemed that a North Dakota statute attempting to control all wheat purchases within the state was unconstitutional because it "directly interfere[d] with and burden[ed] interstate commerce").

laws impede on their constituents' opportunities to successfully adopt and would rather see them waste their money by working within the narrow scope of their state with very limited opportunities for success, leaving them childless, rather than allowing their constituents to work with highly credible adoption entities with conspicuous media presence that would greatly increase prospective adoptive parents' chances in finding a baby.

As applied, out-of-state for-profit organizations would have to change how they provide services, alter their organization's structure, and take down their websites just to comply with another state's laws, which would amount to regulation of their internal affairs.[124] Under the *Pike v. Bruce Church, Inc.* balancing test, the burden on interstate commerce of such state laws far outweighs any putative local benefits.[125] In *Pike*, an Arizona law prohibiting a grower of cantaloupes from "transporting uncrated cantaloupes from its Arizona [] ranch to a nearby [] California [city] for packing and processing" was deemed unconstitutional as an unlawful burden upon interstate commerce.[126] There, the court weighed the reasoning behind the law, which was to prevent growers from "shipping inferior or deceptively packaged produce" in order to promote and preserve the reputation of Arizona farmers,[127] with the burden that the law posed, which was requiring the grower to "build and operate an unneeded $200,000 packing plant" in Arizona.[128] After balancing these factors, the court deemed such a burden as illegal and thus, the law as unconstitutional.[129]

In comparison to *Pike*, state laws prohibiting out-of-state for-profit entities from working with those states' constituents propose to serve the governmental interest of avoiding a corrupt adoption process (i.e. baby-selling).[130] However, the burden would be great on the out-

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124. *See* Edgar v. Mite Corp., 457 U.S. 624, 645-46 (1982) ("Illinois has no interest in regulating the internal affairs of foreign corporations.").

125. Pike v. Bruce Church, Inc., 397 U.S. 137, 142 (1970).

126. *Id.* at 138, 146.

127. *Id.* at 143.

128. *Id.* at 145.

129. *Id.*

130. *Cf.* Ruth-Arlene W. Howe, *Adoption Laws & Practices in 2000: Serving Whose Interests?*, 33 FAM. L.Q. 677, 681 (2000), *available at* http://lawdigitalcommons.bc.edu/cgi/viewcontent.cgi?article=1087&context=lsfp (since prospective adoptive parents started utilizing the internet to locate available babies, "[i]ndictments and prosecutions for illegal 'babyselling' are on the rise.

of-state adoption entities, but more so on the prospective adoptive couples and birth-parents who are cursed by the state that they reside in and limited to the scarce newborn adoption opportunities within their state. Limiting prospective adoptive parents and birth-parents to their state's adoption entities dramatically decreases their chances of successfully and safely going through the adoption process. This burden would also drive out-of-state businesses to cut their advertising costs in order to accommodate such state laws, which would then also greatly decrease the chances of prospective adoptive parents and birth-parents of successfully and safely going through the adoption process, because exposure would be very limited. Thus, as in *Pike*,[131] such state laws would not satisfy the balancing test.

***States Have an Interest in Regulating the Adoption Process.***

Some state laws allow out-of-state not-for-profit organizations to provide adoption services, but not out-of-state for-profit organizations.[132] If all adoption entities must adhere to the same regulations in child welfare, what is the difference? What is the state's interest in preventing for-profit entities to help people adopt, especially if such entities are highly credible and increase the likelihood of adoption? Is it still to protect their constituents? This places a rather large burden on prospective adoptive parents by decreasing their likelihood of adopting a baby.

A state may argue that its interest in prohibiting out-of-state for-profit adoption entities from working with their constituents is that such entities make a profit off of providing adoption services and are not regulated by the respective state that their prospective clients reside in. Profiting off such a process, a state may argue, increases the incentive for an adoption entity to cut corners, exploit prospective adoptive parents and/or birth-parents, and to put a child's welfare on the backburner if it means that it will maximize profits. While this is a legitimate state interest, creating a blanket prohibition against all out-of-state for-profit adoption entities is unfair and does not take into consideration less-discriminatory alternatives to ensure that that particular state interest is protected. It burdens all out-of-state for-profit adoption entities, which are usually the ones with the most conspicuous internet presence, from helping prospective adoptive parents whom are

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Pressure for federal regulatory legislation may begin to mount . . . .").

131. *Id.*

132. *See* Child Welfare Info. Gateway, *supra* note 1, at 3-4.

also burdened by such a blanket prohibition.

The Court in *City of Philadelphia v. New Jersey* made it quite clear that protectionist measures, such as a blanket prohibition described herein, are disfavored and not a legitimate state interest:

> The evil of protectionism can reside in legislative means as well as legislative ends. Thus, it does not matter whether the ultimate aim of [a state law] is to [protect the state's environment or its economy] . . . whatever [the state's] ultimate purpose, it may not be accomplished by discriminating against articles of commerce coming from outside the State unless there is some reason, apart from their origin, to treat them differently.[133]

The court stated that the legitimacy of a state law can be determined by looking at whether it is "basically a protectionist measure, or whether it can fairly be viewed as a law directed to legitimate local concerns, with effects upon interstate commerce that are only incidental."[134]

If a state were to argue that prohibiting out-of-state for-profit adoption entities is directed at a legitimate local concern, it would have a difficult time arguing that preventing a corrupt adoption process is a local concern, rather than a concern that is applicable nationwide. State laws banning out-of-state for-profit adoption entities from working with prospective adoptive couples in their state for the sake of protecting them from a possible corrupt adoption process serves as nothing more than a protectionist measure against baby-selling, which is not directed towards a legitimate local concern since baby-selling is a nation-wide concern.[135]

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133. City of Philadelphia v. New Jersey, 437 U.S. 617, 626-27 (1978).

134. *Id.* at 624.

135. *E.g.*, *In re* Baby M, 537 A.2d 1227, 1242 (1988) ("Baby-selling potentially results in the exploitation of all parties involved. Conversely, adoption statutes seek to further humanitarian goals, foremost among them the best interests of the child. . . . The demand for children is great and the supply small. The availability of contraception, abortion, and the greater willingness of single mothers to bring up their children has led to a shortage of babies offered for adoption. The situation is ripe for the entry of the middleman who will bring some equilibrium into the market by increasing the supply through the use of money.") (citations omitted); *See also* Mark Hansen, *As Surrogacy Becomes More Popular, Legal Problems Proliferate,* ABA J. (Mar. 1, 2011, 11:40 AM), http://www.abajournal.com/magazine/article/as_surrogacy_becomes_more_popular_legal_problems_proliferate ("The Baby M case provoked such an outcry in some quarters over concerns about 'baby selling' and the possible exploitation of poor

The determining factor for states should be whether a particular adoption entity is credible, safe, and effective, rather than where it is located in the United States. If ANLC, for example, is permitted to work with constituents in a majority of states (i.e. it adheres to those states' standards regarding the adoption process), why should it be prohibited from working in ANY state? The idea is to have a federal standard for adoption entities that all states should adhere to, and respect, across all state lines. If a federal standard is created, it would eliminate discrimination of credible adoption entities and it would ensure that all adoption entities in the country are following a set and clear standard that would be accepted by all states.

## PART IV:

## State Laws Prohibiting Out-Of-State Citizens from Participating in the Adoption Process in Those States are Unconstitutional Because They Violate the Privileges and Immunities Clause.

Under Article IV of the United States Constitution, the privileges and immunities guaranty prohibits "a state to exclude citizens of other states from the privileges [and immunities] granted to its own citizens."[136] "The clause forbids certain discriminations by a state against citizens of another state in favor of [sic] its own citizens, and is designed to insure to a citizen of one state who ventures into another state the same privileges which the citizens of such other state enjoy."[137] Applied to state laws regarding adoptions, a State A statute that prohibits State B birth-parents from placing their baby with a potential adoptive couple in State A denies the State B birth-parent same privileges that a birth-parent from State A would enjoy. In other words, birth-parents outside of State A are unable to use adoption services in State A as a State A resident would be able to do, solely because State A's statute prohibits them from doing so.[138] Another way of looking at it is a state statute, which states that a birth-parent in State A is prohibited from placing their child with an out-of-state adoptive couple.

Additionally, in the case of ANLC, Kris Yellin (the owner), could

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women . . . .").

136. *See* U.S. CONST. art. IV, § 2, cl. 1; *See also* 16B C.J.S. *Constitutional Law* § 1047 (2015).

137. § 1047.

138. *See* Child Welfare Info. Gateway, *supra* note 1, at 3-4.

potentially raise a Privileges and Immunities claim for not being given the same privileges and immunities as Illinois' (or another state) individual adoption facilitators.[139] Furthermore, such a law prohibits Illinois' constituents from freely traveling to California to take advantages of ANLC's services there. The Privileges and Immunities Clause aims to prevent such discrimination and to further the concept of federalism and create a national economic unit.[140] Such discrimination exists when a state allows adoptions to take place where the birth-parent and prospective adoptive couple are both residents of the state, but prohibits out-of-state parties from doing the same.

The Privileges and Immunities Clause focuses "upon fusing into one nation a collection of independent, sovereign states."[141] Not having a federal guideline as to how states should regulate the availability of adoption services weakens the Clause's goal to fuse the United States into a single nation that supports adoption and an adoptive couple's or a birth-parent's right to choose their own birth-parent or adoptive couple, respectively.

In presenting a challenge to a state law under the Privileges and Immunities Clause, there are two issues that need to be addressed: 1) "the activity in question must be sufficiently basic to the livelihood of the nation []" and 2) "if the restriction deprives nonresidents of a protected privilege, it will be invalidated only if [the] restriction is not closely related to advancement of [a] substantial state interest."[142] These two issues are addressed in turn.

***Being Able to Choose a Birth-Parent or Adoptive Parent is Sufficiently Basic to the Livelihood of the Nation.***

In the context of the adoption process, the Privileges and Immunities Clause is implicated where state law restricts an out-of-state/nonresident birthmother from placing her child with an in-state/resident adoptive couple. In the converse, the nonresident could also be an out-of-state adoptive couple being restricted from adopting a baby born in a particular state.

The confinement of adoption resources available within a single state restricts the opportunity for prospective adoptive parents and birth-parents to reach out nationally for the purpose of increasing their

139. Interview with Erwin Chemerinsky, *supra* note 3.
140. § 1047.
141. *Id.*
142. *Id.*

adoption opportunity exposure. Restricting a nonresident from being able to enter into the adoption process with a resident violates the nonresident's rights under the Privileges and Immunities Clause, as well as the resident's rights to get the best opportunity to complete the adoption process successfully, because a state cannot say "an in-stater can do it, but an out-of-stater cannot."[143]

Additionally, Kris Yellin's ability to work with prospective adoptive parents who seek out her services in California is her livelihood, her profession.[144] For a state law to tell her that she cannot work with constituents from another state deprives her, as a nonresident, of the privilege to carry out her profession, a privilege that should be protected.[145]

With infertility rates on the rise,[146] and the internet evolving into the primary mode of opportunity for adoption services, it seems highly counter-productive in serving any state interest to limit its chance to successfully participate in the adoption process by restricting nonresidents of a state from being a potential party or participant to an in-state adoption proceeding. For prospective adoptive parents, their rights to reproduce have been taken away by infertility or an alternative lifestyle, such as single or same-sex prospective adoptive parents; they should not also be confined to the resources in their home state in trying to adopt a baby of their own. Birth-parents should have a right to find the best prospective adoptive parent for their baby; they too should not be confined to the limited resources in their state in trying to find the perfect placement for their baby. The success of the adoption process widely depends on the opportunities available.[147] If residents of all states are able to participate in the adoption process together, the opportunity to become parents, or to find the best family for their baby, increases the chances of a potential adoptive parent to become what

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143. *See* Interview with Erwin Chemerinsky, *supra* note 3.

144. *See* Interview with Kris Yellin, *supra* note 9.

145. § 1047.

146. *See generally* Abha Maheshwari et al., *Effect of Female Age on the Diagnostic Categories of Infertility*, 23 HUM. REPROD. 538 (2008), *available at* http://humrep.oxfordjournals.org/content/23/3/538.full.pdf.

147. *See generally Facilitators*, AM. ACAD. OF ADOPTION ATTORNEYS, http://www.adoptionattorneys.org/aaaa/adopting-parents/facilitators (last visited June 13, 2015) ("One of your most important decisions when beginning the adoption process is selecting the resources you will use to locate a child who is available for adoption or to connect with birth parents who will place their baby with you.").

they have longed for, to be a parent.

***State Laws Restricting Nonresidents of the Privilege to Participate in Adoption Services in a State Should be Invalidated Because Such a Restriction is Not Closely Related to the Advancement of a Substantial State Interest.***

"The state may defend its position by demonstrating that there is a substantial reason for the difference in treatment, and that the discrimination practiced against nonresidents bears a substantial relationship to the state's objective."[148] In order to confine parties to an adoption to the resources and citizens of their state, there must be a substantial reason for doing so.[149] As stated previously, as long as the process is being conducted by a credible adoption entity, and there is no abusive agenda behind the parties' interest in going through the process, a state has little, to no, reason to assume that prohibiting inter-state adoptions would directly and automatically lead to baby-selling, or would be adverse to the interests of the parties involved.

Therefore, state laws limiting nonresidents of the opportunity to participate in adoption services should be invalidated because such a limitation is not closely related to the advancement of a substantial state interest.[150] Consequently, such state laws should be deemed in violation of the Privileges and Immunities Clause of Article IV.

**Conclusion**

State laws prohibiting out-of-state for-profit adoption entities from advertising in those states should not apply to such entities that do not provide adoption services in those states. Including internet advertising in state laws limiting out-of-state advertising creates a slew of implications, mainly due to the evolution of how a majority of business transactions today are conducted via the internet. These statutes do not take into consideration the differences in implementing such laws that have not been amended since entering the digital age.

Additionally, advertising is a form of speech that falls under First Amendment protection.[151] Barring out-of-state for-profit entities from

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148. § 1047.

149. *See id.*

150. *See* Supreme Court of Virginia v. Friedman, 487 U.S. 59, 70 (1988) ("A State may not discriminate against nonresidents unless it shows that such discrimination bears a close relation to the achievement of substantial state objectives.").

151. Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc., 425 U.S. 748, 761 (1976).

advertising at all in the states that prohibit it is a violation of the Commercial Speech Doctrine under the First Amendment.[152]

Furthermore, state laws prohibiting out-of-state for-profit adoption entities from working with those states' constituents are in violation of the Dormant Commerce Clause, because the practical effect of such state laws is to regulate conduct outside of its state by discriminating against out-of-state for-profit adoption entities.[153] Although states have an interest in protecting child welfare and preventing fraud within the adoption process,[154] their own laws are not adequately serving this interest. Such laws are facially discriminatory when they say that "an in-state entity can [work with our constituents], but an out-of-stater cannot,"[155] and as such are in violation of the Dormant Commerce Clause. More specifically, a state telling its constituents that they cannot work with an adoption entity, which has the largest exposure to potential birth-mothers, solely because it is out-of-state and/or for-profit not only places an extremely high burden on potential adoptive parents, but also on those out-of-state entities.

State laws prohibiting out-of-state citizens from participating in the adoption process in those states are unconstitutional because they violate the Privileges and Immunities Clause.[156] The confinement of resources resulting from state laws restricting a nonresident from being able to enter into the adoption process with a resident violates the nonresident's rights, as well as the resident's rights, to get their best opportunity to complete the adoption process safely and successfully. As such, state laws limiting nonresidents of the opportunity to participate in adoption services in a state should be invalidated, because such a limitation is not closely related to the advancement of a substantial state interest.

In sum, state laws that impede their constituents' opportunities to successfully adopt should be viewed under strict scrutiny because these laws violate the First Amendment, Fourteenth Amendment, the

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152. *Id.*

153. *See* North Dakota v. Heydinger, 15 F. Supp. 3d 891, 910 (D. Minn. 2014) ("[A] state statute that has 'an extraterritorial reach' . . . has the practical effect of controlling" out-of-state conduct and is "per se invalid. . . . A state statute that is discriminatory on its face, in practical effect, or in purpose is subject to strict scrutiny.") (citation omitted).

154. *See* Hollinger, *supra* note 121, at 207.

155. Interview with Erwin Chemerinsky, *supra* note 3.

156. 16B C.J.S. *Constitutional Law* § 1047 (2015).

Dormant Commerce Clause, and the Privileges and Immunities Clause. Prospective adoptive parents are "not a politically powerful group. Ultimately, what it's going to take is a business like [ANLC] that wants to hire a lawyer to bring a challenge to the law."[157] What this paper aims to do, and hopefully accomplishes, is raise awareness regarding the burdens and injustices imposed on this nation's citizens who are cursed by the virtue of the state that they reside in and the sheer ignorance—or maybe even abusive power—of their state legislators. Ideally, such awareness will assist in an effort to have a federal standard imposed on adoption entities, leading to a cease in discrimination and an increase in prospective adoptive parents having their best chance at finding a baby. All these prospective adoptive parents wish to do is become parents.

157. Interview with Erwin Chemerinsky, *supra* note 3.