Editor's Note: The following brief was filed in Travis County, Texas district court by the Washington, D.C.-based Institute for Justice, which represented two black children and the white couple who wished to adopt them. The brief was written in support of a motion for a summary declaration that Texas' race-conscious adoption policies and practices violate equal protection. Summary judgment was denied on April 23, 1996, and the case is scheduled for a hearing on the merits on November 12, 1996 in the Travis County (Texas) District Court.

Those collaborating on the brief were:
William H. Mellor III, Clint Bolick and Donna Matias of the Institute for Justice; Professors Elizabeth Bartholet, Laurence H. Tribe and Randall Kennedy of Harvard Law School; and Don R. Willett of Haynes and Boone, L.L.P., Austin, TX.

The editors have chosen to leave the brief in its original format, rather than making technical corrections and changes. Some portions of the brief have been omitted, and footnotes have been renumbered. Footnotes and citations have been omitted where noted. A list of court exhibits referred to throughout the brief appears at the end for easy reference.

No. 95-04417

MATTHEW O. AND JOSEPH I., by and through their next friends LOU ANN AND SCOTT MULLEN, and as representatives for all non-white children in the legal custody and control of the Texas Department of Protective and Regulatory Services for whom adoption is the permanent plan (a class of individuals),	§	IN THE DISTRICT COURT
Plaintiffs,	§	
v.	§	
TEXAS DEPARTMENT OF PROTECTIVE AND REGULATORY SERVICES (DPRS); MART HOFFMAN, Interim Executive Director of DPRS; and BOARD MEMBERS OF DPRS;	§	345th JUDICIAL DISTRICT
Defendants.	§	TRAVIS COUNTY, TEXAS

Introduction

The policies at issue in this case are an anachronism, a throwback to the old days of Jim Crow, when people were told by the state who they could or couldn't marry, where they could sit on streetcars or buses, and from which water fountains they could drink. For nearly 30 years, the United States Supreme Court has instructed that such discriminatory policies and their vestiges must be eradicated "root and branch." *Green v. County School Bd. of New Kent County*, 391 U.S. 430, 438 (1968).

Happily the days of anti-miscegenation laws and "separate but equal" are long behind us, consigned to history by legislative acts and judicial decisions. So far as we can determine, only one formal system from that era remains with us today: the widespread policy and practice of racial classifications and discrimination in the context of adoptions.

The State of Texas forbade altogether the adoption of children by families of a different race, until the early 1970s when the law was struck down as unconstitutional. But attitudes and the lingering vestiges of the old ways die hard. The state continues today to classify children and parents by race and color, and to maintain discriminatory adoption practices that are inconsistent with the best interests of minority children who await adoption by loving families.

These policies and practices violate equal protection of the laws since they are not narrowly tailored to a compelling state interest. Plaintiffs Matthew and Joseph, along with countless other children, have suffered under this regime. In this lawsuit they seek to bring an end, once and for all, to the state's race-conscious screening policies and to the broad discretion of state agents to inject racial criteria into the adoptive placement process.

[Statement of the Case omitted]

Statement of Facts

In this section we begin with general background on interracial adoption before discussing Defendants' specific policies and practices. Although this case challenges current policies and practices in Texas, Plaintiffs submit that an overview of the history of interracial adoption and an account of how seemingly benign race consciousness takes on a more pernicious form in agency practice is essential to understanding what Defendants contend is constitutionally permissible. Moreover, because Defendants rely on the stance taken by the National Association of Black Social Workers (NABSW) to support their use of race in placing minority children, discussion of their hotly controversial position is warranted.

A. The Role of Race in Adoptions.[1]

The widespread practice of adoptions of children by families of other races is a recent phenomenon. Until mid-century, there were nearly absolute social and legal barriers to interracial adoptions. The general practice was to match children with adoptive parents who most closely resembled them. *See* Elizabeth Bartholet, "Where Do Black Children Belong? The Politics of Race Matching in Adoption," 4 *Reconstruction* 22, 28 (1992) (Exh. A).[2] As recently as the 1970s, some states' statutes, including Texas', expressly prohibited interracial adoptions. "These restrictions were a byproduct of anti-miscegenation statutes, emanating from bigoted opposition to the creation of racially heterogeneous households, rather than from a concern for the welfare of the child." Shari O'Brien, "Race in Adoption Proceedings: The Pernicious Factor," 21 *Tulsa L. J.* 485, 486 (1986) (Exh. C).

Interracial adoptions began to blossom during the 1960s. Civil rights activists viewed barriers to interracial adoptions as "a reactionary vestige of the policy of segregation." Peter Hayes, "The Ideological Attack on Transracial Adoption in the USA and Britain," 9 *Int'l J. of Law & the Family* 1, 2 (1995) (Exh. D). In 1969, the Child Welfare League's *Standards for Adoption Service*, which is designed to standardize adoption practices nationwide, was revised to excise warnings about interracial adoptions and to urge assistance and encouragement for families wishing to adopt children of other races. *Id.* at 1-2. This trend was reflected in the numbers of reported interracial adoptions, which rose gradually to 733 in 1968 and more than tripled to 2,574 in 1971. Bartholet, Exh. A at 28.

But in 1972, "this brief era of relative openness to trans-racial adoption came to an abrupt end." *Id.* at 29. That year, the influential National Association of Black Social Workers (NABSW) adopted a policy statement terming interracial adoptions a form of cultural "genocide." The policy statement asserted that

> Black children should be placed only with Black families whether in foster care or for adoption. Black children belong, physically, psychologically and culturally in Black families in order that they receive the total sense of themselves and develop a sound projection of their future. Human beings are products of their environment and develop their sense of values, attitudes and self concept within their family structures. Black children in white homes are cut off from the healthy development of themselves as Black people.

Id.

The NABSW policy statement did not reflect the views of all black social workers or even social workers generally. Austin H. Lawrence, an African-

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[1] In this brief we use interchangeably the terms "interracial" and "transracial" adoption to mean the adoption of a child by a family in which one or both parents has a racial or ethnic background that differs from the child. DPRS appears to use this definition.

[2] An earlier, more expansive version of this article, which includes source cites, appears at 139 *U. Pa. L. Rev.* 1163 (1991)(Exh. B).

American psychotherapist and social worker in the field for over two decades had worked with transracial adoptions for six years when the NABSW took its militant stance. During the early 1970s, the NABSW invited Mr. Lawrence to join the organization, an invitation he flatly rejected because of their position on transracial adoption. As Mr. Lawrence attests,

> I was well aware of the NABSW's 'vehement opposition to the practice of placing black children with white families,' which they formally announced in 1972. I had been involved with transracial adoption since 1966, my first year in graduate school. I knew the NABSW was flatly wrong in its claims about the harm transracial adoption caused black children. Rather than join this organization, I mobilized with other black social workers to protest what I believed was ill-guided social policy. I was fully aware that if black children could not be placed in white homes, they would probably languish in foster care for indeterminate periods of their lives.

Affidavit of Austin H. Lawrence, Exh. E at 2. Others noted that those black social workers who had direct experience with transracial adoption "tended to have favorable evaluations [of the practice] while those with no contact were more critical." *Id.* at 2-3.

Nevertheless, the NABSW policy statement had a profound impact throughout the profession. The very next year, the Child Welfare League reverted back to its pre-1969 position endorsing same-race placements as preferable to interracial adoptions. Hayes, Exh. D at 3. The number of interracial adoptions steadily declined every year thereafter, from 2,574 in 1971 to 831 in 1975, which was the last year in which nationwide statistics were systematically generated. Bartholet, Exh. A at 29.

The NABSW's position suffers practical problems as well as philosophical ones. The vast mismatch between the number of non-white children waiting for adoption and the number of minority families seeking to adopt [sic]. *See, e.g.*, Myriam Zreczny, "Race-Conscious Child Placement: Deviating from a Policy Against Racial Classifications," 69 *Chicago-Kent L. Rev.* 1121, 1146-47 (1994) (Exh. F). This, despite the fact that the black community's efforts to find homes for black children are "nothing short of heroic." Lawrence Aff., Exh. E at 3. Moreover, numerous efforts exist to increase the already disproportionately large pool of black adoptive families, including special recruitment, subsidies, and modification of ordinary adoption requirements. Bartholet, Exh. A at 29. As a result, the pool of black prospective adoptive parents are "significantly older, poorer and more likely to be single than their white counterparts." *Id.* at 32.

Despite these efforts, as Austin Lawrence observes, "the numbers simply don't add up." Lawrence Aff., Exh. E at 3. Well over a third of the half million children in foster care are black (compared to 12 percent of the overall national population) and approximately one half of the foster care population is non-white. Bartholet, Exh. A at 32. Moreover, minority placement rates are twenty percent lower than non-minority placement rates. *Id.* As the number of minority children needing adoptive homes grows, the number of intact minority families declines: the National Urban League reports that by 1991, 46.4 percent of all

black families were headed by single females. *See The State of Black America 1994* at 232 (Washington, D.C.: National Urban League, Inc. 1994). Given these conditions, it is not surprising that despite extensive efforts, the number of minority adoptive families is inadequate for the number of minority children who need homes.

The burden of these grim realities is shouldered by minority children awaiting adoption, who inevitably suffer when state adoption officials persist in efforts to match children with adoptive families of the same race. "Child welfare officials agree with virtual unanimity that children need continuity in the context of a permanent home in order to flourish." Bartholet, Exh. B at 1223 and n.162. Searches to find same-race placements conflict with the children's interests, consigning them to lengthy and unnecessary placements in foster homes or institutional care, and diminishing prospects for adoption. *See, e.g., id.* at 1201-07 and 1223-25. Moreover, attempts to stretch the supply of minority adoptive homes may lead to less-than-optimal placements. Professor Bartholet describes the hierarchy of preferences for a black child waiting for a home:

> Black and white candidates are still assessed and ranked by these criteria [*e.g.*, income, age, marital stability], with singles, older people, and economically marginal individuals placed at the bottom of prospective parent lists. What adoption workers have done, in trying to expand what is an all-too-short black prospective parent list, is to seek out the kind of people they would normally exclude altogether from the white parent list. Because of the importance attributed to the racial factor, those at the bottom of the black list are generally preferred over all those on the white list for any waiting black child.

Bartholet, Exh. B at 1200.

Despite these costs, "the use of race as a factor in determining the best interest of a child is frequent, endorsed, and sometimes even mandated by adoption agencies, statutes, and courts." Zreczny, Exh. F at 1121. These formal rules are, however, only the "proverbial tip of the iceberg. . . . [I]t is the unwritten and generally invisible rules that are central to understanding the nature of current policies. . . . The rules make race not simply a factor, but an overwhelmingly important factor in the placement process." Bartholet, Exh. A at 29-30.

B. The Impact of Interracial Adoptions.

The growing need and desire for interracial adoptions, juxtaposed against fierce ideological opposition and the persistence of race-matching policies, has led to extensive studies of interracial adoptions.[3] As one observer states,

> Given the influence that [the NABSW's] arguments have had, it might be expected that they would be supported by social scientific research on minority children placed for adoption in white homes. But they are not; al-

[3] For an extensive review of the literature, see Bartholet, Exh. B at 1207-26.

> most all of the evidence presented in these investigations suggests that [interracial adoption] is as successful as in-racial adoption.

Hayes, Exh. D at 4. *Accord*, Zreczny, Exh. F at 1142-44; Valerie Phillips Hermann, "Transracial Adoption: 'Child-Saving' or 'Child-Snatching'?" 13 *Nat'l Black L. J.* 147, 164 (1993)(Exh. G) ("The dangers of transracial adoption that the NABSW charges are grossly exaggerated. And the damage done to children who are shifted to and from different institutions is understated"); Ezra E.H. Griffith and Ina L. Silverman, "Transracial Adoptions and the Continuing Debate on the Racial Identity of Families," in Herbert W. Harris, Howard C. Blue, and Ezra E.H. Griffith, eds., *Racial and Ethnic Identity: Psychological Development and Creative Expression* (1995) (Attached as Attachment 3 to the Affidavit of Dr. Ezra E.H. Griffith, Exh. H, at 108 ("The claims made by the NABSW *en route* to their conclusions obviously do not withstand serious scrutiny, as the research data on outcome studies do not support the logic used by NABSW")).

Together, the most thorough studies on interracial adoptions—conducted by social scientists reflecting a broad ethnic and philosophical spectrum, including even some who are hostile to interracial adoptions[4]—"provide an overwhelming endorsement of transracial adoption." Bartholet, Exh. A at 33. Austin Lawrence summarizes his 26 years of practice as a psychotherapist who has examined, evaluated and occasionally treated black and bi-racial children adopted transracially:

> For the most part, my evaluations and subsequent treatment, if warranted, reveal that the issues these children had to deal with were issues of growing up, rather than issues of racial identity or racial self-esteem. [A]s a rule, my observations led me to conclude that these children were firmly anchored in their families, had a positive sense of self and a positive black self-image. The great majority of these individuals were able to 'move' equally in the black and white communities.

Lawrence Aff., Exh. E at 1-2.

In terms of general adjustment, the empirical studies consistently reveal that interracially adopted children exhibit high levels of self-esteem and do not differ from other adopted children in terms of overall adjustment. Bartholet, Exh. B at 1211-16. Interracially adopted children experience the same anxieties and conflicts as other adopted (and non-adopted) children, but typically these involve "issues of growing up, rather than issues of racial identity or racial self-esteem." Lawrence Aff., Exh. E at 1-2.

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[4] Even Defendants' expert witness, Ruth McRoy, found in her study comparing 30 children raised in same-race adopted families with 30 raised in interracial families that "there were no significant differences in the self-esteem scores of the transracially and inracially adopted Black children." Griffith and Silverman, Exh. H, Attachment 3 at 99 (citing Ruth McRoy, *et al.*, Self-Esteem and Racial Identity in Transracial and Inracial Adoptees, 27 *Social Work* 522 (1982); and "The Identity of Transracial Adoptees," *Social Casework* 34 (January 1984)). *See also* Affidavit of Rita J. Simon, Exh. I at 5.

Likewise, the studies find that interracially adopted children develop a strong sense of racial identity. There is no evidence that same-race families provide a "better" sense of racial pride or culture than families from different races. Bartholet, Exh. B at 1216-21; Griffith Aff., Exh. H at 6-8. Indeed, there is no consensus among Blacks about what "black culture" or "black identity" is since blacks, like other individuals, will have different values, beliefs, attitudes, customs, and tastes determined by their individual experiences rather than the color of their skin. *Id.* at 6. In fact, the main difference in how transracially adopted individuals perceive their racial identity is that they appear to be more comfortable moving within both the black and white communities. Bartholet, Exh. B at 1221-23.

Plaintiffs' expert Dr. Rita Simon confirms these findings. Simon Aff., Exh. I and Attachments 2, 3 thereto. Simon and her colleague, Dr. Howard Altstein, have studied interracial adoption for a quarter of a century, authoring the leading longitudinal study on the impact of interracial adoption on the children and families. The specific research design of the Simon-Altstein study is set forth in the Simon Affidavit, Exh. I. Over the course of 20 years, Simon and Altstein periodically interviewed minority children and their adoptive families to evaluate the long term impact of the adoptions. At the end of the 20 years, in-depth interviews with the adoptees, now adults, were conducted. They discussed their experiences growing up in interracial families, and how the situation affected their racial and social identities and their sense of awareness about racial issues. Simon Aff., Exh. I at 3. In the end, Simon and Altstein concluded that

> Without doubt, the results of our study show that transracial adoptees grow up emotionally and socially adjusted and aware of and comfortable with their racial identity. They perceive themselves as integral parts of their adopted families and they maintain strong ties to their parents and siblings even after they move away from home.

Id. at 4.

The conclusions of the Simon-Altstein project are consistent with the findings of other leading research in this field. *See id.* at 4-6, including Defendants' expert on their summary judgment motion, Ruth G. McRoy. McRoy and her colleagues conducted a comparative study of 30 black children adopted inracially and 30 black children adopted interracially. Her results demonstrated that the interracial adoptees had a healthy sense of self-esteem, and their scores did not differ from those of the norm population. *See id.* at 5; Griffith Aff., Exh. H at 4. Moreover, the interracially adopted children exhibited healthy relationships with their families, teachers, and peers. Simon Aff., Exh. I at 5. Nonetheless, McRoy appeared troubled that not all the interracial adoptees identified themselves as "black"; in fact, only 30 percent of them did. Griffith Aff., Exh. H at 4. However, the racial makeup of McRoy's comparative groups was quite different: among the inracial adoptees, 83 percent had two black birth parents, while only 27 percent of the interracial adoptees did. *Id.* Fifty-seven percent of the interracial adoptees were born of a black father and a white mother, and the remaining 16 percent had black fathers and mothers of white, Mexican, or other racial/eth-

nic background. *Id.* This difference in sample groups is significant, as a study by the Chicago Child Care Society demonstrated that interracial adoptees of mixed racial background (part black) tend to identify themselves as "mixed" rather than black, largely because they had lighter complexions and recognized their entire racial makeup. *Id.* at 4-5.

Moreover, McRoy's opposition to interracial adoption seems to rest on the normative claim that part-black children *should* identify themselves as "black"; those that don't demonstrate the "harm" in interracial placements. However, there is no such monolith as "black identity." As Plaintiffs' expert, Yale psychiatrist and African American Studies professor Dr. Ezra Griffith puts it: "In any group of Blacks, there will be a broad spectrum of attitudes toward blackness depending on a variety of factors," including for example age, socioeconomic status, and geographic region. *Id.* at 6.

Griffith is one of the few medical professionals to have contributed to the literature on interracial adoption from a mental health perspective. Rather than assert the unsupportable position that all Blacks have the same identity, and that therefore Blacks harbor "unique" abilities of to raise black children, Griffith relies on empirical research to conclude that minority children awaiting adoption are best served by color-blind adoption policies that ensure finding a loving, qualified home as quickly as possible. Interracial adoption is a proven "successful undertaking." *Id.* at 8.

The sum of real-world experiences of interracially adopted children demonstrates that such placements are successful undertakings rather than harmful ones. *See, e.g.*, Lawrence Aff., Exh. E; Griffith Aff., Exh. H; Simon Aff., Exh. I. And unquestionably, they provide children in need of homes with love and stability where they would otherwise go wanting. Griffith Aff., Exh. H at 8. These findings have led thoughtful legal scholars and social scientists, both black and white, liberal and conservative, to conclude as follows:

> The use of race in the child-placement process may be well-intentioned, but such policies lack both empirical and reasoned justification. Therefore, courts and agencies should ignore the race of the child when making placement decisions. Instead, courts and agencies should place Black children as soon as possible into the arms—whatever color—of loving and capable parents.

Kim Forde-Mazrui, "Black Identity and Child Placement: The Best Interests of Black and Biracial Children," 92 *Mich. L. Rev.* 925, 967 (1994)(Exh. J).

C. Texas Law and Policies.

Until 1973, the State of Texas flatly prohibited interracial adoptions. Tex. Stat. Ann., art. 46a § 8 (Vernon 1969) provided that "No white child can be adopted by a negro person, nor can a negro child be adopted by a white person." This law was declared unconstitutional as violative of equal protection under Tex. Const. art. I, § 3 and the Fourteenth Amendment. *In re Gomez*, 424 S.W.2d 656, 659 (Tex. App.—El Paso 1967, no writ).

After that time, the state permitted interracial adoptions but overtly engaged in race-matching policies. Deposition of Pat K. Devin, Exh. K at 103. Several high-profile conflicts between parents seeking to adopt interracially and the state led the Legislature to take action in 1993.[5] The resulting legislation was codified as Tex. Hum. Res. Code Ann. § 47.041 (West 1993), providing that

> The department, a county child-care or welfare unit, or a licensed adoption agency may not deny or delay placement of a child for adoption or otherwise discriminate on the basis of race or ethnicity of the child or prospective adoptive parents.

Despite this clear proscription on the use of race, DPRS expressly continued to use race as a "screening device"; *i.e.*, to determine which prospective parents might be suitable or preferable to adopt minority children. The persistence of discriminatory practices induced the Legislature to take additional action last year, after this lawsuit was filed. The new statute, which amended and recodified the previous statute as Tex. Fam. Code § 162.308(a)(West 1996), provides that

> The department, a county child-care or welfare unit, or a licensed child-placing agency may not make an adoption placement decision on the presumption that placing a child in a family of the same race or ethnicity as the race or ethnicity of the child is in the best interest of the child.

The statute provides further that unless an independent psychological evaluation of a specific child indicates that an interracial placement would be detrimental to the child, DPRS may not "deny, delay, or prohibit the adoption of a child because the department . . . is attempting to locate a family of a particular race or ethnicity," Tex. Fam. Code § 162.308(b), and any employee violating these provisions is subject to immediate dismissal.[6]

DPRS, which has the power and responsibility to enforce the state's adoption laws and to administer adoption services, amended its policies in light of the 1993 law, to the effect that "race or ethnicity was only to be used as one of several factors." Devin Dep., Exh. K at 108. The agency continued (and apparently continues) expressly to use race as a factor in adoption placements. A memorandum dated August 11, 1993 from Pat K. Devin, Director of DPRS' Protective Services for Families and Children (Devin Dep., Exh. K, Dep. Exh.

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[5] *See, e.g.*, Melinda Smith, "What Makes a Home?" 56 *Tex. Bar J.* 492 (May 1993) (describing the spectacle of a state social worker tearing three-year-old Christopher Jenkins from his foster mother). Exhibit L provides written testimony presented to the Texas Senate Committee on Health and Human Services illustrating, often in vivid terms, a wealth of complaints about DPRS conduct with respect to interracial adoption, and the human consequences exacted.

[6] This apparently harsh sanction may be mere window dressing. DPRS claims to have conducted an internal investigation in response to the allegations in Plaintiffs' petition, finding no wrongdoing. Yet DPRS only "investigated" its own people, without ever even contacting the Mullens to obtain their side of the story. *See* Devin Dep., Exh. K at 132-35.

5), interpreted the 1993 law as forbidding delays in placements if the "only basis . . . is to locate a foster family with the same cultural or ethnic background as the child," but stated that "it continues to be appropriate to consider the short and long term needs of children in placement regarding their cultural and ethnic needs." The memorandum also explained a federal agency interpretation of federal law as providing "that race may be considered as a factor in making more positive placements for children," a view "similar to our interpretation regarding [the 1993 law], as well as the Department's policy regarding placements in foster care and adoption." *Id.*

Attached to the memorandum were revisions to DPRS policy "clarif[ying] the factors to consider in selecting an adoptive home for a child." Under "Issues to Consider" relating to adoption placements, the policy lists the appropriateness of continuing a foster family relationship through adoption, the child's need for placement with siblings, and "[p]reservation of the child's racial and ethnic identity and heritage." The policy goes on to state that "[p]lacing a child with adoptive parents whose race or ethnicity is the same as the child's ordinarily helps the child develop a sense of identity consistent with his racial or ethnic background." DPRS will "consider" different-race placements under various criteria set forth in the policy. *Id.*

DPRS policy on "Information to Consider About the Child When Selecting an Adoptive Family" (*Id.*, Dep. Exh. 3) includes the following "Identifying Information": age, sex, siblings, religion, ethnicity, race. Its policy on "Information to Consider About the Prospective Adoptive Family When Placing a Child for Adoption" (*Id.*, Dep. Exh. 4) includes the following "Identifying Information": age, employment, religion, physical environment, sex, marital status, ethnicity, education, children in home, race.[7]

DPRS' head office in Austin does not actively monitor its regional offices to determine how they use race, and instead vests broad discretion in the regional offices and individual caseworkers. Devin Dep., Exh. K at 20-25. DPRS classifies all children on the basis of race. *Id.* at 71. Children are classified by the race of the parents if known, or by "what's apparent" to the caseworker by visual inspection. *Id.* at 69.

Race and culture figure prominently in DPRS officials' concept of a child's "identity," and DPRS seems to use the terms interchangeably. The following ex-

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[7] At the recent January 22 hearing, DPRS for the first time provided to Plaintiffs' counsel a copy of a policy that apparently has been in place since November 1995 (Exh. M). The policy directive purports to narrow considerably considerations of race in the adoption placement process in conformance with the 1995 law. DPRS Deputy Director Devin apparently worked to draft those policies. Devin Dep., Exh. K at 118-22. Devin was deposed one week before these new policies were issued, and it is logical to assume she had them in mind when she testified about the necessity of using race in considering adoptive families. Given that DPRS consistently has used race as a factor—and has a history of interpreting prohibitions on the use of race to permit the use of race—Plaintiffs believe a court order remains necessary to set clear policies against racial discrimination and to ensure that agency officials comply with those policies.

change between Plaintiffs' counsel and DPRS Child Protective Services supervisor Brenda Chatman illuminates the point:

> Q:Let me ask you this. What is identity?
> A:That would be the child's culture, basically.
> Q:Okay. And how do you determine what a child's culture is?
> A:You go back and look at the child's parents, what the parents' cultures are, what that child's heritage may be.

Deposition of Brenda Chatman, Exh. N at 35-36. Ms. Chatman testified further she felt it is important to "maintain" a child's cultural identity (read: "racial identity"), *id.* at 38, even if the child was abandoned at birth and raised by a family of a different culture (read: "race.") *Id.* at 37.

DPRS officials readily acknowledge that race remains a significant factor to consider in finding families. "Race would be one of a number of factors that we would consider in making an adoptive placement for a child," testified Pat Devin, Devin Dep., Exh. K at 81-82, a factor she deems "important." *Id.* at 72. *See also* Chatman Dep., Exh. N at 40 (race "should be considered" in adoption placements). According to Pat Devin, the 1993 statutory proscription against denying, delaying, or otherwise discriminating in adoptions meant "you would not automatically exclude families of a different race," but in her interpretation it still allowed consideration of race as "one of a number of factors." Devin Dep., Exh. K at 104.

"In my way of thinking," Devin stated, race "could not carry more weight than any other factor." *Id.* at 105. How the racial factor is considered is "certainly [a] subjective decision." *Id.* "The obvious and easiest way to preserve one's racial identity," observes Devin, "is to be with . . . people who look and are like you." *Id.* at 76. If a different-race family and a same-race family both wanted the same child, is the different-race family turned away? "Not on that factor alone, no." *Id.* at 92-93. What if both families can meet the child's needs—can race tip the balance? "Perhaps." *Id.* at 93.

As Professor Bartholet concludes from her extensive investigation into how race-matching preferences are manifested in agency practice, agencies use the "massive discretion accorded them by adoption laws to create racial policies that would be difficult for legislators to justify politically." Exh. B at 1182. For example, Bartholet recounts how the agencies' use their discretion in decisions on whether and when to terminate parental rights and in the recruitment families for minority children to effect race-matching policies. *Id.* at 1193-1201.

DPRS asserts, no doubt correctly, that it now approves hundreds of transracial adoptions[8] annually, and that in 1995 approximately 40 percent of adoptions

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[8] These numbers may be inflated by a broad definition of "transracial" adoptions, which apparently encompasses any placement in which the race of one parent differs from that of the child. Curiously, this means, for example, that a bi-racial (Anglo/African American) child adopted by a bi-racial couple (one Anglo parent/one African American parent) would be "transracial" by DPRS standards, even though this would be the racial outcome if the couple gave birth to a child.

were transracial. However, these figures are meaningless in a vacuum. DPRS produced in discovery material demonstrating the willingness of adoptive applicants—whose homes were never certified by DPRS—to adopt children of different races, but it never provided this information on the homes that *were* certified. Without this information, it is impossible to assess whether "40 percent" is extraordinarily low, high, or exactly as it should be in a discrimination-free system.

DPRS also states that in fiscal year 1994, white children remained in DPRS custody before adoption an average of 22.3 months, compared to 23 months for black children, a difference (3 percent longer for blacks) it considers *de minimis*.[9] A closer look at the statistics reveals that in fact, there exist marked differences in the amount of time white and minority children spend in DPRS custody (i.e. foster or institutional care) between termination of parental rights and adoption—in other words, the period during which children are legally available for adoption. The following chart is derived from numbers provided by DPRS for fiscal year 1995 (Devin Dep., Exh. K, Dep. Exh. 10):

Average Length of Time From Termination of Parental Rights to Adoptive Placement (in months)

	Age *0-6*	% +/-	*7-9*	% +/-	*10-12*	% +/-	*13-15*	% +/-
Anglo	7.6		11.2		14.3		22.5	
Black	9.8	+28.9	12.2	+8.9	23.6	+65.0	22.0	-2.3
Hispanic	10.0	+31.6	19.8	+76.8	21.9	+53.1	28.6	+27.1
Other[10]	8.5	+11.8	19.4	+73.	11.3	-21.0	28.5	+26.7

	Total	% +/-
Anglo	10.2	
Black	11.9	+16.7
Hispanic	15.7	+53.9
Other	11.3	+10.8

From these statistics, it is clear that minority children— black, Hispanic, and mixed-race—in virtually every age category consistently have endured and continue to endure substantially longer waits for permanent homes once parental rights were terminated.

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[9] Professor Laurence Tribe notes, in a response to Professor Bartholet's work that "[e]ven if the delay for a particular child is relatively brief, and even if it may be argued that racial factors were less than completely determinative in causing delay for that child, the mandate of the Constitution . . . is a mandate of *equal* protection under the law. That mandate is not satisfied by protection that is more-or-less equal, or that denies equality to a particular child in the ostensible interest of the social group." *See*, Tribe Correspondence, 2 *Reconstruction* 105 (1992) (Exh. O).

[10] These children are usually of mixed racial background. We have not extracted statistics for American Indian children since their situation is unique under federal law, nor for "Oriental" (Asian) children since their numbers are negligible.

And despite two legislative efforts to reign in DPRS conduct, reports of individual instances of discrimination continue. As Amy Russell, Program Director of Child First United reported at the January 22 hearing on Class Certification [footnote omitted], she receives telephone calls from individuals, sometimes anonymously or under the condition of confidentiality for fear of retaliation by DPRS, complaining that Defendants refuse to permit them to adopt interracially. Moreover, as the Affidavit of Victoria Croyle indicates, DPRS also attempted to impede Mrs. Croyle's adoption of her African American daughter on the basis of race, even though Tex. Hum. Res. Code § 47.041 prohibited them from doing so. Affidavit of Victoria Croyle (Exh. P.)

In sum, notwithstanding sincere legislative attempts to curb racial discrimination and presumptions by state officials in adoption placements, DPRS continues to erect racial barriers to keep certain children out of certain loving families that would provide them with what they need most: a permanent home.

D. The Case of Matthew and Joseph.

Plaintiffs Matthew and Joseph exemplify the way in which DPRS uses race to the detriment of children in need of homes. DPRS shuttled Matthew and Joseph from home to home in the early years of the boys' lives, despite Scott and Lou Ann Mullen's efforts to bring them into their family.

Matthew O. (now Matthew Mullen), an African-American boy, was born on November 3, 1992, addicted to crack cocaine and suffering from syphilis. Affidavit of Lou Ann Mullen at 2 (Exh. Q); Affidavit of Scott Mullen at 2 (Exh. R). When he was nine days old, DPRS placed him in the foster home of Scott Mullen (who is white) and Lou Ann Mullen (who is Native-American). Lou Ann Mullen Aff., Exh. Q at 2. Matthew remained in the Mullens' home until August 13, 1994, when defendants removed him to place him with a black adoptive family with his half-brother, Joseph I. (now Joseph Mullen). *Id.* at 3; Scott Mullen Aff., Exh. R at 2. This, despite the fact that Lou Ann had asked, on at least five occasions, to adopt Matthew. Each time, DPRS told her "no" because he would go to a black home. Lou Ann Mullen Aff., Exh. Q at 2-3.

In October 1994, the adoptive placement failed and the boys were sent to an African-American foster home. *Id.* at 4; Scott Mullen Aff., Exh. R at 2. This was not the first time that the adoptive placement of a Mullen foster child had fallen apart, and the Mullens were understandably upset and concerned about the impact of another move on Matthew and Joseph. Scott Mullen Aff., Exh. R. at 2. After discussing discussing [sic] it with each other and their children, the Mullens decided to try again to adopt Matthew and to adopt Joseph, too. Lou Ann Mullen Aff., Exh. Q at 4; Scott Mullen Aff., Exh. R at 2. When they inquired into adopting both Matthew and Joseph, DPRS again stated that it wanted a black home for the boys, that it would be in their "best interest" and "for their culture." Lou Ann Mullen Aff., Exh. Q at 4-5. In January 1995, the boys were placed in the Mullens' foster care. *Id.* at 5-6. On April 14, 1995, the day after this lawsuit was filed, DPRS contacted the Mullens to state that they would

now enter into adoptive placement agreements with them, all at once determining that they would now be an appropriate home for the boys. *Id.* at 6-7. The adoption was finalized on August 18, 1995 by order of the 87th Judicial District Court.

DPRS officials confess that early on the Mullens began to repeatedly express their desire to adopt Matthew (and later Joseph), acknowledging that race was instrumental in the deliberations that ultimately resulted in a failed adoptive placement and multiple foster placements. As soon as Matthew was born, DPRS officials knew they wanted to pursue termination of parental rights and an adoptive placement. Deposition of Jeanie Mehlhop, Exh. S at 95. Jeanie Mehlhop, a Children's Protective Specialist IV with responsibility for the Mullens' foster home, acknowledges that the Mullens "[f]requently" expressed their desire to adopt Matthew, starting "soon after Matthew was placed in their home." *Id.* at 198. Mehlhop repeatedly informed the Mullens that Matthew and Joseph probably would be adopted together and placed with a black family. *Id.* at 207. "I knew that's what the adoption unit was looking for . . . for those two boys." *Id.* at 201. Likewise, Mehlhop's quarterly narrative report on the Mullens reflects the view that Matthew was to be placed in an adoptive home that meets his "ethnic needs." *Id.* at Dep. Exh. 12.

Although DPRS has repeatedly emphasized the importance of placing siblings together if possible, no attempts were made to place Matthew and Joseph together in a foster home. Chatman Dep., Exh. N at 23-24. Indeed, when Lou Ann Mullen first learned that Matthew had a half-brother Joseph in another foster home, she asked his caseworker if they could take Joseph into their home so that the boys could be together. Lou Ann Mullen Aff., Exh. Q at 2. As has proven par for the course in this case, Lou Ann's inquiries fell on deaf ears. *Id.* During this period, Joseph was living in a foster home with another brother, Isaiah, who was subsequently returned to his biological father. Yet DPRS never attempted to place Matthew in Joseph's foster home even after Isaiah left the foster home and an opening became available. *Id.* at 3; Scott Mullen Aff., Exh. R at 2. Nor did the supervisor assigned to Matthew and Joseph even consider the possibility. Chatman Dep., Exh. N at 24-25. And, although DPRS claims it was concerned about bonding between Matthew and Joseph, it took no steps to increase visitation between the boys when Lou Ann asked that Joseph be able to spend weekends at their home with Matthew. Lou Ann Mullen Aff., Exh. Q at 3. Thus, DPRS' idea of "bonding" appears to be based on three visits between the boys for a total of 2 ½ hours.[11] *Id.*; Scott Mullen Aff., Exh. R at 2.$p Moreover, despite the fact that DPRS purports to apply a preference for foster parents over other prospective adoptive parents, Mehlhop Dep., Exh. S at 83, DPRS officials never suggested to the Mullens' that if they were interested in adopting Matthew that they also consider adopting Joseph. *Id.* at 200-203.
See also Lou Ann Mullen Aff., Exh. Q at 3.

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[11] A DPRS worker called off one of the scheduled visits after only 30 minutes because she didn't think Matthew and Joseph were "doing anything." Scott Mullen Aff., Exh. R at 2.

The Garrisons, the black adoptive couple with whom DPRS placed the boys in August 1994, had had at least one change of heart before Matthew and Joseph made it into their home. In July 1994, the Garrisons backed out of their initial plan to adopt, but subsequently that same month decided again to take the boys. Chatman Dep., Exh. N at 70. One must ask what prompted DPRS' frenetic efforts to remove Matthew to a same race family that couldn't decide if it wanted him: at the time the placement was made, the Garrison home was not licensed by DPRS. *Id.* at 64. This practice appears to violate DPRS policy against placing children in an unlicensed home. Devin Dep., Exh. K at 140.

After the Garrison placement fell apart, Matthew and Joseph were placed in a foster home in Bryan that "is also black which meets cultural/heritage needs." Deposition of Susan Pritchard, Exh. T at 93 and Dep. Exh. 11. When the Mullens found out about the failed adoption placement in October 1994, Scott Mullen called DPRS and expressed an interest in adopting both boys. Lou Ann Mullen Aff., Exh. Q at 4; Scott Mullen Aff., Exh. R at 2-3. Susan Pritchard, a Child Protective Services Specialist who supervises foster homes, recorded that "I told him at the present we were recruiting for a suitable blck (sic) family like we had been but, anyione (sic) could apply to adopt." Pritchard Dep., Exh. T at 111 and Dep. Exh. 17. And, although they knew of the Mullens' desire to adopt both boys, DPRS did not send an adoption application to them. *Id.* at 124-25. *See also* Lou Ann Mullen Aff., Exh. Q at 5. Pritchard subsequently told Scott Mullen again that the adoption unit supervisor "felt that . . . a black family would be more suitable for the boys." Pritchard Dep., Exh. T at 119. She also mentioned that her supervisor had a group home in which she could place the boys. *Id.* at 122; Scott Mullen Aff., Exh. R at 3.

On November 7, 1994, Plaintiffs' attorneys at the Institute for Justice sent a letter to DPRS Adoption Unit Supervisor Ann Ruten on the Mullens' behalf, informing her that the agency's actions were unlawful and asking the agency to immediately consider the Mullens as adoptive parents for Matthew and Joseph (Exh. U). The letter caused quite a stir at DPRS: Supervisor Brenda Chatman testifies that "we basically decided that day the Mullens would be considered." Chatman Dep., Exh. N at 89. Nevertheless, DPRS would not permit Matthew and Joseph to see the Mullens even after they filled out an adoption application and a home study was begun. Scott Mullen Aff., Exh. R at 3.

But after the foster placement in Bryan fell apart, DPRS placed Matthew and Joseph in the Mullens' foster care in January 1995. Jeanie Mehlhop informed the Mullens at that time that it was "a foster placement until Matthew and Joseph's worker informed them otherwise." Mehlhop Dep., Exh. S at 183 and Dep. Exh. 18 at 3; Lou Ann Mullen Aff., Exh. Q at 5. Susan Pritchard informed the Mullens it would remain a foster placement for six months, after which time the Mullens could be *considered.* Pritchard Dep., Exh. T at 127-28; Lou Ann Mullen Aff., Exh. Q at 5-6.

While the Mullens cared for Matthew and Joseph, DPRS continued to search for an adoptive family. Chatman Dep., Exh. N at 102-103; DPRS Recruitment Efforts, Exh. V. *See also* Lou Ann Mullen Aff., Exh. Q at 5; Scott Mullen Aff., Exh. R at 3. Up through the commencement of this lawsuit, DPRS officials con-

tinued to tell the Mullens that the boys' status with them remained a foster care placement. Pritchard Dep., Exh. T at 136; Lou Ann Mullen Aff., Exh. Q at 6; Scott Mullen Aff., Exh. R at 3. On April 17, 1995—four days after the lawsuit was filed—DPRS agreed to approve the adoption of Matthew and Joseph pending approval by a court, Lou Ann Mullen Aff., Exh. Q at 6-7, and the boys' legal status in the Mullen home was changed by persons unknown to reflect that they were now an adoptive placement. Pritchard Dep., Exh. T at 129.

Throughout this ordeal, DPRS' actions exacted an enormous emotional toll on Matthew, Joseph, and the entire Mullen family. Although Matthew and Joseph now have a permanent home, the Mullens continue in this lawsuit in the "hope that no other children or families should have to go through what we experienced." Lou Ann Mullen Aff., Exh. Q at 7.

[Standard of Review Omitted]

Argument

THE USE OF RACE AS A SCREENING DEVICE IN ADOPTION PLACEMENTS VIOLATES THE GUARANTEES OF EQUAL PROTECTION OF LAW UNDER THE UNITED STATES AND TEXAS CONSTITUTIONS.

As Professor Elizabeth Bartholet aptly has observed, "Current racial matching policies are in conflict with the basic law of the land concerning racial discrimination. They are an anomaly. In no other area do state and state-licensed decision makers use race so systematically as a basis for action." Bartholet, Exh. A at 37.

In the pages below, we shall set forth the strict scrutiny standard that applies to all state-imposed racial classifications. Applying that standard to the Texas adoption policies and practices at issue here, we shall demonstrate that the use of race as a screening device is not narrowly tailored to a compelling governmental interest.[12]

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[12] By "screening device," we mean the use of race or ethnicity to determine the relative desirability or qualifications of a prospective adoptive family. Removing race as a screening device means that adoptive families and children would be matched on a color-blind basis, applying such non-racial criteria as the agency deems appropriate (such as placement with siblings, preference for foster families, age, economic circumstances, home environment, number of children, etc.). Obviously if the family chosen is not compatible with the particular child, for whatever reasons, the search can continue. Race simply should be eliminated as a device to screen people out (or in), or as a factor to assess relative qualifications or desirability.

A. All Racial Classifications Must be Subjected to Strict Constitutional Scrutiny.[13]

Racial and ethnic distinctions are "by their very nature 'odious to a free people whose institutions are founded upon the doctrine of equality.' " *Loving v. Virginia*, 388 U.S. 1, 11 (1966), quoting *Hirabayashi v. U.S.*, 320 U.S. 81, 100 (1943). The Fourteenth Amendment's central mandate is "racial neutrality in governmental decisionmaking." *Miller v. Johnson*, 115 S.Ct. 2475, 2482 (1995). By now the basic principle is firmly established: " 'Racial and ethnic distinctions *of any sort* are inherently suspect and call for the most exacting judicial examination.' " *Id.*, quoting *Regents of Univ. of Calif. v. Bakke*, 438 U.S. 265, 291 (1978) (opinion of Powell, J.) (emphasis added).

This standard is a stringent one. The only instance where the U.S. Supreme Court has sustained a racial classification under strict scrutiny was its long-discredited decision upholding Japanese internment camps in *Korematsu v. U.S.*, 323 U.S. 214 (1944). *See* Zreczny, Exh. F at 1136.

Strict scrutiny applies regardless of whether the racial classifications impose special burdens on some or apply to members of all races. *See, e.g., Loving*, 388 U.S. at 8 (rejecting the argument that anti-miscegenation laws were permissible since they applied both to blacks and whites). That is because the rights protected by the Fourteenth Amendment are personal rights. *Sweatt v. Painter*, 339 U.S. 629, 635 (1950).

Accordingly, any time state action "touch[es] upon an individual's race or ethnic background, he is entitled to a judicial determination that the burden he is asked to bear on that basis is precisely tailored to serve a compelling governmental purpose." *Bakke*, 438 U.S. at 299 (Powell, J.); *accord, Adarand Constructors, Inc. v. Pena*, 115 S.Ct. 2097, 2111 (1995). That is the determination to which Matthew and Joseph are entitled in this case.

The catalog of purposes the U.S. Supreme Court has approved as compelling justifications for racial classifications is an extremely slender one: to date it has recognized only the remedying of past discrimination.[14] But DPRS' race-matching cannot be defended as a remedial measure. As Professor Tribe, a self-described "long-time proponent and defender of race-specific programs of affirmative action" declares,

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[13] The same equal protection scrutiny applies under both the Texas Constitution and the Fourteenth Amendment. See, e.g., *Richards v. LULAC*, 868 S.W. 2d 306, 310-11 (Tex. 1993).

[14] Plaintiffs assume that Defendants do not assert this as a justification for their policies. As Bartholet observes, Exh. A at 38, "Race-conscious action that has any level of support relies on arguments that it *benefits* racial minorities." The policies at issue here decidedly are not a form of "affirmative action," which has an integrative, not segregative, purpose. Randall Kennedy, "Orphans of Separatism: The Painful Politics of Transracial Adoptions," *The American Prospect* (Spring 1994) at 44 (Exh. W). *See also* Tribe Corresp., Exh. O.

> Once government undertakes a form of social engineering, whether in family law or elsewhere, that would sacrifice the interests of one black child or one black family to the supposed interest of [racial] solidarity or integrity, it has crossed the line beyond anything that could meaningfully be call affirmative action in the constitutional sense.

Tribe Corresp., Exh. O at 105. Moreover, even in the context of remedial measures, the Supreme Court requires particularized findings that such action is necessary. *See, e.g., Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267, 276-77 (1986) (plurality). It consistently has rejected racial generalizations to justify race-conscious state action, such as the need to provide same-race "role models" to children. *Id.* at 276 ("Carried to its logical extreme, the idea that black students are better off with black teachers could lead to the very system the Court rejected in *Brown v. Board of Education*, 347 U.S. 483 [(1954)]").

Equally important, the use of racial criteria must be narrowly tailored to the compelling state interest. This entails a showing that non-racial criteria are unavailing in achieving the state's objectives. *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 507 (1989) (plurality). If either the government's interest is not compelling or the means chosen to accomplish it are not narrowly tailored, the use of racial criteria is unconstitutional. *See, e.g., Miller*, 115 S.Ct. at 2482.

B. Strict Scrutiny Applies to Racial Criteria in the Adoption Context.

As one observer correctly has noted, "Curiously, [race] matching policies have persisted in a legal system which is in nearly every other case offended by racial classifications that burden or stigmatize a particular group." Zreczny, Exh. F at 1121. "The distinctive realm of child placement, where prospective parents and available children are separated and classified on the basis of race, . . . stands as an exception to the general rule that no racial classification is absolutely necessary to further any state interest, however compelling." *Id.* at 1122.

Accordingly, Defendants continue to act as if exempt from the Fourteenth Amendment, a fact profoundly troublesome given the U.S. Supreme Court's unanimous decision in *Palmore v. Sidoti*, 466 U.S. 429 (1984). There, the Court held emphatically that the use of racial classifications by state actors to determine whether a placement is in a child's best interest must be subject to the most stringent constitutional scrutiny.

In *Palmore*, a divorced father sought custody of his daughter on the grounds that his ex-wife was cohabiting with a black man, whom she later married. The Florida state courts, citing "social stigmatization" to which the child would be subjected as a consequence of her mother's decision to pursue a "life-style unacceptable . . . to society," determined that a change in custody was in the child's best interests. *Id.* at 430-31.

Finding that the case raised "important federal concerns arising from the Constitution's commitment to eradicating discrimination based on race," *id.* at 432, the U.S. Supreme Court overturned the state courts' decision. The Court at the outset set forth the analytical framework that should govern this case as well:

> A core purpose of the Fourteenth Amendment was to do away with all governmentally imposed discrimination based on race. . . . Classifying persons according to their race is more likely to reflect racial prejudice than legitimate public concerns; the race, not the person, dictates the category. . . . Such classifications are subject to the most exacting scrutiny. . . .

Id. at 432 (citations omitted).

The Court recognized that the "goal of granting custody based on the best interests of the child is indisputably a substantial governmental interest." *Id.* at 433. But while the Court acknowledged "the reality of private biases and the possible injury they might inflict," it ruled such considerations were impermissible factors on which to predicate the placement decision. The Court's holding was unequivocal: "The Constitution cannot control such prejudices but neither can it tolerate them. Private biases may be outside the reach of the law, but the law cannot, directly or indirectly, give them effect."[15] *Id.*

Plaintiffs anticipate Defendants' continued reliance on several lower court decisions that appear to contradict *Palmore* by allowing the use of race as "a factor" in adoption placements.[16] However, to the extent that those cases conflict with *Palmore* or fail to apply strict scrutiny, they provide no sound basis for Defendants' legal position. Defendants appear to stake much of their case on the continuing viability of *Drummond v. Fulton County Dept. of Family & Children's Services*, 563 F.2d 1200 (5th Cir. 1977) (*en banc*), where the Fifth Circuit upheld a state agency's removal of a mixed-race child, Timmy, from the white foster family (the Drummonds) that had raised him and wanted to adopt him. In considering whether the state violated the Drummonds' due process rights by removing Timmy,[17] the Fifth Circuit held that it did not, so long as race was not used as an "automatic" disqualifier. Instead, the use of race was permissible as a factor to "be taken into account, perhaps decisively if it is the factor which

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[15] "By phrasing its holding in this manner, the Court appears to have outlawed all uses of racial criteria in the custody and adoption area," *see* Davidson M. Pattiz, "Racial Preference in Adoption: An Equal Protection Challenge," 82 *Georgetown L. J.* 2571, 2581 n.66 (1994) (Exh. X).

[16] Defendants asserted their reliance on these cases in their Amended Motion for Summary Judgment, which this Court denied on January 22, 1996. Defendants asked this Court to accept as controlling the decisions in *e.g., Tallman v. Tabor*, 859 F. Supp. 1078 (E.D. Mich. 1994) (allowing use of race as a factor in removing child from foster family and returning her to birth mother); *Compos v. McKeithen*, 341 F. Supp. 264, 266 (E.D. La. 1972) (striking down statute prohibiting interracial adoption but suggesting that "community pressures, born of racial prejudice" may justify the use of race as a factor in adoption placements). However, contrast *McLaughlin v. Pernsley*, 693 F. Supp. 318, 324 (E.D. Pa. 1988), *aff'd*, 876 F.2d 308 (3rd Cir. 1989) (holding that the use of race as a factor is not constitutionally "necessary" to a child's best interests in long-term foster care placements).

[17] Although the Drummonds asserted an equal protection claim on their own behalf, the Fifth Circuit did not apply strict scrutiny to the state's conduct in removing Timmy, failing entirely to engage in an equal protection analysis.

tips the balance between two potential families."[18] *Id.* at 1204-1205. The court concluded that " 'the difficulties inherent in interracial adoption' justify the consideration of 'race as a relevant factor in adoption'." *Id.* at 1205. The court sanctioned the use of racial criteria on the grounds that "adoption agencies quite frequently try to place a child where he can most easily become a normal family member. The duplication of his natural biological environment is a part of that program." *Id.*

Drummond and its progeny—predicated on using discriminatory state action to maintain racially "natural" or "normal" family relationships—are untenable in light of *Palmore*, which forbade the use of racial generalizations in the adoption context. As Professor Tribe observes, *Palmore* "essentially recognized that legal practices cannot be saved from constitutional condemnation under the Fourteenth Amendment's Equal Protection Clause simply because those practices reflect or mirror what has come to be seen as socially normal or biologically natural." Tribe Corresp., Exh. O at 106. Nor can there be doubt that the Supreme Court's most recent equal protection pronouncements, such as *Miller* and *Adarand*, which subject to strict scrutiny *all* governmental race classifications,[19] lay to rest any questions about the remaining viability of *Drummond*. *See, e.g.*, Pattiz, Exh. X at 2580 (*Palmore* places in question the holding in *Drummond* and related cases). When subjected to the appropriate constitutional scrutiny, DPRS' racial screening policies must be struck down.

C. DPRS' Race-Conscious Adoption Policies and Practices are Unconstitutional.[20]

While *Palmore* recognized that the best interest of the child is "indisputably a substantial governmental interest," *Palmore*, 466 U.S. at 433, "consideration of

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[18] Likewise here, race is expressly a factor in adoption placements, which, Defendants admit, "[p]erhaps" may be used to tip the balance between prospective adoptive families of different races. Devin Dep., Exh. K at 93.

[19] Notably, for instance, the district court in *Tallmore v. Tabor*, *supra*, on which Defendants' rely, did not apply strict scrutiny analysis.

[20] Defendants correctly note that plaintiffs do not challenge the constitutionality of Tex. Fam. Code § 162.308(a)(West 1996), which would seem to prohibit race-conscious adoption policies and practices. Notwithstanding this law and its predecessor 1993 law, DPRS continues to expressly consider race as an "important" factor in adoption placements, *see, e.g.* Devin Dep., Exh. K at 72, and narrowly construes prohibitions against discrimination so as to allow consideration of race. *Id.* at 104.

DPRS also invokes the federal Multi-Ethnic Placement Act (MEPA), 42 U.S.C. §§ 622, 5115a (1994), to support its policies. However, MEPA does not *mandate* the use of race by state agencies; it merely defines the contours of permissive uses of race. Moreover, Professor Randall Kennedy observes, Exh. W at 43, that to the extent MEPA "openly instructs officials that they may take race into account in making child placement decisions," it too may violate equal protection. In any event, DPRS does not contend that the Act *compels* it to discriminate, so this issue is not before the Court.

race is neither a necessary nor narrowly tailored means of achieving this goal." Zreczny, Exh. F at 1122. We demonstrate below that the objectives asserted by the state and the means used to achieve them do not match up, and that the use by DPRS and its agents of racial criteria in adoption placements is therefore unconstitutional.

(1) DPRS uses race as a screening device in adoption placements.

The Supreme Court has applied a variety of means to determine the existence of racial discrimination in official policy. Of course, where racial criteria are expressly used, strict scrutiny is triggered. *See, e.g., Adarand, supra.* But less obvious means of discrimination are impermissible as well. In *Yick Wo v. Hopkins*, 118 U.S. 356, 373-74 (1886), for example, the Court struck down discriminatory state action where the law was "fair on its face and impartial in appearance," but "administered by public authority with an evil eye and an unequal hand." In that context, "an invidious discriminatory purpose may often be inferred from the totality of the relevant facts, including the fact, if it is true, that the law bears more heavily on one race than another." *Washington v. Davis*, 426 U.S. 229, 242 (1976). Evidentiary sources may also include the "historical background of the decision" as well as "[d]epartures from the normal procedural sequence." *Village of Arlington Heights v. Metropolitan Housing Development Corp.*, 429 U.S. 252, 267 (1977).

These latter cases involving indirect indicia of invidious discrimination are especially relevant in the case of contemporary adoption policies, where outright prohibitions of interracial adoptions have been eliminated but informal barriers remain. As Zreczny observes, Exh. F at 1129, "Where racial classifications are intermingled with a wealth of other factors, the discrimination may not be as obvious as it would be in the case of an outright ban on transracial adoption. Nevertheless, the 'race as a factor' system leaves itself wide open to judicial and administrative abuse." *See also* Bartholet, Exh. A at 29-30 (formal rules impeding interracial adoptions are only the "tip of the iceberg," beneath which are "unwritten and generally invisible rules" that make race "an overwhelmingly important factor in the adoption process").

The evidence in this case establishes beyond doubt that DPRS uses race to impede adoption opportunities for children consigned to its care. Given the pervasiveness of its race-matching policies and practices in the past—and its vigorous assertion that the law permits them—any assurance by DPRS that it has now ceased to engage in such practices should be greeted with skepticism. Defendants' "litigation conversion," even if sincere, should be enforced by court order.

The state flatly prohibited interracial adoptions until 1973, and DPRS continued to overtly employ race-matching policies thereafter. The Texas Legislature aimed to end the discriminatory regime under which minority children suffered when it enacted Tex. Hum. Res. Code § 47.041 in 1993 and Tex. Fam. Code § 162.308 et seq. last year. Nevertheless, DPRS continues to engage in racial classifications in a manner best characterized as at once systematic and haphaz-

ard. DPRS classifies children in its custody and prospective adoptive parents by race and ethnicity. Devin Dep., Exh. K at 68 and 71. DPRS policies expressly include race and ethnicity as a factor to be considered in adoption placements. *Id.* at Dep. Exhs. 3, 4, 5. DPRS admits that race may tip the balance between possible adoptive placements. *Id.* at 93. The agency vests substantial discretion in its regional offices and individual caseworkers to apply racial factors, and admits that it does not actively monitor them to determine whether they are complying with the law. *Id.* at 20-25.

DPRS officials believe race is an important factor to consider in adoption placements. Id. at 81-82. The application of racial criteria in specific instances is a "subjective decision." *Id.* at 105. As set forth in the Statement of Facts (*supra* at 22-23), the application of these criteria results in substantial delays for black, Hispanic, and mixed-race children between the termination of parental rights and their placement in adoptive homes.[21] Other witnesses attest to DPRS' continuing discriminatory practices, even in the face of apparent statutory prohibitions. Exh. P. The combination of the explicit use of racial criteria by the agency, the broad subjective discretion given to regional offices and caseworkers to apply those criteria, and the impact of those policies and practices on minority children trigger the broad array of equal protection concerns at issue in such cases as *Adarand*, *Yick Wo*, and *Arlington Heights*—as well, of course, as *Palmore v. Sidoti*.

Likewise, it is beyond dispute that racial considerations played a role in the adoption ordeal of the individual plaintiffs, Matthew and Joseph. Testimony of DPRS officials and notations in case files make clear that DPRS intended to secure, a same-race placement for the boys even though a loving, qualified family was available. DPRS officials repeatedly told the Mullens, both before and following the breakdown of the first adoptive placement, that they wanted the boys placed in a black home. Mehlhop Dep., Exh. S at 201, 207, and Dep. Exh. 12; Pritchard Dep., Exh. T at 119 and Dep. Exhs. 11 and 17; Lou Ann Mullen Aff., Exh. Q. Indeed, the Adoption Unit Supervisor Ann Ruten was willing to send them to a "group home" rather than place them with the Mullens. Lou Ann Mullen Aff., Exh. Q at 4; Scott Mullen Aff., Exh. R at 2-3.

With Matthew and Joseph, DPRS departed from its ordinary procedures in numerous instances, and always in ways consistent with a goal of a same-race placement. Although DPRS usually tries to place siblings together in a foster home, at no time prior to its removal of Matthew from the Mullens did it attempt to place the boys together, Chatman Dep., Exh. N at 23-24, either in the Mullen home or in Joseph's foster home. Lou Ann Mullen Aff., Exh. Q at 2, 3. And, while DPRS ostensibly prefers foster parents over complete strangers to adopt the children with whom they've bonded and the Mullens repeatedly made their desires to adopt Matthew known, DPRS never suggested that in order to adopt Matthew the Mullens should also consider adopting Joseph. Mehlhop

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[21] Moreover, even where the delay for some children might be considered by DPRS to be *de minimis*, these cases do not escape the exacting scrutiny equal protection requires. *See* Tribe Corresp., Exh. O.

Dep., Exh. S at 83 and 200-203; Lou Ann Mullen Aff., Exh. Q at 3. The boys were placed in a black adoptive home that was unlicensed, Chatman Dep., Exh. N at 65, contrary to DPRS policy, Devin Dep., Exh. K at 140.

Even after the August 1994 adoptive placement failed and the Mullens expressed a desire to adopt both boys, no adoption application was sent to them. Pritchard Dep., Exh. T at 124-25; Lou Ann Mullen Aff., Exh. Q at 5. Only when the Institute for Justice sent DPRS a threatening letter did the agency decide to consider the Mullens as an adoptive family and send them an application. Chatman Dep., Exh. N at 89; Lou Ann Mullen Aff., Exh. Q at 5. When the boys were placed in the Mullens' foster care in January 1995, the Mullens were informed it would be a foster placement for six months. Pritchard Dep., Exh. T at 127-28; Lou Ann Mullen Aff., Exh. Q at 5-6. DPRS continued its recruitment efforts for other prospective families. Chatman Dep., Exh. N at 102-103; Recruitment Efforts, Exh. V. Immediately after this lawsuit was filed, DPRS contacted the Mullens to say they would agree to the adoptions. Lou Ann Mullen Aff., Exh. Q at 6-7. On April 17, 1995, four days after the lawsuit was commenced, the boys' case files were changed to reflect an adoption placement and DPRS entered into an Adoption Placement Agreement with the Mullens. Pritchard Dep., Exh. T at 129, 131; Lou Ann Mullen Aff., Exh. Q at 6-7. Much as DPRS might like to chalk all this up to coincidence, the pattern of discrimination is unmistakable and exemplifies Defendants' interpretation of what they mean by using race as "a factor" in placement decisions.

(2) Preservation of a group's "racial identity" or "culture" is not a compelling state interest.

DPRS justifies its consideration of race and ethnicity as a relevant factor in determining a child's best interests. In so doing, it mistakenly conflates the concept of preserving a *group's* "culture" and/or "racial identity" with the concept of the "best interest of a child," as if these are the same thing. These are in fact quite distinct.[22] *See, e.g., Compos v. McKeithen*, 341 F. Supp. at 267 (striking down a prohibition on interracial adoptions since the statute "promotes not the child's best interests but only the integrity of race in the adoptive family relationship"). The distinction is important because if the state's objective is the best

[22] One defender of race-conscious adoption policies frankly concedes that distinction, arguing that the "best interests" standard is inadequate because it does not take into account collective group interests. "Minority groups whose children may be placed transracially have at least two identifiable interests--an interest in decision-making power and an interest in continuing to exist as discrete groups." Margaret Howard, "Transracial Adoption: Analysis of the Best Interests Standard," 59 *Notre Dame L. Rev.* 503, 504 (1984). An individual's "racial identity" does not necessarily mirror the "racial identity" or "culture" of a collective group to which he or she belongs, even assuming such a monolith exists. Indeed, Dr. Griffith questions whether there is such a definable entity as "black culture" or "black identity," since individual blacks have different ideas about what constitutes their culture and individual identity and have differing reference group orientations. *See* Griffith Aff., Exh. H.

interest of the child, that objective indisputably substantial, but race-conscious means must be narrowly tailored to that purpose. By contrast, if the state's objective is preserving the "racial identity" or "culture" of a particular group, that objective is constitutionally illegitimate.

The ideology underlying race-matching in adoption placements holds that all black children have an interest in preserving a collective cultural identity, Hayes, Exh. D at 4, and that the larger black community has an interest in keeping the children as part of their discrete group. These assumptions underlie DPRS' race-conscious adoption policies as well, and, upon closer scrutiny, expose the glaring absence of foundation.

Deposition testimony of DPRS officials reveal that they are more concerned about group interests than the best interest of individual minority children. DPRS Supervisor Brenda Chatman testified that she believes children inherit their identity, which she defines as "culture," from their parents; and that it is important to "maintain" cultural identity (read: racial integrity) even for a child abandoned at birth and raised by a family with a different "culture" (read: of a different race).[23] Chatman Dep., Exh. N at 35-38. Similarly, DPRS/CPS Deputy Director Pat Devin testified that she believes all African-Americans share a common racial identity, Devin Dep., Exh. K at 78; and that racial identity "is one of a number of important factors" to consider in adoption placements. *Id.* at 72. "The obvious and easiest way to preserve one's racial identity," she testified, "is to be with . . . people who look and are like you." *Id.* at 76. A notation in Plaintiffs' case file underscores this point, noting that Matthew and Joseph were placed in a foster home "which is also black which meets cultural/heritage needs." Pritchard Dep., Exh. T at 93 and Dep. Exh. 11.

Defendants' reliance on the assumption that skin color determines an individual's racial identity and culture lacks support in the psychiatric literature. Dr. Griffith, a forensic psychiatrist and Professor of African American studies at Yale, flatly rejects this "essentialist" view of identity.[24] Griffith draws a distinction between "what is the physical or racial characteristic of blackness and the concept of ethnically held beliefs, values, attitudes and tastes." Griffith Aff., Exh. H at 6. He notes that among any group of Blacks, adopted or nonadopted, individuals will have differing attitudes about their blackness based on a variety of factors such as socioeconomic status, age, education, etc. *Id.* These attitudes are constantly developing and changing. While these individuals will adopt different individual identities, they also have different notions about what constitutes "black culture."

> As a racial group, Blacks are not a homogenous *cultural* group. Blacks, like other individuals, have different religious connections, educational levels, political interests and commitments, and different levels of involvement as they seek to confront racism.

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[23] This view holds that identity and culture are passed on genetically, inherent in the fact of one's race. Professor Sanford Levinson refers to this as an "essentialist" view of identity. *See* Tribe Corresp., Exh. O at 107.

[24] See fn. 26

Id.

That DPRS relies so heavily on the NABSW to defend its use of race suggests that its objective is the protection of black culture or the "racial identity" of a group.[25] According to NABSW literature, the organization's purpose is to "promote the welfare and survival and liberation of the African American community. . . . We must preserve our ancestral Heritage." NABSW Pamphlet (Exh. Y). Whatever the merits of this objective as a matter of social policy, it is certainly an improper consideration for equal protection purposes.

From the foregoing, it appears the purpose of using race as a factor in DPRS adoption placements is to preserve a particular group's "racial identity" or "culture." In fact, defendants offer no other justification.[26] But this objective is an impermissible basis for state action.[27] *See, e.g., Loving v. Virginia*, 388 U.S. at 11, n.11 (anti-miscegenation law invalid "even assuming an even-handed state purpose to protect the 'integrity' of all races"); *Bakke*, 438 U.S. at 298 (Powell, J.) ("Nothing in the Constitution supports the notion that individuals may be asked to suffer otherwise impermissible burdens in order to enhance the societal standing of their ethnic groups"); *Wygant*, 476 U.S. at 276 (rejecting "role model" justification). *See also* Tribe Corresp., Exh. O at 105 ("Refusing admission to a housing project to a black family, for example, under a tipping-point ordinance or regulation ostensibly designed to achieve an optimal racial mix . . . in a neighborhood by avoiding the all-too-familiar phenomenon of white flight must, for constitutional purposes, be recognized as an instance of discriminating against, and therefore denying equal protection to, that black family. That the discrimination or denial may be benevolent in ultimate motivation seems to me constitutionally immaterial.") Since the state's objective in using racial criteria is itself impermissible, DPRS' policies and practices violate the Constitution.

(3) The use of racial criteria by DPRS as a screening device in adoption placements is not narrowly tailored to the child's best interests.

As Professor Bartholet observes, Exh. B at 1223, "Child welfare professionals agree with virtual unanimity that children need continuity in the context of a permanent home in order to flourish." Beyond that agreement, consensus breaks down over the objective factors that comprise a child's best interest. As Professor Kennedy remarks, Exh. W at 42, "there exists no consensus on how best to

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[25] Further, in their summary judgment motion, Defendants suggested that the Indian Child Welfare Act, designed to protect the survival of Native American culture, as a model for the placement of all minority children.

[26] Caseworker Jeanie Mehlhop noted adverse "community reactions" to some interracial adoptions, Mehlhop Dep., Exh. S at 174, but that justification cannot be used to support racial classifications in light of *Palmore v. Sidoti*.

[27] Professor Levinson notes that the Supreme Court has in exceptional cases protected particular cultures such as Native Americans and the Amish. He observes that whatever the merits of an argument that race-matching is necessary to protect a particular culture, "regard for the 'interests of the child has precious little to do with it." Tribe Corresp., Exh. O at 107.

raise a black child or any other child." There is no consensus on what constitutes "black culture." Griffith Aff., Exh. H. at 6. Nor does membership in a given racial group provide the "right" way to think through issues of race or to teach our children what we want them to learn. While black children—and all children—should be taught about our country's treatment of blacks from slavery and beyond Jim Crow, there is nothing inherent about being black that assures one will teach such lessons more effectively or appropriately, and nothing inherent about not being black that guarantees one is incapable of passing on these lessons. Griffith Aff., Exh. H at 8.

Interjecting race and ethnicity as "a factor" into the adoption placement equation is fraught with danger, as DPRS' policies and practices illustrate. Taking aim at these practices and policies requires Plaintiffs to shoot at a moving target—the rationalization constantly shifts. To our knowledge, DPRS has never anchored its policies in any particularized findings about the necessity to employ racial criteria in adoption placements.[28] The Supreme Court has admonished, "Absent such findings, there is a danger that a racial classification is merely the product of unthinking stereotypes or a form of racial politics." *Croson*, 488 U.S. at 510 (plurality).

That seems exactly the case here. Race-conscious adoption policies rest "upon a racial generalization, a racial stereotype, regarding the relative abilities of white and black adults in terms of raising African-American children," a practice at odds with a legal system that "demands that people be given individualized consideration to reflect and effectuate our desire to accord each person respect as a unique and special individual." Kennedy, Exh. W at 41.

DPRS contends that its use of race is merely one of a number of factors it uses in adoption placements. But as Zreczny cautions, Exh. F at 1150,

> Narrowing the definition and scope of the race factor in order to narrowly tailor race-matching is theoretically appealing, but practically ineffective. . . . [C]onsidering race as a factor [inserts] a very tangible factor in an otherwise very intangible and discretionary best interest of the child analysis. Race is simply too powerful an influence to be relegated to the status of a mere factor among many. . . . The temptation to assume that an African-American family would be in a better position [to preserve cultural identity] is too apparent.

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[28] When asked in discovery to produce all documents supporting its position that same-race placements ordinarily help a child develop a sense of identity consistent with his or her racial background, Defendants produced nothing, instead directing Plaintiffs to contact the NABSW and the North American Council on Adoptable Children (NACAC) for documents. (*See* Defendants' Response "I" to Plaintiffs' First Request for Production). However, neither group can provide empirical support for DPRS claims. *See* Simon Aff., Exh. I; Griffith Aff., Exh. H; NACAC Newsletter (Exh. Z) (survey on barriers to same race placement is "far from comprehensive or rigorously scientific.") Plaintiffs are left to assume that Defendants cannot support their policies by reference to any evidence demonstrating that children are better off in foster care than in an interracial home.

Moreover, the "general rule that race may be considered as a factor in a placement proceeding is a tremendously vague instruction." *Id.* at 1149. Where, as here, the actual application of the race factor is unstructured, discretionary, and subjective, it gives rise to decisions based on "personal biases, unsupported assumptions, and incomplete analyses." Twila L. Perry, "Race and Child Placement: The Best Interest Test and the Cost of Discretion," 29 *J. Family L.* 51, 57 (1991) (Exh. AA). These are precisely the types of subjective prejudices and racial generalizations that the current DPRS system allowed to subvert the best interests of Matthew and Joseph, needlessly impeding (and nearly destroying) their prospects for adoption by the only real family either of them has ever known.

Yet given the tremendous discretion that the agency and its officials wield, it is clear that anything less than a complete prohibition on the use of racial criteria inevitably will give rise to abuse. For as Judge Tuttle observed in *Drummond*, 563 F.2d at 1219 (Tuttle, J., dissenting), "it is utterly impossible to determine" whether race is the decisive factor or merely a contributing factor in an adoption proceeding. As one observer has noted,

> the distinction between using race as 'the sole' criterion or 'merely a' criterion, a device lower courts still employ to keep racial classifications alive, is nonsensical. Just as no court would allow a prohibition on transracial marriage to stand merely because the law at issue employed race as only a single criterion, so too should the courts eliminate [interracial adoption] laws that do the same.

Pattiz, Exh. X at 2605.

DPRS cannot establish the necessity of considering racial criteria as a factor in determining a child's best interest. Experts may differ on the probative value of the other factors considered by DPRS for prospective adoptive families—age, employment, religion, physical environment, sex, marital status, education, and other children in the home. All of these affect a child's well-being, or at least weigh in the relative desirability of a particular placement. But race, of course, is constitutionally different, requiring a showing of compelling justification and narrow tailoring. Far from satisfying this standard, the overwhelming weight of evidence indicates that the race of the adoptive family has no negative effect on a minority child's well-being, either in terms of overall adjustment, self-esteem, or racial identity. *See, e.g.*, Bartholet, Exh. B at 1207-25; Zreczny, Exh. F at 1142-44; Griffith and Silverman, Exh. H3 at 112; Lawrence Aff., Exh. E; Griffith Aff., Exh. H; Simon Aff., Exh. I.

By contrast, the use of race as "a factor" means that minority children suffer substantial delays while awaiting a permanent family, *see* Bartholet, Exh. B at 1203-1205; or are placed with families that, in terms of criteria other than race, would not be the most optimal families. *Id.* at 1206-1207. Defendants have the burden of proving why any use of race as a screening device, much less their haphazard manner of using it, is a narrowly tailored means of achieving a compelling governmental objective. This they cannot do. For all these reasons, defendants cannot justify the use of race as a screening device in adoption placements.

(4) Nonracial criteria will ensure the best interests of the child.

The application of the nonracial criteria that DPRS considers should yield the optimal adoptive placements for children. To the extent special circumstances arise, they should be dealt with not by indulging race-based presumptions, but by determining whether a particular child's actual needs will likely be met by the family selected by reference to objective nonracial criteria. *See* Zreczny, Exh. F at 1151. As the court concluded in *McLaughlin*, 693 F. Supp. at 324,

> [T]he use of race as a factor in determining long-term foster care placements is not constitutionally 'necessary' where a governmental entity such as this Court can make placement decisions on an individualized basis. Foster care decisions made under these circumstances should not be decided by use of pernicious generalization but rather should be decided on individual merit.

The existence of adequate nonracial criteria to screen and compare prospective adoptive parents renders the use of racial criteria constitutionally impermissible.

Conclusion

Every year in Texas and elsewhere, children of color are subjected to ordeals like the one to which Matthew and Joseph were subjected. Matthew and Joseph's story ultimately had a happy ending. But because state officials still possess the power to use race as a factor in adoption placements, other children will suffer.

Professor Kennedy, Exh. W at 42, sums up the situation at hand:

> [O]ur government should reject any scheme that engages in racial steering on the basis of a hunch that certain people—because of their race, color or national origin —will know better how to raise a child than other people of a different race, color, or national origin. If officials are satisfied that adults seeking foster or adoptive children are safe, sober folk, they should have to pass no racial screening. What parentless children need are not "white," "black," "yellow," "brown," or "red" parents but loving parents.

This is the rule mandated by the guarantee of equal protection. Plaintiffs respectfully urge this Court to put an end to defendants' use of race as a screening device in adoption placements. [footnote omitted]