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1310 L Street NW
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The Honorable Mark Mickelson
State Capitol
500 East Capitol Avenue
Pierre, SD 57501-5070

Re: Oppose SB 149 – Allowing Discrimination by State-Funded Child Placing Agencies

Dear Speaker Mickelson:

On behalf of its South Dakota members and supporters, Americans United for Separation of Church and State urges you to oppose SB 149, a bill that would provide child placing agencies with a broad right to refuse to place children in adoptive homes if that placement is contrary to the agency's religious beliefs. Passage of this bill could lead to discrimination against prospective foster or adoptive parents, as well as youth in care and could burden a child's right to receive services and be placed in a stable home according to the best interests of the child. A broad exemption such as this would place the beliefs of the agency above the needs of the child; therefore, this bill must be rejected.

This Exemption Is Unconstitutionally Broad and Would Burden Adoptees' Best Interests

Although the government may offer religious accommodations even where it is not required to do so by the Constitution,¹ the state's ability to provide religious accommodations is not unlimited: "At some point, accommodation may devolve into an unlawful fostering of religion."² In *Texas Monthly, Inc. v. Bullock*,³ the Supreme Court explained that legislative exemptions for religious organizations that exceed free exercise requirements will be upheld only when they do not impose "substantial burdens on nonbeneficiaries" or they are designed to prevent "potentially serious encroachments on protected religious freedoms." To meet the confines of the Establishment Clause, "an accommodation must be measured so that it does not override other significant interests."⁴ It may not place "unyielding weight" on the religious interest "over all other interests," including the interests of child placing agencies.⁵

¹ Of course, in some instances exemptions may be constitutionally permissible but unwise public policy.

² *Corporation of the Presiding Bishop v. Amos*, 483 U.S. 327, 334-35 (1986) (internal quotation marks omitted).

³ 480 U.S. 1, 18 n. 8 (1989).

⁴ *Cutter v. Wilkinson*, 544 U.S. 709, 722 (2005).

⁵ *Estate of Thornton v. Caldor, Inc.*, 472 U.S. 703, 704, (1985).

However, placing the interests of one group over another is exactly what SB 149 seeks to do. This bill prioritizes the religious views of child placing agencies above the best interests of the child. This contradicts state law and generally accepted standards, which require the court to “give due consideration to the interests of the parties to the proceedings, but shall give paramount consideration to the best interests of the child”⁶ when placing a child in a foster or adoptive home. “The best interests of the child are determined by considering the child’s temporal, mental, and moral welfare,”⁷ and “the trial court may, but is not required to, consider the following *Fuerstenberg* factors in determining the best interests and welfare of the child: parental fitness, stability, primary caretaker, child’s preference, harmful parental misconduct, separating siblings, and substantial change of circumstances.”⁸ The South Dakota Supreme Court has made it clear that what is in the child’s best interest is to be evaluated by the trial court and are specific to circumstances of each case. But under this bill “no child-placement may be required to provide any service that conflicts with, or provide any service under circumstances that conflict with the any sincerely-held religious belief or moral conviction of the child placement agency,” and thus, an agency could refuse services to a child, even when those services are in the child’s best interest. This would be a major shift in public policy in South Dakota where the best interest of the child is the “guiding force behind ... adoption and dependency and neglect statutes.”⁹ SB 149 must be rejected.

This Exemption Permits Taxpayer-funded Discrimination

SB 149 would allow agencies to use religious doctrine as the defining criterion for selecting foster and adoptive parents even when these agencies accept government funds. This bill would enable government funding for agencies that discriminate against potential foster or adoptive parents for any reason, as long the agency claims the discrimination is based upon its religious beliefs. For example, an adoption agency could refuse to place a child in an otherwise stable home because the prospective parents were unmarried, were a same-sex couple, or were adherents to a religion with beliefs different than an agency’s beliefs. Allowing government money to flow to these institutions is a clear violation of one of the central principles of our country’s constitutional order: “the Constitution does not permit the State to aid discrimination.”¹⁰

Moreover, this bill fails to safeguard taxpayer funds from flowing to organizations that contract with the government to provide services, but then refuse to fulfill their obligations under the contract. Under SB 149, it is entirely plausible that an agency would receive government funding to provide children with placements and provide them necessary support services according to the best interests of those children, but then fail to carry out its mission because it objects to the religion of the potential parents, despite it being an otherwise suitable placement. For example, a taxpayer-funded agency could refuse to place a child with a potential family because it objects to the church they attend, that one of the parents was previously divorced, or that an older sibling was born before the parents were

⁶ S.D. Codified Laws § 25-6-2

⁷ *Nickles v. Nickles*, 865 N.W.2d 142, 148 (S.D. Sup. Ct. 2015)

⁸ *Roth v. Haag*, 834 N.W.2d 337, 340 (2013) (quoting *Simunek v Auwerter*, 803 N.W.2d 835 (S.D. Sup. Ct., 2011))

⁹ *People In Interest of E.M.H.*, 873 N.W.2d 485, 490 (S.D. Sup. Ct. 015)

¹⁰ *Norwood v. Harrison*, 413 U.S. 455, 465-66 (1973).

married. Taxpayer dollars should not fund services contingent on a religious litmus test – nor should it fund agencies that use religion to deny essential services to those who need them.

Although Americans United supports accommodations to protect religious freedoms, the exemptions in SB 149 would impermissibly create state-sponsored discrimination and would burden children’s rights to be placed in adoptive homes according to their best interests. Accordingly, I urge you to oppose SB 149.

Sincerely,

A handwritten signature in cursive script that reads "Maggie Garrett".

Maggie Garrett

cc: Members of the South Dakota House of Representatives