AMERICANS UNITED
FOR SEPARATION OF CHURCH AND STATE

Maggie Garrett
Legislative Director

(202) 466-3234
(202) 898-0955 (fax)
americansunited@au.org

1310 L Street NW
Suite 200
Washington, DC 2005

March 8, 2017

The Honorable Dennis Daugaard
Office of the Governor
500 East Capitol Avenue
Pierre, SD 57501

Re: Veto SB 149 – Bill Would Allow Discrimination by State-Funded Child Placing Agencies

Dear Governor Daugaard:

On behalf of its South Dakota members and supporters, Americans United for Separation of Church and State urges you to veto 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. It also could burden a child's right to receive services or 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.

<u>This Exemption Is Unconstitutionally Broad and Would Burden the Best Interests of Youth in Care</u>

Although the government may create religious exemptions even where it is not required to do so by the Constitution,[1] the Constitution puts limitations on the government's ability to create religious exemptions: "At some point, accommodation may devolve into [something] unlawful."[2] The constitutional requirements are straightforward: "an accommodation must be measured so that it does not override other significant interests"[3] or "impose unjustified

[1] Of course, in some instances exemptions may be constitutionally permissible but unwise public policy.
[2] *Corp. of the Presiding Bishop v. Amos,* 483 U.S. 327, 334-35 (1986) (internal quotation marks omitted). Of course, in some instances exemptions may be constitutionally permissible but unwise public policy.
[3] *Cutter v. Wilkinson*, 544 U.S. 709, 722 (2005). Likewise, it must be calculated to lift an actual burden on religious exercise. *E.g.*, *County of Allegheny v. ACLU*, 492 U.S. 573, 613 n.59 (O'Connor, J., concurring) ("[A]n accommodation of religion, in order to be permitted under the Establishment Clause, must lift 'an identifiable burden on the exercise of religion.'") (quoting *Corp. of Presiding Bishop*, 483 U.S. at 348; *Wallace v. Jaffree*, 472 U.S. 38, 57 n.45 (1985)).

burdens on other[s]."[4] So, for example, in *Estate of Thornton v. Caldor, Inc.,*[5] the Supreme Court struck down a blanket exemption permitting employees to take off work for their Sabbath because it "unyielding[ly] weight[ed]" their religious interests "over all other interests."

Placing the interests of one group over another, however, 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 state the court to "shall 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.

In contrast, this bill states that "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.

<u>This Exemption Permits Taxpayer-funded Discrimination</u>

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 taxpayer-funded discrimination could be for any reason, as long the agency claims the discrimination is based upon its religious beliefs. For example, an agency could refuse to place a child in an otherwise stable home because the prospective parents were unmarried, a same-sex couple, or attending a church to which it objected. 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]

---

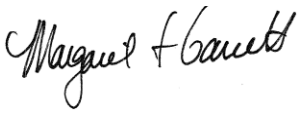
[4] *Cutter*, 544 U.S. at 726. *See also Texas Monthly, Inc. v. Bullock*, 480 U.S. 1, 18 n. 8 (1989) (such accommodations may not impose "substantial burdens on nonbeneficiaries").
[5] 472 U.S. 703, 704f (1985).
[6] S.D. Codified Laws § 25-6-2 (emphasis added).
[7] *Nickles v. Nickles*, 865 N.W.2d 142, 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).

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. 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 appropriately tailored accommodations to protect against government actions that substantially burden religious exercise, the exemptions in SB 149 go too far. It would permit state-sponsored discrimination and would burden children's rights to be placed in adoptive homes according to their best interests and run afoul of core constitutional principles. Accordingly, I urge you to veto SB 149.

Sincerely,



Maggie Garrett