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1310 L Street NW
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May 5, 2017

The Honorable Joe Straus
Texas House of Representatives
PO Box 2910
Austin, TX 78768

Re: Oppose HB 3859 – Bill Would Allow Discrimination by State-Funded Child Welfare Service Providers

Dear Speaker Straus:

On behalf of its Texas members and supporters, Americans United for Separation of Church and State urges you to oppose HB 3859, a bill that would provide taxpayer-funded child welfare service providers with a broad right to refuse services to vulnerable children if the service is contrary to the agency's religious beliefs. This would even include the right to refuse to place youth in adoptive and foster homes. Passage of this bill could lead to discrimination against prospective foster or adoptive parents, as well as youth in care. 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 the Best Interests of Youth in Care

The Constitution puts limitations on the government's ability to do so: "At some point, accommodation may devolve into [something] unlawful."¹ The constitutional requirements are straightforward: "an accommodation must be measured so that it does not override other significant interests"² or "impose unjustified burdens on other[s]."³ So, for example, in *Estate of Thornton v. Caldor, Inc.*,⁴ 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."

¹ *Corp. of the Presiding Bishop v. Amos*, 483 U.S. 327, 334-35 (1986) (internal quotation marks omitted).

² *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))).

³ *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").

⁴ 472 U.S. 703, 704f (1985).

Placing the interests of one group over another, however, is exactly what HB 3859 seeks to do. This bill prioritizes the religious views of child welfare service providers above the best interests of the child. This contradicts state law and generally accepted standards, which state “the best interest of the child shall always be the primary consideration of the court in determining the issues of conservatorship and possession of and access to the child.”⁵

The Texas Supreme Court has made it clear that it is the duty of the trial court to determine the best interest of the child based on a variety of factors, including the desires of the child, the emotional and physical needs of the child, and the stability of the home or proposed placement for the child.⁶ What clearly is not among the factors to be considered by the court: the religious beliefs of the child welfare service provider. In fact, Texas courts have made clear that “it is a fundamental principle that the State cannot prefer the religious views of one parent over the other in deciding the best interest of a child”⁷ following a divorce. If, under the U.S. and Texas constitutions, a parent’s religion cannot be a factor in determining the best interest of the child, it is hard to imagine how an independent social service agency’s religious beliefs are relevant.

Nonetheless, this bill prohibits “adverse action” from being taken against a child welfare provider that refuses to provide services that “conflict with the provider’s sincerely held religious beliefs.” Thus, an agency could refuse services to a child, including placement in a foster or adoptive home, even when those services are in the child’s best interest. This would be a major shift in public policy, conflict with prior Texas court rulings, and be likely unconstitutional. HB 3859 must be rejected.

This Exemption Permits Taxpayer-funded Discrimination

HB 3859 would allow agencies to use religious doctrine as the defining criterion for providing services and selecting foster and adoptive parents even when these agencies accept government funds. This taxpayer-funded discrimination could be for any reason, as long as 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 belong to a faith to which it objected. Or refuse to provide a foster home to a gay teen, provide necessary healthcare to a youth who has experienced sexual assault, or refuse to allow a youth in care to attend her church. 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 State may not aid discrimination.⁸

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

⁵ Tex. Fam. Code § 153.002.

⁶ See *Holley v. Adams*, 544 S.W.2d 367, 371–72 (Tex. 1976).

⁷ *Matter of Marriage of Knighton*, 723 S.W.2d 274, 278 (Tex. App. 1987).

⁸ *Norwood v. Harrison*, 413 U.S. 455, 465-66 (1973).

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 HB 3859 go much too far. It would permit state-sponsored discrimination, would burden children's rights to be provided services and placed in foster or adoptive homes according to their best interests, and would run afoul of core constitutional principles. Accordingly, I urge you to oppose HB 3859.

Sincerely,

A handwritten signature in black ink that reads "Maggie Garrett". The signature is written in a cursive, flowing style.

Maggie Garrett

CC: Members of the Texas House of Representatives