April 16, 2019

The Honorable Dade Phelan
Chair
State Affairs Committee
Texas House of Representatives
P.O. Box 2910
Austin, Texas 78768

The Honorable Ana Hernandez
Vice Chair
State Affairs Committee
Texas House of Representatives
P.O. Box 2910
Austin, Texas 78768

Re: Oppose HB 1035 and HB 3172 – These Bills Would Allow for Discrimination Against Any Texan

Dear Chair Phelan and Vice Chair Hernandez:

On behalf of the Texas chapters, members, and supporters of Americans United for Separation of Church and State, I write to urge you to oppose HB 1035 and HB 3172. Both of these bills would give individuals, corporations, and religious organizations a blanket religious exemption that would allow them to discriminate against and deny services to others, regardless of the harm it causes. These bills, therefore, would violate the Establishment Clause of the First Amendment of the U.S. Constitution and should be rejected.

Although the state may offer religious exemptions even where it is not required to do so by the Free Exercise Clause of the U.S. Constitution,1 its ability to provide religious accommodations is not unlimited: “At some point, accommodation may devolve into an unlawful fostering of religion”2 that violates the Establishment Clause of the Constitution. To avoid an Establishment Clause violation, a religious exemption “must be measured so that it does not override other significant interests” and may not “impose unjustified burdens on other[s].”3 In Estate of Thornton v. Caldor, Inc.,4 for example, the Supreme Court struck down a blanket law allowing anyone to designate and take off his or her Sabbath because it “unyieldingly weighted” the religious interest “over all other interests,” including the interests of co-workers.

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1 Of course, in some instances exemptions may be constitutionally permissible but unwise public policy.
4 472 U.S. 703, 704 (1985). See also Barber v. Bryant, 193 F. Supp. 3d 677, 688 (S.D. Miss. 2016), rev’d on other grounds (a similar Mississippi law violated the Establishment Clause “because persons who hold contrary religious beliefs are unprotected—the State has put its thumb on the scale to favor some religious beliefs over others.”).
In contrast, these bills would give blanket exemptions to individuals, corporations, and religious organizations to discriminate based on their beliefs; HB 1035 would privilege certain religious beliefs about marriage and gender, and HB 3172 would privilege any religious belief. HB 1035 even allows government employees and taxpayer-funded entities to discriminate. Neither bill, however, takes into account the harm and suffering that could result. For example, a therapist could refuse to treat a child because her parents are a same-sex couple or unmarried. This would not just harm the human dignity of the parents but would allow the therapist to put his religious beliefs over the needs of a patient.

A few more examples of the types of discrimination that HB 1035 or HB 3172 could authorize include:

- a government clerk could refuse to issue marriage licenses, and a judge could refuse to solemnize weddings—with no repercussions—if they have religious objections to a couple’s marriage;
- a real estate agent could refuse to work with a married couple because they are interfaith or the “wrong” religion; and
- a taxpayer-funded organization that provides shelter to kids who have suffered child abuse could turn away a pregnant teenager.

Because exemptions like these would result in harm to others, they are impermissible under the Establishment Clause.5

Freedom of religion is a fundamental American value. It means that we are all free to believe or not as we see fit. But it is not a justification for denying rights to others or causing them harm. These bills do not protect religious freedom; instead, they authorize discrimination against Texans. We therefore urge you to reject HB 1035 and HB 3172. Thank you for your consideration on this important matter.

Sincerely,

Nikolas Nartowicz
State Policy Counsel

cc: Members of the House State Affairs Committee

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5 See, e.g., Barber, 193 F. Supp. at 721 (explaining that the Mississippi FADA violates “this ‘do no harm’ principle”).