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## MEMORANDUM

**TO:** Governor Henry McMaster  
**FROM:** Nikolas Nartowicz, State Legislative Counsel, Americans United for Separation of Church & State  
**DATE:** June 29, 2018  
**SUBJECT:** Section 38.29 of the Provisos in H 4950 Would Allow Discrimination by State-Funded Child Placing Agencies

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I write to inform you of our opposition to Section 38.29 of the Provisos in H 4950. This section directs the Department of Social Services to promulgate regulations for “faith-based” child placing agencies. However, it requires that these regulations permit state-funded adoption and foster care providers to ignore the best interests of children in their care and contractual obligations they have with the state if an agency claims either conflicts with its sincerely-held religious beliefs. We have serious concerns about the harmful consequences and the constitutional infirmities of this provision.

### **Section 38.29 Allows Taxpayer-Funded Child Placing Agencies to Ignore the Best Interest of the Child and Discriminate Against Children and Parents**

Child placing agencies must provide services based solely on what is in the best interest of the child. This section undermines this bedrock child welfare standard by putting the religious beliefs of child placing agencies ahead of the best interests of the children whom the agencies contract with the state to serve. This would cause real harm to these children and to prospective parents. The regulations required by the legislation would allow adoption and foster care providers to claim a right to:

- refuse to serve a child in need. For example, a provider could say it has the right to refuse to take in a child because he is gay, belongs to the “wrong” religion, or is the “wrong” gender or race. Such rejection is unconscionable, and would compound the already difficult circumstances children in care face;
- discriminate against qualified prospective parents. For example, an agency could claim a right to refuse to allow a child’s aunt to adopt her because that aunt has been divorced, has used birth control, is a different faith than the agency, or is married to someone of the same sex. This would not just harm the human dignity of the parents, but would increase both wait times for children in care as well as the number of youth leaving care without finding their forever family; or
- refuse to provide a child the services she needs. For example, the provider could claim a right to deny mental health counseling to a child who was a victim of abuse because its religion rejects psychiatric treatment. An agency could also claim a right

to refuse to provide a teenager who is a victim of sexual abuse needed healthcare services—something that she would have no other way to obtain. Again, this could cause real damage to the children in providers' care.

Providers who accept taxpayer dollars to serve these children must put the best interest of the children—not their own religious beliefs—first.

### **The Bill Allows Contractors to Refuse to Provide the Services the State Is Paying It to Provide**

Section 38.29 would mandate regulations that bar “any adverse action” against a child placing agency that refuses to provide services based on sincerely-held religious beliefs. These regulations, therefore would likely require the government to continue an ongoing contract with adoption and foster care providers and renew contracts in the future—even if the actions of the providers put the welfare of children in their care at risk, and even if refusing to provide placement services would otherwise violate their contract.<sup>1</sup> Likewise, the government would likely also be prohibited from reducing payments to the agency. The result—the government must contract with the agency, but the agency could refuse to perform services under the contract. Not only is this illogical, but also, it invites waste and abuse of taxpayer dollars.

### **The Establishment Clause of the U.S. Constitution Prohibits the Religious Exemption Created by Section 38.29**

The section would violate the Establishment Clause of the U.S. Constitution in two ways. First, the state cannot create religious exemptions that harm third parties. Second, government cannot delegate or share discretionary powers with religious organizations.

#### *Religious Exemptions Violate the Establishment Clause When They Harm Others*

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, its ability to do so is not unlimited. The Establishment Clause requires the government to “take adequate account of the burdens” that an exemption “may impose on nonbeneficiaries” and must ensure that any exemption is “measured so that it does not override other significant interests.”<sup>2</sup> It prohibits granting religious exemptions that would detrimentally affect any third party.<sup>3</sup> In *Estate of Thornton v. Caldor, Inc.*, for example, the Supreme Court struck down a blanket exemption for employees to take time off on the Sabbath day of their choosing because it “unyielding[ly] weight[ed]” the religious interest “over all other interests.”<sup>4</sup>

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<sup>1</sup> Indeed the state can—and may be constitutionally required—to prohibit government-funded agencies from discriminating against children and potential parents: “The Constitution does not permit the State to aid discrimination.” *Norwood v. Harrison*, 413 U.S. 455, 465-66 (1973).

<sup>2</sup> *Cutter v. Wilkinson*, 544 U.S. 709, 720, 722 (2005); see also *Estate of Thornton v. Caldor, Inc.*, 472 U.S. 703, 709-10 (1985).

<sup>3</sup> E.g., *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751, 2781 n.37 (2014) (citing *Cutter*, 544 U.S. at 720); *Holt v. Hobbs*, 135 S. Ct. 853, 867 (2015) (Ginsburg, J., concurring); *Cutter*, 544 U.S. at 726 (may not “impose unjustified burdens on other[s]”); *Texas Monthly, Inc. v. Bullock*, 489 U.S. 1, 18 n.8 (1989) (may not “impose substantial burdens on nonbeneficiaries”).

<sup>4</sup> *Caldor*, 472 U.S. at 709-10.

Section 38.29 would grant state-funded adoption and foster care providers a blanket exemption to any obligation—contractual or otherwise—to provide services that conflict with their religious beliefs. It fails to take into account any harms the exemption would cause to others, whether to potential parents or the children themselves. As explained above however, the harms are likely to be significant. The primary obligation of all providers is to serve the best interest of the child. Yet, this provision would allow providers to put their religious beliefs above children’s best interests—even denying children the families they deserve and need.

*The Government May Not Give Religious Organizations Discretionary Government Powers*

Under the regulations required by Section 38.29, a faith-based adoption or foster care provider could take state funds to provide services to the public and then use a religious litmus test to determine whom they will serve and which services they will provide. This is not just unfair, but unconstitutional. In *Larkin v. Grendel’s Den*, for example, the Supreme Court overturned a law that allowed churches to veto applications for liquor licenses in their neighborhoods. The Court explained that that the government cannot delegate or share “important, discretionary governmental powers” with religious institutions.<sup>5</sup> This legislation, however, delegates governmental authority to religious organizations and specifically allows them to use religious criteria to determine who deserves public services and which services each person may receive.

**Conclusion**

Freedom of religion is a fundamental American value that is protected by the U.S. and South Carolina Constitutions. It allows all of us the freedom to believe or not as we see fit, but it does not allow anyone to use religion to harm or discriminate against others. Religion is no justification for denying children services or loving homes and discriminating against prospective parents.

For all the above reasons, we believe Section 38.29 of H 4950 would result in a harmful—and constitutionally unsound—policy. Please contact me if you have any questions regarding this memo.

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<sup>5</sup> 459 U.S. 116, 125-27 (1982).