



MEMORANDUM

TO: Governor Jeff Colyer
FROM: Nikolas Nartowicz, State Legislative Counsel, Americans United for Separation of Church & State
DATE: May 7, 2018
SUBJECT: Veto SB 284 Because It Would Allow Discrimination by State-Funded Child Placement Agencies

I write to urge you to veto SB 284. This bill would 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 the bill.

SB 284 Allows Taxpayer-Funded Child Placement Agencies to Ignore the Best Interest of the Child and Discriminate Against Children and Parents

Child placement agencies must provide services based solely on what is in the best interest of the child. This bill undermines this bedrock child welfare standard by putting the religious beliefs of child placement 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 legislation would allow adoption and foster care providers to claim a right to:

- refuse to place a child with her aunt because the aunt is married to someone of the same sex; or
- discriminate against qualified prospective parents, including couples who are interfaith, previously divorced, or of a different faith than the agency.

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.

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

SB 284 would 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.¹ Likewise, the government would 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 SB 284

The bill 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.”² It prohibits granting religious exemptions that would detrimentally affect any third party.³ 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,” including the interests of co-workers.⁴

SB 284 would grant state-funded adoption and foster care providers a blanket exemption to any obligation—contractual or otherwise—regarding child placements 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 amendment 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 bill, 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

¹ 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).

² *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).

³ *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”).

⁴ *Caldor*, 472 U.S. at 709-10.

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 the government cannot delegate or share “important, discretionary governmental powers” with religious institutions.⁵ 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 Kansas 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 take away the rights of others. Religion is no justification for denying children homes and discriminating against prospective parents.

For all the above reasons, we believe SB 284 would result in a harmful—and constitutionally unsound—policy and urge you to veto it. Please contact me if you have any questions regarding this memorandum.

⁵ 459 U.S. 116, 125-27 (1982).