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The Honorable Michael Curcio
Chair
Judiciary Committee
Tennessee House of Representatives
425 5th Avenue North
630 Cordell Hull Building
Nashville, TN 37243

The Honorable Johnny Garrett
Vice-Chair
Judiciary Committee
Tennessee House of Representatives
425 5th Avenue North
630 Cordell Hull Building
Nashville, TN 37243

Re: Oppose Discrimination by State-Funded Child-Placing Agencies

Dear Chair Curcio and Vice-Chair Garrett:

On behalf of the Tennessee chapter, members, and supporters of Americans United for Separation of Church and State, I urge you to reject HB 836. This bill would authorize state-funded child-placing agencies to use religion to justify denying services to children and discriminating against prospective parents simply because they are the “wrong” religion. This would violate the Establishment Clause of the U.S. Constitution.

Freedom of religion is a fundamental American value that is protected by the U.S. and Tennessee 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 as an excuse to harm or discriminate against others. The religious exemption in this bill, however, would cause significant harm to children and potential parents.

HB 836 Allows Taxpayer-Funded Child-Placing Agencies to Ignore the Best Interest of the Child and Discriminate Against Children and Parents

HB 836 would undermine the bedrock child welfare standard that requires child-placing agencies to provide services based solely on what is in the best interest of the child.¹ Instead, the bill seeks to put 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 legislation would allow adoption and foster care providers to claim a right to refuse to work with or provide services to children in need. Rejecting children in need is unconscionable and would cause children in care real harm and compound the already difficult circumstances they face. For example, a provider could claim a right to:

¹ Tenn. Code Ann. § 36-1-101

- refuse to take in a child because the child has a different faith or is the “wrong” gender;
- deny mental health counseling to a child who was a victim of abuse because its religion rejects psychiatric treatment; or
- provide a teenager who is a victim of sexual assault healthcare services she needs and would have no other way to obtain.

The bill would also allow agencies to turn away qualified prospective parents who want to provide a loving, stable home for children in care. When an agency refuses to work with qualified parents, children in care are harmed. They face increased wait times, and the number of youth leaving care without finding their forever family increases. This also harms the human dignity of parents who simply want to help children in care.

Indeed, this kind of discrimination has happened in South Carolina. Miracle Hill Ministries, a state-funded foster care agency, has repeatedly refused to work with people who are the “wrong” religion. Three women who wanted nothing more than to help children in foster care have faced discrimination:

- Aimee Maddonna, a Catholic mother of three who grew up in a family who provided a home for countless children in foster care, had been told by Miracle Hill that her family was a great fit to work with kids. Instead of being able to volunteer to provide loving experiences to children in care, Maddonna was told that Miracle Hill only works with people “who are Protestant Christian.” Maddonna has filed suit to stop this government-sanctioned religious discrimination.²
- Motivated by Jewish values and her father’s own experience in foster care, Lydia Currie and her husband wanted to expand their family by fostering. But when Currie contacted Miracle Hill, she was turned away because they are not Protestant.³
- Beth Lesser, who is also Jewish, attended a training co-hosted by Miracle Hill and completed background checks before she was told that non-Protestants could not mentor or foster children.⁴

If this bill is passes, the same kind of religious discrimination could occur in Tennessee.

² Meg Kinnard, [AP Exclusive: Lawsuit claims discrimination by foster agency](#), AP, Feb. 15 2019. Maddonna is represented by Americans United for Separation of Church and State.

³ Lydia Currie, [I was barred from becoming a foster parent because I am Jewish](#), Jewish Telegraphic Agency, Feb. 5, 2019.

⁴ Angelia Davis, [Scrutiny of Miracle Hill’s faith-based approach reaches new level](#), Greenville News, Mar. 1, 2018.

The Establishment Clause of the U.S. Constitution Prohibits the Religious Exemption Created by HB 836

The bill would violate the Establishment Clause of the U.S. Constitution in two ways. First, it would impermissibly create a religious exemption that harms third parties. Second, it would delegate government discretionary powers to 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.”⁵ It prohibits granting religious exemptions that would detrimentally affect any third party.⁶

HB 836 is aimed at creating a blanket exemption for state-funded child-placing agencies but 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 is designed to 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 will serve and which services they will provide. This is not just unfair, but unconstitutional: The government cannot delegate or share “important, discretionary governmental powers” with religious institutions.⁷

Conclusion

We appreciate the important role religiously affiliated institutions historically have played in partnership with the government to provide adoption services. Effective government collaboration with faith-based groups, however, has not and does not require the sanctioning of discrimination with taxpayer funds. No taxpayer-funded organization should be able to use religion to justify refusing to provide services to children or place them in a safe and happy family because of the religion of the prospective parents.

Although Americans United supports appropriately tailored accommodations to protect against government actions that substantially burden religious exercise, the exemption in HB 836 goes too far.

⁵ *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).

⁶ 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”).

⁷ *Larkin v. Grendel’s Den*, 459 U.S. 116, 125-27 (1982).

For these reasons, I urge you to oppose HB 836.

Sincerely,

A handwritten signature in black ink, appearing to read "Nikolas Nartowicz", with a stylized, flowing script.

Nikolas Nartowicz
State Policy Counsel

cc: Members of the House Judiciary Committee