MEMORANDUM

TO: Jeff Graham

FROM: Maggie Garrett, Legislative Director, Americans United for Separation of Church & State

DATE: February 14, 2018

SUBJECT: SB 375 – A Bill that Allows Discrimination by State-Funded Child Placing Agencies

---

I am writing to inform you of our position on SB 375, which would permit state-funded adoption and foster care providers to ignore laws and contractual obligations that conflict with their sincerely held religious beliefs. We have serious concerns about the consequences and the constitutional infirmities of this bill.

SB 375 is not needed to allow faith-based groups to provide foster and adoption care services--the state partners with these organizations to provide these services already. Passage, however, would cause real harm to the children in care and their prospective parents. It would not only sanction discrimination against prospective parents—most often LGBTQ parents—but also allow taxpayer-funded organizations to deny children a safe, loving, and happy family. Consequently, the bill would violate the U.S. Constitution.

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

SB 375 Allows Taxpayer-Funded Child Placement Agencies to Ignore the Best Interest of the Child and Discriminate Against Children and Parents

It is universally understood that child placement agencies must provide services based solely on what is in the best interest of the child. SB 375 undermines this bedrock child welfare standard by placing religious beliefs over the best interests of the children whom the providers contract with the state to serve. This would cause real harm to these children and their prospective parents. The bill 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, 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.

- 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.

SB 375 Allows Contractors to Refuse to Provide the Services the State Is Paying It to Provide
SB 375 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 organizations put the welfare of children in their care at risk, and even if refusing the services would otherwise violate their contract. The government would also be prohibited from reducing payments to the agency even if the agency did not perform most of the services it contracted to provide. The result—the government must provide a contract to the organization, but the organization can refuse to perform any provision in the contract. Not only is this illogical, but also, it invites waste and abuse of taxpayer dollars.

The Free Exercise Clause of the U.S. Constitution Does Not Require the Exemptions in SB 375
In *Trinity Lutheran Church of Columbia v. Comer*,[1] the Supreme Court held that Missouri could not deny a church the right to "compete with secular organizations for a grant" to rebuild a playground surface "solely because it is a church."[2] The decision is limited to "playground resurfacing" and does not "not address religious uses of funding" or other limitations on access to grants.[3] The Court, in this case, also took the opportunity to reaffirm *Locke v.* Davey,[4] which upheld the right of the state to refuse to fund scholarships for theology degrees. Among other distinctions between *Trinity Lutheran* and *Locke*, the Court explained that the student in *Locke* "was not denied a scholarship because of who he *was*; he was denied a scholarship because of what he proposed *to do*" with the funds.[5]

---

[1] 137 S. Ct. 2012, 2017-18, 2024-25 (2017).
[2] *Id.*at 2022.
[3] *Id.* at 2024 n.3. Though this footnote was joined by only four Justices, it is controlling because it set forth narrower grounds for the judgment than did the two Justices who joined the majority opinion but not the footnote. *See Trinity Lutheran*, 137 S. Ct. at 2025–26 (concurring opinions of Thomas, J., and Gorsuch, J.); *Marks v. United States*, 430 U.S. 188, 193 (1977). In addition, Justice Breyer, who did not join any of the majority opinion, wrote a concurrence expressing views similar to those in the footnote. *See id.* at 2026–27.
[4] 540 U.S. 712 (2004).
[5] *Trinity Lutheran*, 137 S. Ct. at 2023. Furthermore, following *Locke*, numerous appellate courts have rejected contentions that the U.S. Constitution requires governmental bodies to provide funding for religious uses on the same terms as for secular uses. See *Bowman v. United States*, 564 F.3d 765, 772, 774 (6th Cir. 2008) (religious ministry to youth); *Teen Ranch, Inc. v. Udow*, 479 F.3d 403, 409–10 (6th Cir. 2007) (religious programming in

That key distinction is relevant here. No religious adoption or foster care provider in Georgia is being denied a contract with the state "*solely* because of its religious character."[6] To the contrary, the state partners with religious adoption and foster care providers every day. The state, with its own funds, in contrast, can certainly limit what these groups *do* with those funds. The state may require the providers to adhere to neutral and generally applicable laws and contractual obligations, including those that require the agency to put the best interest of the child above all else and require it to provide certain services. Furthermore, 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."[7]

Trinity Lutheran, therefore, does not justify the passage of this bill.

The Establishment Clause of the U.S. Constitution Prohibits the Bill's Religious Exemptions
SB 375 would violate the Establishment Clause of the U.S. Constitution in two ways: it creates a religious exemption that causes real harm to people and it grants discretionary powers to religious organizations to place a religious litmus test on who they serve and how they serve them.

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 provide religious accommodations is not unlimited. The Establishment Clause prohibits granting religious exemptions that would detrimentally affect any third party. When crafting such an exemption, the state "must take adequate account of the burdens" that it "may impose on nonbeneficiaries" and must ensure that any exemption is "measured so that it does not override other significant interests."[8] In *Estate of Thornton v. Caldor, Inc.*,[9] 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.[10]

SB 375 would grant adoption and foster care providers a blanket exemption to any obligation—either statutory or contractual—to accept referrals or provide services that conflict with their religious beliefs. The exemption fails to take into account any potential harms the exemptions would cause to others, whether to potential parents or the children themselves. As explained

---

childcare services); *Eulitt ex rel. Eulitt v. Me. Dep't of Educ.*, 386 F.3d 344, 353–57 (1st Cir. 2004) (religious education); *Bush v. Holmes,* 886 So. 2d at 343–44, 357–66 (religious education); *Anderson v. Town of Durham*, 895 A.2d 944, 958–61 (Me. 2006) (religious education).

[6] *Trinity Lutheran*, 137 S. Ct. at 2019 (quoting *Locke*, 540 U.S. at 718).

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

[8] *Cutter v. Wilkinson*, 544 U.S. 709, 720 (2005).

[9] 472 U.S. 703, 704 (1985).

[10] *Id.* at 710.

above however, the harms, however, are likely to be significant. The primary obligation of all providers is to serve the best interest of the child. Yet, this bill would allow providers to put their religious beliefs above children's best interests--even denying children the families they deserve and need.

Such results clearly burden and harm others and are impermissible results under the Establishment Clause.

The Government May Not Give Religious Organizations Discretionary Government Powers
Under this bill, faith-based adoption or foster care provider could take state, local, and federal 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*,[11] 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.[12] This bill, 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.

The rights of children in care and the parents who want to give them a family should not be limited by the religious beliefs of state contractors.

Conclusion
For all the above reasons and more, we believe the bill would result in bad and constitutional unsound policy. Please contact me if you have any questions regarding this memo.

[11] 459 U.S. 116, (1982).
[12] *Id.* at 125-126.