

June 5, 2018

Re: Secular Groups Oppose Legislation Allowing Religious Discrimination in Foster Care and Adoption

Dear Lawmakers:

The undersigned organizations representing the secular community, including atheists, agnostics, humanists, and the religiously unaffiliated, as well as all Americans who value true religious freedom and equality, write to urge you to oppose legislation allowing publicly funded foster care and adoption agencies to discriminate in their placement of children. Using taxpayer money to further the exclusion of secular Americans limits options for a substantial number of children and parents. Legislation has been proposed or passed in Alabama, Kansas, Michigan, Mississippi, North Dakota, Oklahoma, South Carolina, South Dakota, Texas, and Virginia to allow state-licensed child welfare agencies to discriminate and refuse to provide services, instead making foster youth placement decisions based on their religious beliefs.¹ This damaging policy would have a universally harmful impact on foster families who are atheist, agnostic, or otherwise non-religious, as well as LGBTQ people, single parents, and members of minority religions, and we strongly urge you to unequivocally reject this publicly funded discrimination.

Religious-based discrimination in child welfare services potentially affects over a quarter of Americans, with the greatest negative impact on foster youth.

As of September 2016, there were 437,465 children in US foster care systems awaiting adoption.² Unfortunately, rather than expanding the options available to foster youth, this exclusionary legislation limits the number of homes available to foster children, thereby reducing the number of permanent placements of foster children. An insufficient number of foster homes has a negative impact both on child welfare systems and foster youth, as these systems rely upon a significant number of adult applicants in order to properly function. Without enough foster homes, placement agencies are forced to place children outside of their communities and disrupt their lives, which can result in negative psychological effects.³

While religious exceptions in foster care typically allow for broad discrimination based on religion, the prospective foster parents most often affected are atheists and religiously unaffiliated people, LGBTQ people, single people, and members of minority religions. Currently, about 24% of adults are religiously

¹ Ala. HB 24 (2017); Kan. SB 284 (2018); Mich. HB 4188 (2015), HB 4189 (2015), and HB 4190 (2015); Miss. HB 1523 (2016); N.D. Century Code §50-12-07.1 (2003); Okla. Stat. Ann. tit. 51, §§251-258 (2000); S.C. HB 4950 (2018); S.D. SB 149 (2017); Tex. HB 3859 (2017); Va. Code Ann § 63.2-1709.3 (2012).

² Child Welfare Information Gateway. (2017). *Foster Care Statistics 2016*. Washington, DC: U.S. Department of Health and Human Services, Children's Bureau.

³ Mary Katherine Wilderman (2018), *South Carolina Foster Care Group Defends Policy That Allows Only for Christian Foster Families*. The Post and Courier: Greenville, SC.

unaffiliated, and atheists and agnostics make up about 7% of the total population.⁴ Therefore, even without considering the other categories of people affected, allowing foster placement agencies to discriminate on the basis of their religion will potentially exclude about a quarter of adults from providing a home for foster children, inevitably reducing the number of youth placed in loving, permanent homes.

Such legislation will also potentially affect an estimated 2 million LGBTQ adults who are interested in adopting children in the United States,⁵ as well as another 6% of Americans who follow various non-Christian faiths.⁶

For example, in South Carolina, Beth Lesser, a foster care parent of 10 years, was denied the opportunity to work with Miracle Hill, a local Christian placement agency, because she was Jewish.⁷ A portion of the interview process required Lesser to share her “faith journey.” The agency also automatically rejects same-sex couples into fostering programs. Atheist parents, those without a “faith journey,” and LGBTQ parents will face the same discrimination as Jewish applicants, like Beth Lesser, at discriminatory Christian agencies.

Taxpayers should not be forced to financially support this type of state-sanctioned discrimination, particularly when such discrimination will undermine the integrity of the child welfare system and harm the very youth the system was created to serve.

Allowing faith-based discrimination in foster care will subject already at-risk youth to further negative psychological and physical impacts.

In addition to allowing discrimination against would-be parents, the legislation considered in several states would allow child welfare providers to discriminate against the youth themselves based upon their religious beliefs. For example, the South Carolina legislation would prevent any adverse action against a “faith-based child-placing agency... on the basis, wholly or partly, that a faith-based child placing agency has declined or will decline to provide any service that conflicts with... a sincerely-held religious belief or moral conviction of the faith-based child placing agency.”⁸ Based on this language, agencies could simply refuse to place children after discovering they are atheists, or LGBTQ, or members of minority religions.

⁴ Cox D & Jones RP. (2017). *America’s Changing Religious Identity: Findings from the 2016 American Values Atlas*. Public Religion Research Institution: Washington, DC.

⁵ National Adoption Center (2015) *Serving the LGBT Community*, Philadelphia, PA: National Adoption Center. <http://www.adopt.org/content/serving-lgbt-community> (last visited May 30, 2018).

⁶ Smith G, et al. (2015). *America’s Changing Religious Landscape*. Pew Research Center.

⁷ Angelina Davis (2018). *Scrutiny of Miracle Hill’s Faith-Based Approach Reaches New Level*. Greenville News: Greenville, SC. <https://www.greenvilleonline.com/story/news/2018/03/01/miracle-hill-foster-care/362560002/> (last visited May 25, 2018).

⁸ S.C. HB 4950, Section 38.29 (2018).

These exceptions are likely to have a broad impact. Studies show that approximately 13% of youth ages 13-18 identify as atheists, with more than a third being non-religious.⁹ Additionally, there is a disproportionately high number of LGBTQ youth in foster care, with many having been abandoned by their families due to their sexual orientation, gender identity, or gender expression.¹⁰ 18.5% of foster children report experiencing LGBTQ-related discrimination, and 12.9% of LGBTQ youth report being treated poorly by the foster care system, compared to 5.8% of non-LGBTQ youth.¹¹ For groups that are already targeted by religious organizations and legislators, preventing placement will have a significant impact on foster children's personal identity and self-worth.

The worst of these bills actually permit state-funded religious coercion or indoctrination or allow religiously-motivated foster parents to deny children proper healthcare.¹² For example, the Texas legislation prohibits taking action against a service provider or foster parent who declines to provide contraceptives or abortion services on the basis of religious belief, or who forces the child to take part in religious education and activities.¹³ This broadly crafted exemption may even allow providers to subject foster youth to dangerous and discredited practices such as conversion therapy, which falsely claim to change a person's sexual orientation or gender identity or expression.

Taxpayers should not be required to fund services that discriminate against the very foster youth they are intended to serve or to fund services that facilitate religious indoctrination and physical and mental abuse.

Allowing foster and adoption placement agencies to discriminate based on their religious beliefs with state and federal funds violates the Establishment Clause.

The Establishment Clause of the First Amendment requires the consideration of any impact an accommodation or religious exemption would have on third parties. Specifically, the Constitution bars the government from crafting "affirmative" accommodations within its programs if the accommodations would harm any program beneficiaries.¹⁴ The Constitution commands that "an accommodation must be

⁹ The Barna Group (2018). *Gen Z: The Culture, Beliefs and Motivations Shaping the Next Generation*. The Barna Group and Impact 360 Institute: Ventura, CA.

¹⁰ National Adoption Center (2015), *Serving the LGBT Community*. <http://www.adopt.org/content/serving-lgbt-community> (last visited May 25, 2018).

¹¹ The Williams Institute (2014), *Sexual and Gender Minority Youth in Foster Care*. The Williams Institute, Los Angeles LGBT Center, Holarchy Consulting, and Permanency Innovations Initiative: Los Angeles, CA.

¹² Tex. HB 3859 (2017).

¹³ See Miss. HB 1523 (2016), which permits "home studies" in a manner consistent with the belief that marriage should be between a man and a woman only.

¹⁴ U.S. Const. Amend. I; *Cutter v. Wilkinson*, 554 U.S. 709, 720, 722 (2005) (to comply with the Establishment Clause, courts "must take adequate account of the burdens a requested accommodation may impose on nonbeneficiaries" and must ensure that the accommodation is "measured so that it does not override other significant interests") (citing *Estate of Thornton v. Caldor*, 472 U.S. 703, 710 (1985)); see also *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751, 2781 n.37 (2014); *Holt v. Hobbs*, 135 S. Ct. 853, 867 (2015) (Ginsburg, J., concurring).

measured so that it does not override other significant interests;¹⁵ “impose unjustified burdens on other[s];”¹⁶ or have a “detrimental effect on any third party.”¹⁷

However, this type of discriminatory legislation unjustifiably burdens both the applicant parents and the foster youth, who are third party beneficiaries of these programs. These religious exemptions would enable entities receiving taxpayer funding to refuse to provide critical child welfare services on the basis of religious objections, which would undoubtedly harm third parties in violation of the Establishment Clause.¹⁸

Religious adoption agencies will not be forced to close if denied the opportunity to discriminate.

Miracle Hill’s president and CEO Reid Lehman stated that unless granted license to discriminate, the agency would no longer be able to recruit foster families or support them financially.¹⁹ Sponsors of this type of legislation similarly warn of “forced closure” of religiously affiliated agencies who would be mandated to place children in households that do not share the agency’s values. In reality, agencies in other states who choose to discriminate in this way have not been compelled to close—they are simply no longer eligible for public funding. Unless they are allowed to receive public funding and to freely discriminate against people they object to, these agencies threaten to close all operations and to refuse to serve any youth at all. Religious freedom does not provide a right to demand government funding if an organization is not willing to serve the community as a whole.

Child welfare systems must hold the best interests of young people as their first priority. When taxpayer funds are used to assist in the placement of foster children, those funds should be spent ensuring that children are placed in loving, safe, nurturing environments as soon as possible. The ability to love and care for a child is not limited to people who hold one particular faith or people who hold religious faith in general. As advocates for equal protection of secular Americans and for the separation of religion from government, we believe that taxpayer funding should be reserved for those adoption agencies that put the interests of children first, not those who seek to indoctrinate and discriminate. We urge you to reject these measures for your state; the vulnerable young people in our child welfare systems deserve better.

¹⁵ *Cutter v. Wilkinson*, 544 U.S. at 722.

¹⁶ *Id.* at 726.

¹⁷ *Id.* at 720, 722; *See also Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. at 2781; *Estate of Thornton v. Caldor*, 472 U.S. at 710 (“unyielding weighting” of religious exercise “over all other interests...contravenes a fundamental principle” by having “a primary effect that impermissibly advances a particular religious practice.”); *Texas Monthly, Inc. v. Bullock*, 480 U.S. 1, 18 n.8 (1989) (religious accommodations may not impose “substantial burdens on nonbeneficiaries”).

¹⁸ Respecting religious exercise may not “unduly restrict other persons, such as employees, in protecting their own interests, interests the law deems compelling.” *See Burwell v. Hobby Lobby*, 134 S. Ct. at 2787. When considering whether the birth control coverage requirement was the least restrictive means in *Hobby Lobby*, the Court considered that the accommodation offered by the government ensured that affected employees “have precisely the same access to all FDA-approved contraceptives as employees of companies whose owners have no religious objections to providing coverage.” *See id.* at 2759. In other words, the effect of the accommodation on women would be “precisely zero.” *Id.* at 2760.

¹⁹ Angelina Davis (2018), *Scrutiny of Miracle Hill’s Faith-Based Approach Reaches New Level*. Greenville News: Greenville, SC. <https://www.greenvilleonline.com/story/news/2018/03/01/miracle-hill-foster-care/362560002/> (last visited May 25, 2018).

If you should have any questions about this issue or our position, please contact Alison Gill, American Atheists Legal & Policy Director, at agill@atheists.org or by phone at 908.276.7300 Ext. 9.

Sincerely,

American Atheists
American Humanist Association
Center for Inquiry
Freedom From Religion Foundation
Secular Coalition for America
Secular Student Alliance