From the Office of the General Counsel* of the Florida Family Policy Council

ADDITIONAL COMMENTS:
A Summary Response to the Memorandum Issued by the Office of the General Counsel to the Florida Senate Regarding Conscience Clause for Adoption Agencies and Why HB-7111 is Needed to Protect Florida's Faith-Based Child Placement Agencies

On April 14, 2015, the Office of the General Counsel for the Florida Senate released a legal opinion in a memorandum regarding "*Conscience Clause for adoption agencies.*" (Hereinafter referred to as the "Opinion.") In the opening paragraph of the Opinion, the primary conclusion of the 5 page document states: *"I believe that religious organizations would be granted* ***no significant legal protection*** *by House Bill 7111 in light of the Florida Religious Freedom Restoration Act (FRFRA) and its interpreting case law*."

There are a number of legal issues overlooked by the Opinion and therefore the following "Additional Comments" are being presented to members of the Florida Senate for their consideration:

I. THE OPINION IGNORES JUDGES AROUND THE STATE AND NATION WHO HAVE DISREGARDED THE RULE OF LAW AND ARE SEEKING TO IMPOSE RESULT-ORIENTED DECISIONS IN CASES INVOLVING GAY RIGHTS.

Perhaps the most significant oversight of the overly reserved Opinion produced by the Office of the General Counsel of the Senate is that it did not take into consideration the unprecedented legal trend of so many courts to engage in ideologically driven, result-oriented decision making, in cases involving "gay rights." The Opinion shows a certain political naiveté assuming judges will follow the rule of law and case precedent when there is a tension between new found "gay-rights" and core First Amendment rights to the free exercise of religion. Because of this disturbing legal trend by courts, (both in Florida and across the country) the need for the Florida Legislature to create strong and clear laws to protect religious liberty cannot be overstated. HB-7111 gives precisely such clarity, strength and significant protection to faith-based child placement agencies over and above the protections found in FRFRA.

The Opinion fails to cite the numerous high profile cases involving litigation across America where various Christian businesses and ministries have been legally challenged and then penalized by county and city "non-discrimination" (or "Human Rights") ordinances enacted during and after states legalized same-sex marriages. Florida has 23 of its own such local ordinances where new protected classes have been created for "*sexual orientation, gender identity or gender expression.*" These local laws seek to give the same legal protection as the immutable categories or race, age, sex and national origin and have been consistently used around the country as weapons to punish people of faith where they seek to exercise their faith in public life such as businesses, ministries and private property ownership.

The same courts, like the Third District Court of Appeals in Miami, which ignored Florida's longstanding law prohibiting homosexual adoptions, will also attempt to over reach again to find faith-based child placement agencies in violation of non-discrimination ordinances given current legal developments. HB-7111 serves as a shield, guarding against prospective legal threats on the horizon.

II. THE OPINION OVERLOOKS THAT FLORIDA'S RFRA IS A LEGAL DEFENSE REQUIRING A BALANCING TEST OPEN TO A JUDGE'S DISCRETION.

Florida's Religious Freedom Restoration Act (FRFRA) is a legal defense which may be asserted if a person or entity is sued and the defendant believes the subject of the grievance implicates his rights to the free exercise of religion. FRFRA provides a defense which, when asserted, the judge must consider and weigh to determine whether or not the law, or government action, "*substantially burdens a person's exercise of religion*." Unlike HB-7111, there is no language in the FRFRA statute which creates a bright line for judges to find for the party asserting right to free exercise of religion. The FRFRA statute on its face, gives discretion to the court to determine if the law furthers a "*compelling governmental interest*" and whether there is a "*least restricted means*."

The Opinion argues that FRFRA inquiries are "inherently fact specific" and require an analysis of "the adherent's religious practice." But this goes to the very point that protection under FRFRA is only on a case by case basis and depends upon the judge's discretion in applying those facts to the standards.

III. HB-7111 LOCKS DOWN LEGAL PROTECTION BY PREEMPTING TO THE STATE THE AUTHORTY TO REGULATE AND GIVES LITTLE TO NO ROOM FOR "JUDICIAL DISCRETION OR INTERPRETATION."

Unlike FRFRA which is a balancing test, HB-7111 gives clear and unequivocal protection to faith-based child placement agencies. The bill's language is specific and provides a direct protection for child placements which "*would violate an agencies religious or moral convictions*." HB-7111 provides express private contract protection, creates liability protection and contains licensure protection for faith-based adoption agencies. The express preemption in the bill makes it clear to courts that the home rule of a local city or county (or its ordinances) could never trump state law relating to faith-based adoption agencies. While activist courts can still reach result orientated decisions if they insistent on ignoring the rule of law, HB-7111 greatly reduces judicial discretion. This stands in contrast to FRFRA's statutory language, which requires much more judicial discretion or judicial interpretation.

IV. THE OPINION MAKES NO MENTION OF THE PRESENT REALITY OF OTHER STATES' ADOPTION AGENCIES WHICH HAVE CLOSED BECAUSE OF THE LACK OF CONSCIENCE PROTECTIONS SUCH AS THE ONES FOUND IN HB-7111.

The Opinion makes no mention, nor does it even attempt to distinguish the circumstances behind the cases of the very real plight of religious child placement agencies across the country which are being forced to close down because of their required preference for placing children in the hands of married mothers and fathers. Consider the following:

"Catholic Charities of **Boston** was forced to shut down unless it agreed to place children with homosexuals. New state licensing laws in 2006 required that Catholic agencies facilitate adoptions for same-sex couples."

"Catholic Charities of the Archdiocese of **Washington D.C**. was forced to shut down their foster care and public adoption program due to a law recognizing same-sex marriage that went into effect in 2010."

"The necessity of accepting one of two equally objectionable choices confronts dioceses and Catholic Charities in 17 states from **Minnesota** to **New Mexico** and **Massachusetts** to **California**." See: https://www.osv.com/OSVNewsweekly/ByIssue/Article/TabId/735/ArtMID/13636/ArticleID/14666/Tough-times-for-Catholic-adoption-agencies.aspx#sthash.wDJk6lsH.dpuf

Of particular interest, Illinois's RFRA law which is similar to Florida's RFRA, provided no legal help to Catholic Charities affiliates, which after extensive litigation, closed down rather than comply with requirements, saying they can't receive state money if they turn away same-sex couples as potential parents. See Catholic Charities of the Diocese of Springfield v. Illinois, No. 2011-MR-254 (Ill. Cir. Ct. Aug. 18, 2011) (Summ. J. Order), https://www.scribd.com/doc/62597962/Illinois-Circuit-Court-Summary-Judgment-Order-in-Catholic-Charities-Foster-Care-Adoption-Services-Case.

V. THE OPINION FAILED TO RECOGNIZE THAT TWO OTHER STATES HAVE ENACTED CONSCIENCE CLAUSE PROTECTIONS FOR FAITH-BASED ADOPTION AGENCIES WITH PROVISIONS LIKE HB-7111.

The House Committee Staff Analysis of HB-7111 which the Opinion makes no citation or reference to, discusses similar conscience protections in two other states:

"Two states have enacted adoption services conscience protection legislation: North Dakota in 2003, and Virginia in 2012. Both the North Dakota and Virginia adoption services conscience protection laws protect private child placing agencies from:

- Being required to perform any duties related to the placement of a child for adoption if the proposed placement would violate the agency's written religious or moral convictions or policies.
- Denial of initial licensure, revocation of licensure, or failure to renew licensure based on the agency's objection to performing the duties required to place a child for adoption in violation of the agency's written religious or moral convictions or policies.
- Denial of grants, contracts, or participation in government programs based on the agency's objection to performing the duties required to place a child for adoption in violation of the agency's written religious or moral convictions or policies.

Neither law has been challenged on constitutional grounds."

Of interest, the state of Virginia adopted both a RFRA and conscience law protections for private child placement agencies and did not see this practice as "*duplicative or unnecessary*." See Opinion at p5.

VI. CONSCIENCE PROTECTIONS HAVE BEEN CARVED OUT FOR RELIGIOUS HOSPITALS FROM PERFORMING ABORTIONS WITH NO SUCCESSFUL CONSTITUTIONAL CHALLENGES.

According to the House staff analysis on HB-7111, there are both state and federal statutes which provide conscience protections for hospitals and other health care providers related to abortion.

"By 1978 almost all states had conscience protection legislation related to abortion. Today, every state but West Virginia has conscience protection statutes for individual providers in relation to abortion." "Section 390.0111(8), F.S., grants conscience protection for hospitals, physicians, or any person who refuses to participate in the termination of a pregnancy in Florida."

Seventeen other states have conscience protection statutes for individual health providers related to sterilization, ten other states have conscience protection statutes for individual providers related to contraception which act as abortifacients.

"Education conscience protection has also emerged in education. In 2011, Missouri amended its Constitution to include, "no student shall be compelled to perform or participate in academic assignments or educational presentations that violate his or her religious beliefs."

"Although most do not amend their constitutions, "the vast majority of states have adopted legislation allowing parents to opt their children out of educational curriculum that they contend conflicts with their religious beliefs." In 2013, the state of New Hampshire enacted a broad statutory provision allowing any parent to opt out of specific curricula based on any "objectionable" reason." See *HOUSE OF REPRESENTATIVES STAFF ANALYSIS BILL #*: CS/HB 7111, PCB HHSC 15, 03 Conscience Protection for Private Child Placing.

VII. CONCLUSION

HB-7111 acts as a necessary legal shield against both existing and future threats that are on the horizon in a quickly changing legal and constitutional landscape. Many judges have become self-appointed social change agents instead of respecting their proper limited role as objective interpreters of law and the constitution. In Florida, we have consistently seen both federal and state courts aggressively advance "gay-rights" and openly defy Florida law. These courts have ignored the will of the people, the state constitution and the plain language of longstanding statutes. Unless legislative policies are crystal clear, certain members of the judicial branch will continue to find creative ways to completely undermine the authority of the Florida legislature. HB-7111 would provide additional, clear and significant protections not found in the state statutes regarding religious liberty for child placement agencies and therefore should be passed by the Florida Senate and sent to the Governor.

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