ALLIANCE DEFENDING
FREEDOM
FOR FAITH. FOR JUSTICE.

LEGAL MEMORANDUM

DATE: April 16, 2015

RE: Legal Analysis Comparing the Protections of HB 7111 and Florida's Religious Freedom Restoration Act

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Introduction

Alliance Defending Freedom[1] has been asked by Florida Family Action to analyze whether the conscience protections of HB 7111 provide greater protection for religious adoption agencies than Florida's Religious Freedom Restoration Act (FRFRA). We easily conclude HB 7111 would grant significantly greater protection than FRFRA.

I. HB 7111 expressly prohibits the state from withholding a contract from a child placing agency because it declines to place a child in a home contrary to its religious convictions. Based on court decisions from other states, this contract right conferred by HB 7111 to child placing agencies may be a necessary predicate to asserting any right under FRFRA or the state and federal constitutions.

II. HB 7111 provides clear conscience protections to very specific interests of child placing agencies, while the more generalized protection of FRFRA varies depending on its fact-specific balancing test that weighs the competing interests of the religious entity against those of the state.

III. Despite nearly identical religious freedom protections as the Florida RFRA, Massachusetts and Illinois forced religious child placing agencies to stop providing services after these states

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[1] Alliance Defending Freedom is an alliance-building, non-profit legal organization that advocates for life, religious liberty, and marriage and the family. We regularly offer analysis of proposed laws and their effect on our areas of interest.

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recognized same-sex unions. Now that Florida has same-sex marriage, it is likely only a question of time before a Florida court requires religious agencies to violate their beliefs unless specific conscience protections like those found in HB 7111 are enacted.

IV. Unlike HB 7111, FRFRA may not protect child placing agencies from private lawsuits brought by same-sex couples.

V. HB 7111 includes preemption language that prevents cities and counties from enacting ordinances that are inconsistent with state laws protecting religious child placing agencies.

Each of these issues will be examined in turn.

I. HB 7111 would expressly prohibit the state from withholding a contract because the child placing agency declines to place a child in a home contrary to its religious convictions.

Following the enactment of civil unions for same sex couples, Illinois refused to renew the annual contract of Catholic Charities, an adoption and foster care provider, because it declined to place children in same-sex households. The 40-year child placing agency sued the state of Illinois arguing, in part, that the state's RFRA prohibited the denial. The Illinois court stated that before it could reach the Catholic Charities' rights under the due process clause, RFRA and the First Amendment, it had to address the threshold issue of whether Catholic Charities possessed a legally cognizable property interest in the contract: "If there is no legally protected property interest the analysis ends and summary judgment for Defendants is appropriate." The court dismissed the suit concluding "[t]here are no statutory terms creating a property interest in the Plaintiffs' contracts."

The terms of HB 7111 would create a property interest in the contract for child placing agencies:

> The state or a local government or community-based care lead agency may not withhold a grant, contract, or participation in a government program from a licensed private child-placing agency, or from a family foster home or residential child-caring agency affiliated with a private child-placing agency, because of the refusal of the private child-placing agency to perform, assist in, recommend, consent to, or participate in the placement of a child.

(HB 7111, pg, 2, lines 26-29.) HB 7111 would forbid the state of Florida from refusing to renew a provider's contract on the grounds it declined to place a child contrary to its religious beliefs. FRFRA may not provide this important threshold right, which a Florida court may require be established before the agency can assert its claims or defenses under FRFRA.

II. HB 7111 provides explicit right of conscience protections for very specific interests of child placing agencies, while FRFRA's protection is not particularized and the outcome of any given case depends on a fact-specific balancing test that weighs the interests of the religious entity against the compelling interests of the state.

By its very nature, FRFRA is a fact-specific, balancing test. It requires the court to make a series of determinations regarding 1) the nature of the religious interest, 2) how the law burdens that religious interest, 3) the nature of the state's claimed compelling interest, and 4) whether the state has chosen the least restrictive means to accomplish the compelling state interest.[2] *Christian Romany Church Ministries*, 980 So.2d 1164, 1167 (2008). The Florida Supreme Court has adopted a "narrow definition of substantial burden" which is one that "either compels the religious adherent to engage in conduct that his religion forbids or forbids him to engage in conduct that his religion requires." *Id.* If a court determines a religious practice has been substantially burdened, only then does the court balance the competing interests--the interest of the religious person being burdened against the government's interests furthered by its law. FRFRA does not pick winners and losers; it leaves it to the courts to weigh conflicting interests in light of the specific facts of the case. One court may conclude an agency's religious freedom has been violated and another may not.

By contrast, HB 7111 picks a winner: faith-based child placement agencies. The bill would clearly prevent the government from withholding licenses, contracts, funding, and participation in a program because the agency declined to place a child contrary to its religious convictions. Courts would not need to analyze on a case by case basis the facts or balance the competing interests. The court would only need to determine if the government's refusal was due to the agency declining to place the child for religious reasons.

While the Florida Legislature has not yet recognized sexual orientation as a protected class for purposes of its anti-discrimination laws, it does not preclude a court, or state agency, from construing "sex," a protected class under Florida law, as applying to two men who wish to adopt and who claim they were barred from adoption on account of the sex of one of the men. They might argue that if one of them were a woman, the agency would have placed the child with them. Such a discrimination claim is not far-fetched. Federal antidiscrimination law does not

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[2] (1) The government shall not substantially burden a person's exercise of religion, even if the burden results from a rule of general applicability, except that government may substantially burden a person's exercise of religion only if it demonstrates that application of the burden to the person:
(a) Is in furtherance of a compelling governmental interest; and
(b) Is the least restrictive means of furthering that compelling governmental interest.
(2) A person whose religious exercise has been burdened in violation of this section may assert that violation as a claim or defense in a judicial proceeding and obtain appropriate relief.

recognize sexual orientation as a protected class. However, "sex" in Title VII of the Civil Rights Act is being interpreted by the U.S. Department of Justice to include "sex orientation" and "gender identity." [3]

We also point out that Florida does recognize same-sex marriage and it is reported that over 50% of Floridians live in a place where the county or city recognizes sexual orientation as a protected class.[4] We also understand that the Florida Legislature is considering legislation that would end a statutory prohibition against placing adoptive children in same-sex households. In light of these developments, we believe it is likely, if not probable, that one or more Florida courts will at some point conclude that that the State has demonstrated a compelling interest in ensuring that all married couples within its borders are treated equally and deny FRFRA protection to faith-based adoption agencies.[5]

III. As Massachusetts, Illinois, and Washington D.C. recognized same-sex unions, religious child placing agencies were forced to shutter their doors and stop providing adoption and foster care services because their religious beliefs prevented them from placing children in same-sex homes.

Massachusetts refused to renew the contract of Catholic Charities, a more than 100 year old provider of adoption services, after that state recognized same-sex unions in 2003. *Goodridge v. Department of Public Health*, 440 Mass. 309, 798 N.E.2d 941 (2003).[6] Despite the fact that the Massachusetts' state constitution provided nearly identical religious freedom protection as Florida's RFRA,[7] Catholic Charities did not believe the legal fight could be won and ended its adoption services.[8]

Similarly, in Illinois, following that state's recognition of civil unions in 2011, the state refused to renew the contracts of Evangelical Child and Family Agency and Catholic Charities. Illinois had a nearly identical RFRA to Florida's,[9] but it did not protect these agencies from being forced to end decades of adoption and foster care services after losing in court.

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[3] http://www.justice.gov/opa/pr/attorney-general-holder-directs-department-include-gender-identity-under-sex-discrimination. (accessed April 16, 2015)

[4] http://www.eqfl.org/Discrimination (accessed April 16, 2015).

[5] One Florida court, even before Florida recognized same-sex marriage, employed the highly deferential rational basis test and held that denying adoption to same-sex couples violates the Equal Proction Clause of the Fourtenth Amendment. *Florida Dept. of Children and Families v. Adoption of X.X.G.*, 45 So.3d 79 (Fla. 3d DCA 2010).

[6] Matthew W. Clark, "The Gospel According to the State: An Analysis of Massachusetts Adoption Law and the Closing of Catholic Charities Adoption Services," *Suffolk University Law Review*, Vol. XLI, No. 4 (2008), http://heinonline.org/HOL/LandingPage?handle=hein.journals/sufflr41&div=5&id=&page= (accessed April 16, 2015).

[7] *See Attorney Gen. v. Desilets*, 418 Mass. 316, 321-23, 636 N.E.2d 233, 236-37 (1994).

[8] http://www.bostoncatholic.org/uploadedFiles/News_releases_2006_statement060310-1.pdf (accessed April 15, 2015)

[9] Ill. Rev. Stat. Ch. 775, §35/1, *et seq.*

In Washington D.C., the city council recognized same-sex marriage in 2010. The council required adoption and foster care agencies to place children in same-sex homes. Evan after Catholic Charities urged the council to adopt religious exemptions, the city council refused and the agency transferred its programs to other providers rather than violate its religious beliefs.[10]

We think the history of same-sex marriage, followed by faith-based child placing agencies closing down in states with similar legal protections as FRFRA, indicaties the importance of specific statutory protections like those found in HB 7111. Despite Virginia having a RFRA,[11] it took the prudent step of enacting specific protections for religious child placing agencies that were very similar to HB 7111. [12]

IV. FRFRA may not protect agencies that decline to place a child in a same-sex household from private lawsuits brought by same-sex couples.

One state supreme court construing its RFRA, held the law did not bar a private lawsuit brought by a lesbian couple against the photographer who declined to photograph their same-sex union. The court concluded its state RFRA did not apply to lawsuits in which the government was not a party.[13] This issue has not been addressed by a Florida court construing the FRFRA, so we cannot be certain that a religious child placing agency could successfully use FRFRA to defend itself against a lawsuit for damages and injunctive relief brought by a same-sex couple. HB 7111, on the other hand, provides clear protection in the event of such a private lawsuit:

> d) Refusal of a private child-placing agency to perform, assist in, recommend, consent to, or participate in the placement of a child or to facilitate the licensure of a family foster home which violates the agency's written religious or moral convictions or policies shall not provide the basis for a claim for injunctive relief or compensatory or punitive damages against such private child-placing agency or any operator, owner, or personnel thereof.

HB 7111, pg. 2, lines 36-43.

V. HB 7111 includes preemption language that prevents cities and counties from enacting ordinances that are inconsistent with state laws protecting religious child placement agencies.

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[10] Chuck Donovan, "The D.C. Government's Strike Against Foster Kids—and Religious Liberty," The Heritage Foundation, The Foundry, February 19, 2010, http://blog.heritage.org/2010/02/19/the-d-c-government%E2%80%99s-strike-against-foster-kids-%E2%80%93-and-religious-liberty/ (accessed April 16, 2015).
[11] Va. Code §57-1, *et seq.*
[12] Va. Code Ann. § 63.2-1709.3
[13] *Elane Photography, LLC. v. Willock*, 309 P.3d 53, 76 (2013).

As we mentioned in Section II, it appears more than half of Floridians live in jurisdictions that treat sexual orientation as a protected class. We are concerned that a city or county could take action on its own to enforce its ordinances protecting sexual orientation and prohibit child placing agencies from adhering to their religious beliefs. Florida law appears to grant local jurisdictions wide latitude in both addressing municipal matters and, absent some necessity for a statewide enactment, authority to deal with problems relating to the general health and welfare of their citizens.[14]

HB 7111 provides express preemption language that forecloses home rule in the area of regulating child placing agencies. (HB 7111, pg, 2, line 44 to pg. 3, line 48).

Conclusion

For the foregoing reasons, we conclude HB 7111 provides necessary protections and greater certainty than FRFRA.

[14] Judge James R. Wolf and Sarah Harley Bolinder noted in their article, *The Effectiveness of Home Rule (A Preemption And Conflict Analysis),* 83 Fla. B.J. 92 (2009).