



# Americans United for Separation of Church and State

## NASHVILLE CHAPTER

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March 11, 2013

Brian Kelsey, Chair  
301 6th Avenue North  
Suite 7 Legislative Plaza  
Nashville, TN 37243

Doug Overbey, 1<sup>st</sup> Vice-Chair  
301 6th Avenue North  
Suite 306 War Memorial Bldg.  
Nashville, TN 37243

**Re: Oppose SB 965, which violates the right to petition and creates unnecessary hurdles before Tennessee citizens seeking to protect their constitutional rights.**

Dear Chairman Kelsey & Vice-Chair Overbey:

On behalf of our Tennessee members and Nashville Chapter, Americans United for Separation of Church and State writes to oppose SB 965, which would place significant obstacles before Tennessee citizens who simply seek to protect their constitutional rights. We oppose this bill because it violates the constitutional right to petition, and is both burdensome and unnecessary. If the Tennessee General Assembly truly desires to reduce the amount of litigation over government prayer practices it should take steps to ensure that such practices adhere to the Constitution rather than placing burdens on those who seek to protect their constitutional rights.

### **The Right to Petition**

#### *Right to Petition the Legislature*

Section 7 of this bill would make it a misdemeanor for any person to communicate “in a repetitious manner with the intent to influence, persuade, or induce the local government unit or local public servant to terminate, halt or cease a particular policy, practice, action or custom” if that communication also contains an actual or perceived “threat of initiating legal action.” Barring citizens from communicating with their legislators regarding the constitutionality of government meeting procedures flies in the face of the right to petition, which is guaranteed to all Americans under the First Amendment.<sup>1</sup>

As explained by the United States Supreme Court: “The very idea of a government, republican in form, implies a right on the part of its citizens to meet peaceably for consultation in respect to public affairs and to petition for a redress of grievances.”<sup>2</sup> The right to petition is “among the most precious of the liberties guaranteed by the Bill of Rights,”<sup>3</sup> as “the whole concept of representation depends upon the ability of the people

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<sup>1</sup> “Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.” U.S. Const. amend. I (emphasis added).

<sup>2</sup> *McDonald v. Smith*, 472 U.S. 479, 481 (1985) (quoting *United States v. Cruikshank*, 92 U.S. 542, 552 (1876)).

<sup>3</sup> *Id.* (quoting *Mine Workers v. Illinois Bar Assn.*, 389 U.S. 217, 222 (1967)).



to make their wishes known to their representatives.”<sup>4</sup> Indeed, “except in the most extreme circumstances citizens cannot be punished for exercising this right ‘without violating those fundamental principles of liberty and justice which lie at the base of all civil and political institutions.’”<sup>5</sup> This is true even though the “exercise of the right to petition ‘may well include vehement, caustic, and sometimes unpleasantly sharp attacks on government and public officials.’”<sup>6</sup>

The government’s desire to avoid the constitutional issues regarding legislative prayer surely does not qualify as a “most extreme circumstance” that can overcome the right to petition. Nor is the fact that such petitions are effective tools at convincing legislators to examine or change their policies in this arena a satisfactory reason to bar such communications—the government cannot outlaw its citizens’ ability to petition simply because it does not want the public’s sentiment to force it to change its policies.

#### *Right to Petition the Courts*

Section 6 of this bill seeks to prevent citizens from filing lawsuits if a *different* person with the same attorney filed a similar lawsuit against a *different* local Tennessee government in the prior two years and that person lost his case. But, although each case might contain a First Amendment challenge, the legislative prayer practices in question could differ in constitutionally significant ways, leading one to be constitutional and another to be unconstitutional. This bill, however, attempts to bar the second lawsuit, leaving the petitioner without recourse. Such a practice is fundamentally unfair and violates the citizen’s right to petition the courts.

The goal of this provision is to bar attorneys who litigate these cases from filing lawsuits. In addition to improperly denying Tennessee citizens from being represented by the most qualified attorneys in these cases—those who actually litigate and are experts in Establishment Clause law—it also violates the Constitution. The bill, for example, could bar one of Americans United’s attorneys from filing a case on behalf of a second client in the state of Tennessee who seeks to preserve the separation of church and state. But, as explained in *NAACP v. Button*,<sup>7</sup> which struck down a law that attempted to bar NAACP lawyers from representing clients seeking to challenge government-sanctioned racial discrimination, “a statute broadly curtailing group activity leading to litigation may easily become a weapon of oppression, however evenhanded its terms appear.”

#### **The Bill is Burdensome & Unnecessary**

Unlike this bill’s portrayal of litigation, parties usually engage in lengthy discussions and attempts at negotiation before litigation is filed. Those who challenge legislative prayer practices do so because they genuinely believe that the specific practices are unconstitutional, and their goal is to replace them with constitutional policies—if they can change the practice without litigation, they also prefer this. But, this bill creates a rigid, lengthy, and restrictive practice for pre-litigation negotiations. Furthermore, it places the

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<sup>4</sup> *Eastern Railroad Presidents Conference v. Noerr Motor Freight Inc.*, 365 U.S. 127, 137 (1961).

<sup>5</sup> *McDonald*, 472 U.S. at 481 (quoting *De Jonge v. Oregon*, 299 U.S. 353, 364 (1937)).

<sup>6</sup> *Id.* (citing *New York Times Co. v. Sullivan*, 376 U.S. 254, 270-271 (1964)).

<sup>7</sup> 371 U.S. 415, 435 (1963).

government, which is the entity in power, at an even greater advantage than the Tennessee citizen who simply seeks to cure a constitutional violation.

This bill is further unnecessary because cases over prayer practices are most often filed in federal courts, not state courts. The state government cannot place restrictions on filing cases or the submission of evidence on federal courts. Accordingly, SB 965 may have no real effect on pre-litigation practices except intimidating Tennessee citizens.

**Conclusion**

For all of the above reasons and more, we urge you to reject this bill. It does nothing to ensure that legislative prayer practices are constitutional. Instead, it would create barriers for citizens who seek access to their courts and legislators. Accordingly, the bill should be rejected.



Charles Sumner  
Nashville Chapter Vice-President



Maggie Garrett  
Legislative Director