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IN THE CHANCERY COURT FOR THE STATE OF TENNESSEE
TWENTIETH JUDICIAL DISTRICT, DAVIDSON COUNTY, PART III

ELIZABETH RUTAN-RAM; GABRIEL RUTAN-RAM; REVEREND JEANNIE ALEXANDER; REVEREND ELAINE BLANCHARD; DR. LARRY BLANZ; REVEREND ALAINA COBB; REVEREND DENISE GYAUCH; and MIRABELLE STOEDTER,

Plaintiffs,

vs.

TENNESSEE DEPARTMENT OF CHILDREN'S SERVICES; and COMMISSIONER OF THE DEPARTMENT OF CHILDREN'S SERVICES, currently JENNIFER NICHOLS, in her official capacity,

Defendants.

NO. 22-80-III

Judge Roy B. Morgan, Jr.
Judge Carter S. Moore
Chancellor Ellen Hobbs Lyle (Chief Judge)

Set for hearing on June 14, 2022, 9:00 am Central time, via Zoom videoconference.

PLAINTIFFS' RESPONSE TO DEFENDANTS' MOTION TO DISMISS

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INTRODUCTION

In January 2020, the Tennessee General Assembly enacted Tenn. Code Ann. § 36-1-147, a statute that authorizes child-placing agencies to deny child-placement services, based on the agencies' religious policies, even if state tax dollars fund the services. In accordance with this statute, defendant Tennessee Department of Children's Services pays state funds to Holston United Methodist Home for Children for child-placement services, even though Holston refuses to provide those services to non-Christian couples.

Holston denied service to two of the plaintiffs, Elizabeth and Gabriel Rutan-Ram, because they are Jews. The Rutan-Rams—joined by six other plaintiffs who, like the Rutan-Rams, pay taxes to the State of Tennessee—filed this lawsuit against the Department and its Commissioner to put an end to state-funded religious discrimination in child-placement services. The lawsuit challenges Tenn. Code Ann. § 36-1-147 and the Department's funding of Holston, on the grounds that the religious-freedom and equal-protection guarantees of the Tennessee Constitution prohibit state funding of child-placing agencies that discriminate in state-funded services against prospective or current foster parents based on the religious beliefs of the parents.

The defendants' motion to dismiss, which argues only that the plaintiffs lack standing, should be denied. The Rutan-Rams, who have already been victimized by Holston's discrimination, have standing as foster parents who desire future child-placement services. The challenged statute and conduct have resulted in discriminatory state-funded agencies like Holston not being an option for the Rutan-Rams because they are Jews. The Rutan-Rams face further discrimination in state-funded services by private child-placing agencies in the future. The threat of that discrimination has a chilling effect on their consideration of seeking future services from private child-placing agencies. And the very process of taking into account the risk of discrimination when deciding from whom to seek child-placement services inflicts harm on the Rutan-Rams.

The Rutan-Rams are not deprived of standing by the fact that, when they initially sought services from Holston, they did so in conjunction with an effort to foster and adopt a Florida child, and that Florida, not Tennessee, may therefore have been the state that would have paid for Holston's services relating to that child. The Rutan-Rams subsequently decided to foster Tennessee children instead of out-of-state ones, and they are now doing so and plan to continue to do so. The Department funds placement, training, supervision, and support services that

Holston and other Tennessee child-placing agencies provide in connection with Tennessee children. And Holston has made clear that it will not serve Jewish foster parents regardless of whether the children they wish to foster or adopt are in Tennessee or out of state. Thus Holston's denial of service to the Rutan-Rams covered not only their initial attempt to foster and adopt the Florida child but also their subsequent need to obtain approval to foster Tennessee children and their current and future needs for foster-parent services.

In addition to the Rutan-Rams having standing as foster parents, they and all the other plaintiffs have standing as taxpayers. Under Tennessee case law, state taxpayers have a right to challenge unlawful uses of public funds. The defendants are incorrect in arguing that local taxpayers have this right but that state taxpayers do not. Moreover, the plaintiffs are suffering a special injury to the religious freedoms protected by the Tennessee Constitution because their tax payments are being used, in violation of their consciences, to advance particular religious beliefs through discriminatory practices.

Finally, in 2018, the General Assembly enacted a statute to strengthen the rights of Tennesseans to challenge unconstitutional governmental actions. This statute, Tenn. Code Ann. § 1-3-121, at the very least weighs in favor of a broad view of standing, especially for taxpayers. Denying the plaintiffs standing here would be contrary to the statute's intent.

STATEMENT OF THE CASE

Proceedings

The plaintiffs filed this lawsuit on January 19, 2022. On March 9, 2022, the defendants filed their motion to dismiss. The defendants did not file an answer to the complaint.

Together with the filing of this response to the defendants' motion, the plaintiffs have filed an amended complaint. They did so as of right under Tennessee Rule of Civil Procedure 15.01, which provides that "[a] party may amend the party's pleadings once as a matter of course at any time before a responsive pleading is served." It is well-established that, for purposes of Rule 15.01, a motion to dismiss is not a responsive pleading, and that a plaintiff may therefore amend his complaint as a matter of right before an answer is served when a defendant has filed a motion to dismiss. *See, e.g.*, *Adams v. Carter Cnty. Mem'l Hosp.*, 548 S.W.2d 307, 309 (Tenn. 1977); *Mosley v. State*, 475 S.W.3d 767, 774 (Tenn. Ct. App. 2015).

"[A]n amended complaint supersedes the original complaint, rendering the original of no legal effect." *Christian v. Lapidus*, 833 S.W.2d 71, 73 (Tenn. 1992); *accord, e.g.*, *McBurney v.*

Aldrich, 816 S.W.2d 30, 33 (Tenn. Ct. App. 1991). Thus, when an amended complaint is filed in response to a motion to dismiss, "[t]he motion for dismissal must be considered in relation to the amended complaint." *McBurney*, 816 S.W.2d at 33; *accord Mosby v. Colson*, No. W2006-00490-COA-R3-CV, 2006 WL 2354763, at *12 (Tenn. Ct. App. Aug. 14, 2006); *see also Cordell v. Cleveland Tenn. Hosp., LLC*, 544 S.W.3d 331, 340–41 (Tenn. Ct. App. 2017).

In summarizing their factual allegations in the section that follows, the plaintiffs therefore refer to their amended complaint, not their initial one. The plaintiffs further present additional detail about their allegations, again referencing the amended complaint, in appropriate places in the Argument section.

Summary of Amended Complaint

Tennessee's Authorization of Religious Discrimination by State-Funded Child-Placing Agencies

In January 2020, the Tennessee General Assembly enacted House Bill No. 836, which was signed into law the same month by Governor Bill Lee and codified as Tenn. Code Ann. § 36-1-147. Am. Compl. ¶ 23. This legislation authorizes child-placing agencies—private agencies that provide child-placement and various other services to prospective and current foster parents—to discriminate against those parents based on the agencies' "religious or moral convictions or policies," even if state funds support the agencies' foster-care services. *Id.* ¶¶ 22, 24.

When it enacted the legislation, the General Assembly understood that it would enable state-funded child-placing agencies to deny services to Jews and other religious minorities. *Id.* ¶¶ 28–30, 32. Further, debate on the legislation demonstrated that the General Assembly understood that a number of religiously affiliated child-placing agencies in Tennessee contract with the State and receive state funding, and that a principal purpose of the legislation was to permit those types of agencies to engage in religion-based discrimination even while receiving state funds. *Id.* ¶¶ 31–33.

Holston's Religious Discrimination Against the Rutan-Rams

Holston United Methodist Home for Children is a private child-placing agency that is licensed by, contracts with, and receives funding from the Department. *Id.* ¶¶ 42, 55–58. The Department pays state funds to Holston for placement, training, supervision, and support services that it provides to prospective and current foster parents. *Id.* ¶ 55.

Plaintiffs Elizabeth and Gabriel Rutan-Ram are a Jewish married couple who reside in Knoxville. *Id.* ¶ 8. They are unable to have biological children and would like to become adoptive parents. *Id.* In January 2021, they began their efforts to adopt a child and identified a boy in Florida with a disability whom they wanted to adopt. *Id.* ¶ 37. To do so, they needed to first obtain a foster-parent training and a home-study from a child-placing agency licensed by Tennessee. *Id.* ¶¶ 38–40. Then they would have been eligible to serve as foster parents for the Florida boy for six months and thereafter complete the adoption process. *Id.* ¶ 47.

The Rutan-Rams contacted several child-placing agencies that were not able to provide the needed services for the adoption of an out-of-state child. *Id.* ¶ 41. One of these agencies referred the Rutan-Rams to Holston. *Id.* Holston initially informed the Rutan-Rams that it would provide them the needed training and home-study services. *Id.* ¶ 45. But on the day that the Rutan-Rams were scheduled to begin their training, Holston informed the Rutan-Rams that it would not serve them because they are Jewish. *Id.* ¶ 48.

A Holston employee explained in an email to Ms. Rutan-Ram that "as a Christian organization, our executive team made the decision several years ago to only provide adoption services to prospective adoptive families that share our belief system in order to avoid conflicts or delays with future service delivery." *Id.* ¶ 49 & Ex. A thereto. Specifically, Holston refuses to serve prospective foster or adoptive parents who do not agree with Holston's statement of faith, which reflects a particular understanding of Christianity. *Id.* ¶¶ 73–74, 76, 78 & Exs. F and J thereto. Even a substantial proportion of Christians likely would not agree with Holston's statement of faith. *Id.* ¶ 75.

The Rutan-Rams were hurt, saddened, frustrated, and disappointed by Holston's refusal to serve them. *Id.* ¶¶ 50–51. And unfortunately, because they were not able to find another agency in the Knoxville area that would provide the training and home-study services needed for an out-of-state adoption, they were not able to foster or adopt the Florida boy. *Id.* ¶ 54.

Nevertheless, the Rutan-Rams did not abandon their efforts to foster and adopt children. *Id.* ¶ 87. They decided to apply for approval to serve as foster parents for children in the custody of the State of Tennessee, which is easier to obtain than approval to foster and adopt an out-of-state child. *Id.* ¶ 88. As Holston had already made clear that it would not provide any foster or adoption services to the Rutan-Rams because they are Jews, Holston was not an option for them with respect to the services needed to be approved to foster Tennessee children. *Id.* ¶ 90. This

perpetuated the feelings of hurt, sadness, disappointment, and frustration that the Rutan-Rams initially felt when Holston informed them that it would not serve them. *Id.* ¶ 93. Ultimately, the Department itself provided approval to serve as foster parents for Tennessee children to the Rutan-Rams, along with the training and home-study needed for it, and the Rutan-Rams became foster parents for the Department in June 2021. *Id.* ¶¶ 94–95.

The Ongoing and Future Harm Faced by the Rutan-Rams

Since June 2021, the Rutan-Rams have served as long-term foster parents of a teenage girl, whom they would adopt if the Department determines that it would be in her best interests for them to do so. *Id.* ¶ 96. The Rutan-Rams believe it likely that, within about six to twelve months, they will either be able to adopt the teenage girl or she will be reunified with her parents, and either way their service as foster parents for her will be concluded. *Id.* ¶ 97. Shortly after that occurs, the Rutan-Rams plan to serve as the long-term foster parents of at least one more child and to adopt that child if the Department determines that it would be in the child's best interest for them to do so. *Id.* ¶¶ 98–99. In the future, based on their experiences thus far, the Rutan-Rams plan to foster in-state children rather than again attempting to foster-to-adopt an out-of-state child, as the out-of-state process is more difficult and provides less opportunity for the foster parents and the child to determine whether they are a good fit for each other before a commitment to adopt is made. *Id.* ¶ 100.

When they commence the process of serving as the long-term foster parents of another child, the Rutan-Rams will give serious consideration to partnering with and serving as the foster parents for a private child-placing agency instead of continuing to work directly with the Department. *Id.* ¶ 110. Indeed, if state-funded private child-placing agencies were not permitted to discriminate against foster parents based on religion, the Rutan-Rams would likely choose to work with a private child-placing agency when they commence the process of serving as the long-term foster parents of another child. *Id.* ¶ 112. That is so for two main reasons. *Id.* ¶¶ 101–09, 112.

First, whatever agency the Rutan-Rams affiliate with—public or private—will be responsible for providing placement, training, supervision, and support services to them, as well as any services needed for the renewal of their status as approved Tennessee foster parents, which expires on May 28, 2023. *Id.* ¶¶ 101, 111. While the Rutan-Rams deeply appreciate the efforts of and services provided to them by Department staff, the Department is understaffed and

its staff are overworked, and as a result the Rutan-Rams have found the Department to at times be slow, inefficient, and difficult to work with. *Id.* ¶¶ 102–04; *see also* Ben Hall, *Foster parents warn of a crisis at the Department of Children's Services: One child had five DCS caseworkers in 18 months*, NewsChannel5 Nashville, Mar. 2, 2022, https://bit.ly/3x9E1Og. The Rutan-Rams understand that many private child-placing agencies have reputations of being more efficient and easier to work with than the Department is and of providing better experiences and services to foster parents than the Department does. Am. Compl. ¶ 105.

Second, there are particular advantages for couples such as the Rutan-Rams—who are interested in potentially adopting children whom they foster—to partnering with private child-placing agencies that also operate what the Department calls "Group Care Facilities," which are residential facilities for children whom the Department classifies as temporarily unable to live at home or with a foster family. *Id.* ¶¶ 106–09. Children who are placed in Group Care Facilities are particularly likely to soon thereafter become available for adoption, as they are more likely to have had their parental rights terminated or to be close to having those rights terminated. *Id.* ¶ 107. A child-placing agency that operates a Group Care Facility will often place children from the Facility with foster parents affiliated with that agency once the children are deemed ready to be placed in a foster home. *Id.* ¶ 106. A child-placing agency that operates a Group Care Facility is also particularly likely to have detailed knowledge about the characteristics and needs of children from the Facility whom the agency places with foster parents affiliated with the agency, which the agency can then share with the foster parents to ease the children's transition to the foster home. *Id.* ¶ 108.

Given their future plans, the Rutan-Rams are harmed in several ways by the requirement in Tenn. Code Ann. § 36-1-147 that the Department fund child-placing agencies even if they discriminate based on religion, and by the Department's concomitant willingness to fund child-placing agencies such as Holston that do discriminate based on religion. *Id.* ¶¶ 87–128. First, the statute and the Department's implementation of it deprive, or at best limit, the availability to the Rutan-Rams of what would otherwise be a particularly attractive option to them—a child-placing agency that also operates a Group Care Facility. *Id.* ¶¶ 116-118. To the plaintiffs' knowledge, the only child-placing agencies that both serve the Knoxville area and operate a Group Care Facility in Eastern Tennessee are Holston and Smoky Mountain Children's Home. *Id.* ¶ 117. Holston, of course, does not serve Jews. *Id.* ¶¶ 48–49, 73–74, 77–78, 116 & Exs. A,

F, I, and J thereto. Notwithstanding Holston's past discrimination against them, if Holston were to end its practice of discriminating against foster parents based on religion, and Holston turned out to be the best fit for the Rutan-Rams based on neutral criteria unrelated to religion, the Rutan-Rams would seriously consider partnering with Holston in the future. *Id.* ¶ 113. Meanwhile, Smoky Mountain makes statements on its website which suggest that the agency might only serve Christian foster parents but which are ultimately ambiguous on that issue. *Id.* ¶ 116. It appears that Smoky Mountain, like Holston, receives funding from the Department for its foster-care services. *Id.* ¶ 117.

Relatedly, Tenn. Code Ann. § 36-1-147 and the Department's implementation of it would cause the Rutan-Rams to face additional discrimination upon turning to private child-placing agencies for service in the future. *Id.* ¶¶ 114–120. Holston has already made clear that it will not serve the Rutan-Rams. *Id.* ¶¶ 48–49, 73–74, 77–78, 116 & Exs. A, F, I, and J thereto. Going back to private child-placing agencies would therefore exacerbate the feelings of hurt, sadness, disappointment, and frustration that the Rutan-Rams continue to feel because of Holston's refusal to serve them. *Id.* ¶ 119. In addition, like Smoky Mountain, a Knoxville-area child-placing agency called Free Will Baptist Ministries suggests on its website that it might only serve Christian foster parents but does not publicly make its practice on that question clear. *Id.* ¶ 116. If the Rutan-Rams approach Smoky Mountain or Free Will Baptist for service, they may again be rejected based on their faith. *See id.* That would make them feel further hurt, sad, disappointed, and frustrated. *Id.* ¶ 120. Thus, Tenn. Code Ann. § 36-1-147 and the Department's implementation of it create a chilling effect on the Rutan-Rams' consideration of turning to private child-placing agencies in the future, making the Rutan-Rams less likely to do so even though they are dissatisfied with the quality of service they receive from the Department. *Id.* ¶¶ 101–05, 110, 112, 115.

The statute and the Department's effectuation of it further harm the Rutan-Rams by forcing them to consider and assess the risk of suffering religious discrimination in the future when deciding whether to continue to partner with the Department or work with a private child-placing agency and, if they choose the latter, when selecting a private child-placing agency. *Id.* ¶¶ 121–22. Instead of being able to decide whether to work with the Department or a private agency—and if the latter, which private agency—based on neutral criteria unrelated to religion, the Rutan-Rams must take into account the risk of being rejected because they are Jews. *Id.*

¶ 122. Moreover, with respect to private child-placing agencies that fail to make clear on their websites whether they discriminate based on religion—as is the case with Smoky Mountain and Free Will Baptist—determining whether the agencies do in fact discriminate based on religion would involve contacting the agencies, which would result in the Rutan-Rams again suffering the humiliation of being told directly that the agencies will not serve them if the agencies answer that they, like Holston, do not work with Jews. *Id.*

Ultimately, the Rutan-Rams feel that Tenn. Code Ann. § 36-1-147 and the Department have turned them into second-class citizens, disfavored based on their religious beliefs, by creating an environment where some state-funded child-placing agencies—including Holston—are not an option for them because they are Jews. *Id.* ¶ 123. Thus the Rutan-Rams are denied the opportunity to participate in a governmental program on the same footing as those who satisfy the agencies' religious tests. *Id.* As a result, the Rutan-Rams feel that the State of Tennessee values them less than and does not view them as equal to adherents of favored religious groups such as those that Holston will serve. *Id.* For these reasons, the Rutan-Rams have ongoing feelings of humiliation, sadness, hurt, disappointment, and frustration as a result of the requirement in Tenn. Code Ann. § 36-1-147 that the Department fund child-placing agencies even if they discriminate based on religion and the Department's concomitant willingness to fund private child-placing agencies such as Holston that do discriminate based on religion. *Id.*

The Harm to the Plaintiffs as Taxpayers

The Rutan-Rams are joined as plaintiffs in this case by six Tennessee residents who, like the Rutan-Rams, pay taxes to Tennessee: Rev. Jeannie Alexander, Rev. Elaine Blanchard, Dr. Larry Blanz, Rev. Alaina Cobb, Rev. Denise Gyauch, and Mirabelle Stoedter. *Id.* ¶¶ 9–15. All of the plaintiffs object to the Department's use of their tax payments to fund Holston or any other child-placing agency that discriminates based on religion in state-funded programs or services. *Id.* It violates each plaintiff's conscience to contribute tax dollars toward the support of discriminatory practices that advance Holston's religious beliefs in particular or religious beliefs in general. *Id.* Moreover, the Rutan-Rams in particular object to their own tax payments being used to support discrimination against them. *Id.* ¶ 9.

On November 3, 2021, the plaintiffs' counsel sent a demand letter to the Department on behalf of the Rutan-Rams explaining that the Department's funding of Holston violates the Tennessee Constitution and requesting that the Department stop contracting with and funding

Holston unless Holston stops discriminating based on religion in its provision of programming funded with public dollars. *Id.* ¶¶ 66–67 & Ex. D thereto. On December 7, 2021, the plaintiffs' counsel sent a demand letter to the Department on behalf of the other six plaintiffs, explaining that they were joining this request. *Id.* ¶¶ 83–84 & Ex. H thereto. Each letter warned that failure to respond to the letter within thirty days or to end discrimination by Holston in state-funded services by then would be deemed to be a denial of the request. *Id.* ¶¶ 69, 85. The Department never provided a substantive response to either letter. *Id.* ¶¶ 70, 86. So, as noted above, the plaintiffs filed this lawsuit on January 19, 2022.

Claims Presented and Relief Requested

The lawsuit alleges that the authorization in Tenn. Code Ann. § 36-1-147 of state funding of child-placing agencies that discriminate based on religion, and the Department's concomitant funding of Holston's religious discrimination, violate Section 3 of Article I, Section 8 of Article I, and Section 8 of Article XI of the Tennessee Constitution. Am. Compl. ¶¶ 129–41. Article I, Section 3 "guarantees freedom of worship and separation of church and state." *City of Nashville v. State Bd. of Equalization*, 360 S.W.2d 458, 469 n.5 (Tenn. 1962). Together, Article I, Section 8 and Article XI, Section 8 "guarantee equal privileges and immunities for all those similarly situated." *Tenn. Small Sch. Sys. v. McWherter*, 851 S.W.2d 139, 152 (Tenn. 1993).

The plaintiffs accordingly seek a declaratory judgment that Tenn. Code Ann. § 36-1-147 facially violates these constitutional clauses. Am. Compl., Request for Relief, ¶ 1. They also seek declaratory and injunctive relief prohibiting the Department from continuing to fund or contract with Holston as long as Holston continues to deny state-funded services to prospective or current foster parents based on the parents' religious beliefs. *Id.*, Request for Relief, ¶¶ 2–3.

STANDARD OF REVIEW

As the defendants correctly state, "[w]hen a defendant makes a facial challenge to a court's subject matter jurisdiction"—a challenge that, like the defendants' motion here, does not dispute the factual allegations of the complaint (*see Staats v. McKinnon*, 206 S.W.3d 532, 542–43 (Tenn. Ct. App. 2006))—"the factual allegations are presumed to be true and must be viewed in the light most favorable to the non-moving party." *See* Defs.' Mem. 3; *accord Massengale v. City of E. Ridge*, 399 S.W.3d 118, 123–24 (Tenn. Ct. App. 2012). "[T]he court considers the impugned pleading and nothing else." *Staats*, 206 S.W.3d at 542. "If a complaint attacked on its face competently alleges any facts which, if true, would establish grounds for subject matter

jurisdiction, the court must uncritically accept those facts, end its inquiry, and deny the dismissal motion." *Id.* at 542–43.

ARGUMENT

I. The Rutan-Rams have standing as foster parents.

The Rutan-Rams have standing as active foster parents for Tennessee children. They have already been victimized by Holston's discrimination. They face further discrimination by state-funded private child-placing agencies in the future. The challenged statute and the Department's implementation of it deprive, or at best limit, the availability to the Rutan-Rams of what would otherwise be the particularly attractive option of partnering with a child-placing agency that also operates a Group Care Facility. And the Department's funding, pursuant to the challenged statute, of religious discrimination in foster-care services has a chilling effect on the Rutan-Rams' consideration of seeking future services from state-funded private child-placing agencies. Indeed, the Rutan-Rams are harmed by the very process of taking into account the risk of discrimination when deciding from whom to seek foster-care services.

That the Rutan-Rams initially sought to foster and adopt a Florida child, and that it may have been Florida and not Tennessee that would have been responsible for paying Holston for services relating to that child, does not defeat the Rutan-Rams' standing. The Rutan-Rams subsequently decided to foster Tennessee children, not out-of-state ones, and they plan to continue fostering only Tennessee children in the future. The child-placement services that Holston and other Tennessee child-placing agencies provide concerning Tennessee children are funded by the Department. To be approved as foster parents for Tennessee children, the Rutan-Rams still needed a foster-parent training and a home study. Those services, if provided by Holston, would have been state-funded, but Holston had already made clear to the Rutan-Rams that it does not serve Jews. Likewise, as Jews, the Rutan-Rams are ineligible by virtue of their faith for current and future state-funded foster-care services involving Tennessee children that Holston provides to parents who subscribe to its statement of faith. Holston's discrimination against the Rutan-Rams thus encompasses past, current, and future state-funded services.

A. The rights to sue provided by Tennessee's Declaratory Judgement Act are liberally construed.

Tennessee's Declaratory Judgment Act, which is one of the statutes that gives this Court jurisdiction over this case (*see* Am. Compl. ¶¶ 5–6), provides courts with "the power to declare rights, status, and other legal relations whether or not further relief is or could be claimed."

Tenn. Code Ann. § 29-14-102(a). The Declaratory Judgment Act "is to be liberally construed and administered" in line with its "remedial . . . purpose." Tenn. Code Ann. § 29-14-113. Declaratory judgment actions serve as a "proactive means of preventing injury to the legal interests and rights of a litigant," under the theory that "'[c]ourts should operate as preventive clinics as well as hospitals for the injured.'" *Colonial Pipeline Co. v. Morgan*, 263 S.W.3d 827, 836–37 (Tenn. 2008) (quoting Henry R. Gibson, *Gibson's Suits in Chancery* § 545 (6th ed. 1982)). Thus plaintiffs suing under the Declaratory Judgment Act "need not show a present injury." *Id.* at 837.

To obtain a decision under the Declaratory Judgment Act, "the only controversy necessary . . . is that the question must be real, and not theoretical; the person raising it must have a real interest, and there must be some one having a real interest in the question who may oppose the declaration sought." *Miller v. Miller*, 261 S.W. 965, 972 (Tenn. 1924). As long as these minimal requirements are met, "[i]t is not necessary that any breach should be first committed, any right invaded, or wrong done." *Id.*

For example, in *Miller*, the Tennessee Supreme Court held that a widow and her adult children were entitled to a declaratory judgment as to her ability to sell portions of her deceased husband's estate, even though there was "no present actual controversy in the sense of threatened litigation" challenging her right to do so. *Id.* at 966, 972. In *Cummings v. Beeler*, 223 S.W.2d 913, 914–15, 917–18 (Tenn. 1949), the Court ruled that the Tennessee Secretary of State was entitled to a declaratory judgment upholding the constitutionality of a statute that limited a proposed constitutional convention to certain specified purposes, even though the vote on whether to have the convention had not yet been held. And in *Williams v. American Plan Corp.*, 392 S.W.2d 920, 921–23 (Tenn. 1965), the Court concluded that a loan business was entitled to a declaratory judgment affirming its right to carry out a lease agreement with another business, even though the defendant Commissioner of Insurance and Banking—who had opined that the lease was unlawful—had not taken any action to enforce that opinion.

B. The Rutan-Rams are already victims of religious discrimination in state-funded programming.

Here, the Rutan-Rams' past, ongoing, and threatened injuries are even more concrete than what these cases treated as sufficient. To begin with, Holston has already refused to serve the Rutan-Rams because the Rutan-Rams are Jews. Am. Compl. ¶¶ 48–49 & Ex. A thereto. The defendants argue that the specific services that the Rutan-Rams were seeking when Holston

informed them that it would not serve them would not have been state-funded because the Rutan-Rams were seeking to foster-to-adopt a Florida child. *See* Defs.' Mem. at 8–9. The defendants may be correct, as it may be the case that Florida, not Tennessee, would have paid for Holston's services concerning that child. *See* Am. Compl. ¶ 91; Tenn. Code Ann. § 37-4-201, art. V.

But after the Rutan-Rams lost the opportunity to foster or adopt the Florida child, the Rutan-Rams decided to serve as foster parents for Tennessee children, and they still needed a foster-parent training and a home study to obtain approval to do so. Am. Compl. ¶¶ 54, 87–89. The Department does fund Holston's provision of these types of services for the fostering of Tennessee children. *Id.* ¶ 91. And Holston had already made clear to the Rutan-Rams that it would not provide any foster-care services to them because they are not Christians. *Id.* ¶ 90. Indeed, Holston simply refuses to work with parents who do not subscribe to its statement of faith, regardless of whether the services at issue are government-funded or not. *Id.* ¶¶ 73–78.

Moreover, as current foster parents for Tennessee children, the Rutan-Rams receive state-funded placement, training, supervision, and support services—presently from the Department itself. *Id.* ¶ 101. The Department funds Holston to provide these types of services to foster parents of Tennessee children too. *Id.* ¶ 92. Holston's policy of not serving Jews renders the Rutan-Rams ineligible to receive these services from Holston as well. *Id.* ¶¶ 73–78, 90, 119.

Thus, Holston's discrimination against the Rutan-Rams encompasses both the state-funded services that the Rutan-Rams sought when they decided they wanted to foster Tennessee children and the state-funded services that the Rutan-Rams are receiving now. *Id.* And this has perpetuated the feelings of hurt, sadness, disappointment, and frustration that the Rutan-Rams initially felt when Holston informed them that it would not serve them. *Id.* ¶¶ 93, 119.

C. The Rutan-Rams face additional, future discrimination in state-funded programming.

Contrary to what the defendants contend (Defs.' Mem. 6–7), the future harm that the Rutan-Rams face as a result of the challenged statute and the defendants' implementation of it is far from hypothetical and speculative. Promptly after the Rutan-Rams' current service as the long-term foster parents of a teenage girl is concluded, they plan to serve as long-term foster parents of at least one more Tennessee child, and would adopt that child if the Department determines that it would be in the child's best interests for them to do so. Am. Compl. ¶¶ 98–99.

If the threat of again being victimized by religious discrimination were not an issue, the Rutan-Rams would likely choose to work with a private child-placing agency—and obtain from

the private agency state-funded placement, training, supervision, and support services—instead of continuing to partner directly with and receive those services from the Department as they do now. *Id.* ¶¶ 110–12. That is because the Department is understaffed, its staff are overworked, and the Department is consequently at times slow, inefficient, and difficult to work with. *Id.* ¶¶ 103–04. Many private child-placing agencies have reputations of being more efficient, of being easier to work with, and of providing better experiences and services to foster parents. *Id.* ¶ 105. In addition, partnering with a private child-placing agency that operates a Group Care Facility would be particularly attractive to the Rutan-Rams (if the agency did not discriminate against Jews), partly because such agencies often place children from their Group Care Facilities with the agencies' affiliated foster parents, and children in Group Care Facilities are particularly likely to soon thereafter become available for adoption. *Id.* ¶¶ 106–09.

But if the Rutan-Rams do again turn to private child-placing agencies, they will face additional discrimination. *Id.* ¶ 114. Holston has already made clear that it will not serve Jewish foster parents or anyone else who will not agree to its statement of faith. *Id.* ¶¶ 73–78, 116. At least two other Knoxville-area child-placing agencies—Smoky Mountain Children's Home and Free Will Baptist Ministries—suggest on their websites that they might only serve Christian foster parents but do not make clear whether that is indeed the case. *Id.* ¶ 116.

Moreover, the Rutan-Rams will face deprivation or limitation—because of their Jewish faith—of the otherwise particularly attractive option of working with a child-placing agency that operates a Group Care Facility. *Id.* ¶ 118. To the plaintiffs' knowledge, the only child-placing agencies that both serve the Knoxville area and operate a Group Care Facility in Eastern Tennessee are Holston and Smoky Mountain. *Id.* ¶ 117.

As a result, while the Rutan-Rams will still seriously consider partnering with a private child-placing agency in conjunction with the commencement of their next long-term fostering of a child, Tenn. Code Ann. § 36-1-147 and the Department's implementation of it have a chilling effect on their consideration of doing so, even though they are unhappy with the quality of service they receive from the Department. Am. Compl. ¶¶ 103–05, 110, 112, 115.

In addition, the challenged statute and the Department's concomitant willingness to fund discriminatory child-placing agencies harm the Rutan-Rams by forcing them to consider and assess the risk of suffering religious discrimination in the future when deciding whether to continue to partner with the Department or work with a private child-placing agency and, if they

choose the latter, when selecting a private child-placing agency. *Id.* ¶¶ 121–22. Instead of being able to decide whether to work with the Department or a private agency—and if the latter, which private agency—based on neutral criteria unrelated to religion, the Rutan-Rams must take into account the risk of being rejected because they are Jews. *Id.* ¶ 122. Also, with respect to private child-placing agencies that do not make clear on their websites whether they discriminate based on religion—as is the case with Smoky Mountain and Free Will Baptist—determining whether the agencies do in fact discriminate would involve contacting the agencies, which would result in the Rutan-Rams again suffering the humiliation of being told directly that the agencies will not serve them if the agencies answer that they, like Holston, do not serve Jews. *Id.*

For these reasons, the Rutan-Rams feel that Tenn. Code Ann. § 36-1-147 and the Department have turned them into second-class citizens, disfavored based on their religious beliefs, by creating an environment where some state-funded child-placing agencies, including Holston, are not an option for them because they are Jews. Am. Compl. ¶ 123. This makes them feel that the State of Tennessee values them less than and does not view them as equal to adherents of favored religious groups such as those that Holston will serve. *Id.* The Rutan-Rams therefore have ongoing feelings of humiliation, sadness, hurt, disappointment, and frustration as a result of the challenged statute and the Department's implementation thereof. *Id.*

Courts have recognized that—in addition to more tangible harms, such as the denials of otherwise attractive options that the Rutan-Rams face here—these types of emotional harms from discrimination are legally cognizable as injuries. The U.S. Supreme Court has explained that "discrimination itself, by perpetuating 'archaic and stereotypic notions' or by stigmatizing members of the disfavored group as 'innately inferior' . . . can cause serious non-economic injuries to those persons who are personally denied equal treatment solely because of their membership in a disfavored group." *Heckler v. Mathews*, 465 U.S. 728, 739–40 (1984) (quoting *Miss. Univ. for Women v. Hogan*, 458 U.S. 718, 725 (1982)). Thus "[w]hen the government erects a barrier that makes it more difficult for members of one group to obtain a benefit than it is for members of another group . . . [t]he 'injury in fact' . . . is the denial of equal treatment resulting from the imposition of the barrier, not the ultimate inability to obtain the benefit." *Ne. Fla. Chapter of Associated Gen. Contractors v. City of Jacksonville*, 508 U.S. 656, 666 (1993).

For "acts of invidious discrimination in the distribution of publicly available goods, services, and other advantages cause unique evils." *Roberts v. U.S. Jaycees*, 468 U.S. 609, 628

(1984). "Discrimination is not simply dollars and cents, hamburgers and movies; it is the humiliation, frustration, and embarrassment that a person must surely feel when he is told that he is unacceptable as a member of the public . . . ." *Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241, 292 (1964) (Goldberg, J., concurring). It "denigrates the dignity of the excluded," "reinvokes a history of exclusion," and communicates an "'assertion of . . . inferiority'" to "all those who may later learn of the discriminatory act." *J.E.B. v. Alabama ex rel. T.B.*, 511 U.S. 127, 141–42 (1994) (quoting *Strauder v. West Virginia*, 100 U.S. 303, 308 (1880)).

These harms are amplified when laws "put the imprimatur of the State itself on an exclusion that soon demeans or stigmatizes those whose own liberty is then denied," thus "disparag[ing] their choices and diminish[ing] their personhood." *Obergefell v. Hodges*, 576 U.S. 644, 672 (2015). That is exactly what Tenn. Code Ann. § 36-1-147 and the Department's effectuation of it have done here by authorizing and providing state funding for child-placing agencies that discriminate against religious minorities, and thereby denying the Rutan-Rams the opportunity to participate in a governmental program on the same footing as those who satisfy the agencies' religious tests.

In addition to demonstrating injury, the Rutan-Rams satisfy the causation and redressability requirements (*see, e.g.*, *ACLU of Tenn. v. Darnell*, 195 S.W.3d 612, 620 (Tenn. 2006)) for standing. "[T]he causation element is not onerous" and merely "require[s] a showing that the injury to a plaintiff is 'fairly traceable' to the conduct of the adverse party." *City of Memphis v. Hargett*, 414 S.W.3d 88, 98 (Tenn. 2013) (quoting *Darnell*, 195 S.W.3d at 620). The only argument that the defendants make concerning causation is that child-placement services concerning the Florida child would not have been funded by the Department. *See* Defs.' Mem. 8–9. But as explained above, the Rutan-Rams subsequently decided to serve as foster parents for Tennessee children and will continue doing so in the future, and the Department funds Holston's and other private child-placing agencies' provision of placement, training, supervision, and support services for foster parents of Tennessee children. Am. Compl. ¶¶ 88, 91–92, 94–96, 98–100. The discrimination and associated harms that the Rutan-Rams have suffered and are threatened with in connection with the fostering of Tennessee children are therefore fairly traceable to the challenged statute's requirement that the Department fund child-placing agencies even if they discriminate based on religion and to the Department's concomitant funding of Holston. *Id.* ¶¶ 91–93, 112–123.

Finally, the Rutan-Rams' injuries would be redressed by the remedies that they seek, which are (1) a declaratory judgment that Tenn. Code Ann. § 36-1-147 facially violates the Tennessee Constitution by permitting state funding of child-placing agencies that discriminate in state-funded services against prospective or current foster parents based on the religious beliefs of the parents, and (2) declaratory and injunctive relief prohibiting the Department from continuing to fund or contract with Holston as long as Holston continues to deny state-funded services to prospective or current foster parents based on the parents' religious beliefs. Am. Compl. ¶ 124 & Request for Relief, ¶¶ 1–3. Issuance of the requested relief would cause Holston, as well as any other Department-funded child-placing agencies that discriminate based on religion, to either stop discriminating against foster parents based on the parents' religion or stop accepting state funds. Am. Compl. ¶ 125. At least in the case of Holston, the plaintiffs believe that the requested relief would be far more likely to cause the agency to stop discriminating against foster parents based on the parents' religion than to cause the agency to stop accepting state funds. *Id.* ¶ 126.

If Holston and/or other discriminatory child-placing agencies become willing to serve Jewish foster parents as a result of issuance of the requested relief, that would redress the injuries suffered and faced by the Rutan-Rams in a number of ways. *Id.* ¶ 127. It would reduce or eliminate the risk that they could be victims of religious discrimination in child-placement services in the future. *Id.* It would make greater and more attractive options for the receipt of child-placing services available to them. *Id.* It would reduce or eliminate the chilling effect that Tenn. Code Ann. § 36-1-147 and the Department's implementation thereof impose on the Rutan-Rams' consideration of working with private child-placing agencies in the future. Am. Compl. ¶ 127. And it would reduce or eliminate the harms to the Rutan-Rams associated with having to take into account the risk of being discriminated against when deciding from whom to seek child-placement services. *Id.*

If Holston and/or other discriminatory child-placing agencies instead stop accepting state funds as a result of issuance of the requested relief, that would also redress the injuries suffered and faced by the Rutan-Rams. *Id.* ¶ 128. It would eliminate the feelings that the Rutan-Rams have that Tennessee, by funding child-placing agencies that refuse to serve Jews, has rendered the Rutan-Rams second-class citizens, disfavors them based on their religious beliefs, and values them less than and does not view them as equal to adherents of favored religious groups such as

those that Holston now serves. *Id.* It would thereby alleviate the feelings of humiliation, sadness, hurt, disappointment, and frustration that the Rutan-Rams now feel as a result of the requirement in Tenn. Code Ann. § 36-1-147 that the Department fund child-placing agencies even if they discriminate based on religion and the Department's concomitant willingness to fund private child-placing agencies such as Holston that do discriminate based on religion. Am. Compl. ¶ 128.

These benefits would satisfy the redressability requirement. The U.S. Supreme Court has explained that, in a challenge to a statute that results in discrimination, the redressability requirement for standing is met *either* when the relief granted would provide to the plaintiffs the benefits that were discriminatorily denied to them *or*—even if the plaintiffs would not obtain the benefits—the relief would eliminate the statutory support for the discrimination. *See Heckler*, 465 U.S. at 738–40; *see also City of Jacksonville*, 508 U.S. at 666.

In cases similar to this one, and for reasons similar to those stated above, federal district courts have repeatedly held that prospective foster parents who suffered religion-based discrimination by government-funded foster-care agencies and continued to desire foster-care services had standing to sue. The courts explained that (1) the plaintiffs suffered injuries from the curtailment of options for foster-care services and from the stigma inflicted by discrimination; (2) there was a causal connection between the plaintiffs' injuries and actions by the governmental defendants because the defendants had authorized or funded the discrimination; (3) relief barring the government from supporting the discrimination would redress the plaintiffs' injuries by either increasing the service options available to the plaintiffs or alleviating the stigma inflicted by government-aided discrimination. *See Rogers v. U.S. Dep't of Health & Hum. Servs.*, 466 F. Supp. 3d 625, 640–45 (D.S.C. 2020); *Marouf v. Azar*, 391 F. Supp. 3d 23, 33–37 (D.D.C. 2019); *Dumont v. Lyon*, 341 F. Supp. 3d 706, 719–26 (E.D. Mich. 2018); *Maddonna v. U.S. Dep't of Health & Hum. Servs.*, No. 6:19-cv-3551, ECF No. 43, at 16–26 (D.S.C. Aug. 10, 2020), https://bit.ly/3Jdlcfy. This Court should rule the same way here.

II. All of the plaintiffs have standing as taxpayers.

Even if the Rutan-Rams do not have standing as foster parents, they and all the other plaintiffs have standing as taxpayers. Tennessee courts have repeatedly held that taxpayers have standing to challenge unlawful uses of public funds. The plaintiffs are challenging unconstitutional state spending.

The defendants err in contending that local taxpayers have a broad right to challenge unlawful spending but that state taxpayers may only challenge actions that increase their tax burdens. More than 140 years ago, the Tennessee Supreme Court rejected the proposition that state and local taxpayers should be treated differently for standing purposes and ruled that state taxpayers could proceed with a challenge to the constitutionality of a state spending measure. Since then, Tennessee cases setting forth the requirements for taxpayer standing have regularly presented those requirements as applying to all taxpayers.

But even if Tennessee state taxpayers do not have a general right to challenge unlawful state spending and must show some sort of special interest to have standing, the plaintiffs can do so. The plaintiffs suffer a special injury to the religious freedoms protected by Section 3 of Article I of the Tennessee Constitution because their tax payments are being used, over their objections, to advance particular religious beliefs through discriminatory practices. When a legislature authorizes use of public funds to support religious purposes, as the Tennessee General Assembly has done here, federal courts grant taxpayers standing. This Court should at the very least follow a similar rule.

A. Tennessee courts have repeatedly held that taxpayers have standing to challenge unlawful uses of public funds.

The Tennessee Supreme Court has on many occasions affirmed the right of taxpayers to bring suit when they allege "that public funds are misused." *Badgett v. Rodgers*, 436 S.W.2d 292, 294 (Tenn. 1969). The Court has noted that "[i]t has always been recognized that a taxpayer/citizen has standing to challenge 'illegal' uses of public funds . . . ." *Cobb v. Shelby Cnty. Bd. of Comm'rs*, 771 S.W.2d 124, 126 (Tenn. 1989) (quoting *Soukup v. Sell*, 104 S.W.2d 830, 831 (Tenn. 1937)); *see, e.g.*, *Lynn v. Polk*, 76 Tenn. 121 (1881) (permitting state taxpayers to challenge constitutionally of state spending act, as discussed in more detail *infra* at 20); *Fannon v. City of LaFollette*, 329 S.W.3d 418, 428 (Tenn. 2010) ("[T]he misuse or diversion of public funds may entitle the taxpayer standing to sue."); *Southern v. Beeler*, 195 S.W.2d 857, 868 (Tenn. 1947) (taxpayers "may appeal to the courts to prevent . . . misapplication" of public funds); *Kennedey v. Montgomery Cnty.*, 38 S.W. 1075, 1079 (Tenn. 1897) (where use of tax funds "was unauthorized and illegal," taxpayers "had the right to enjoin any threatened misappropriation" and "to have relief from the further diversion" of the funds); *see also LaFollette Med. Ctr. v. City of LaFollette*, 115 S.W.3d 500, 504 (Tenn. Ct. App. 2003) ("[A] taxpayer may sue without averring or establishing any special injury where an illegal use of

public funds is involved.") (quoting *Wamp v. Chattanooga Hous. Auth.*, 384 F. Supp. 251, 255 (E.D. Tenn. 1974)); *Moody v. Johnson City*, 1988 WL 55021, at *3 (Tenn. Ct. App. June 3, 1988) (same quote), *perm. app. denied* (Tenn. July 3, 1989); *Town of Erwin v. Unicoi Cnty.*, No. 03A01-9111-CH-00382, 1992 WL 74569, at *1 (Tenn. Ct. App. Apr. 15, 1992) (taxpayers have standing when they aver "that public funds are misused").

The Tennessee Supreme Court has explained that Tennessee "courts typically confer standing when a taxpayer (1) alleges a 'specific illegality in the expenditure of public funds' and (2) has made a prior demand on the government entity asking it to correct the alleged illegality." *Fannon*, 329 S.W.3d at 427 (quoting *Cobb*, 771 S.W.2d at 126). In other words, the Court has described the three "elements of taxpayer standing" as "1) taxpayer status, 2) specific illegality in the expenditure of public funds, and 3) prior demand." *Cobb*, 771 S.W.2d at 126. And the Tennessee Court of Appeals has regularly cited and applied this three-part test. *See, e.g.*, *Lewis v. Cleveland Mun. Airport Auth.*, 289 S.W.3d 808, 817 (Tenn. Ct. App. 2008); *Ragsdale v. City of Memphis*, 70 S.W.3d 56, 62 (Tenn. Ct. App. 2001); *City of New Johnsonville v. Handley*, No. M2003-00549-COA-R3-CV, 2005 WL 1981810, at *13 (Tenn. Ct. App. Aug. 16, 2005), *perm. app. denied* (Tenn. Feb. 6, 2006); *Phillips v. County of Andersen*, No. E2000-01204-COA-R3-CV, 2001 WL 456065, at *3 (Tenn. Ct. App. Apr. 30, 2001).

The plaintiffs easily satisfy the three-part test. They pay taxes to the State of Tennessee, including sales, gasoline, and motor-vehicle taxes. Am. Compl. ¶¶ 9–15. They allege that the defendants are violating the religious-freedom and equal-protection guarantees of the Tennessee Constitution by funding a child-placing agency that discriminates in state-funded programming and services against prospective and current foster parents based on the religious beliefs of the parents. *Id.* ¶¶ 55–56, 73–78, 129–41. And, seventy-seven and forty-eight days before filing suit, the plaintiffs sent demand letters to the defendants—which were ignored—asking them to stop providing that funding unless the agency ended its religious discrimination. *Id.* ¶¶ 66–70, 83–86 & Exs. D and H thereto.

B. The same standards apply to state and local taxpayers.

The defendants argue that only local taxpayers have a right to challenge unlawful uses of tax funds. Defs.' Mem. 13–14. They rely on the following language from *Fannon*, 329 S.W.3d at 427, which quoted *Cobb*, 771 S.W.2d at 126: "the taxpayer's complaint 'must allege a specific legal prohibition on the disputed use of funds or demonstrate that it is outside the grant of

authority to the local government.'" But *Fannon* and *Cobb* referenced local taxpayers in that sentence merely because local taxpayers challenging municipal actions were the plaintiffs in both cases. *See Fannon*, 329 S.W.3d at 420; *Cobb*, 771 S.W.2d at 124. Nowhere do *Fannon* or *Cobb* say that state taxpayers lack the same rights to sue that local taxpayers have.

To the contrary, other language in *Fannon* and *Cobb* (first quoted above) discusses taxpayers' right to sue generally, without making any distinction between state and local taxpayers. *See Cobb*, 771 S.W.2d at 126 ("It has always been recognized that a taxpayer/citizen has standing to challenge 'illegal' uses of public funds . . . ."); *Fannon*, 329 S.W.3d at 428 ("[T]he misuse or diversion of public funds may entitle the taxpayer standing to sue."); *id.* at 427 (taxpayers who make a demand have standing when they allege "a specific illegality in the expenditure of public funds" (quoting *Cobb*, 771 S.W.2d at 126)). Numerous other above-cited Tennessee cases likewise refer to taxpayers generally—and do not suggest that state taxpayers' rights are somehow lesser than local taxpayers' rights—in affirming taxpayers' rights to challenge unlawful public spending. *See Southern*, 195 S.W.2d at 297; *Lewis*, 289 S.W.3d at 817; *LaFollette Med. Ctr.*, 115 S.W.3d at 504; *Ragsdale*, 70 S.W.3d at 62; *City of New Johnsonville*, 2005 WL 1981810, at *14; *Phillips*, 2001 WL 456065, at *3; *Moody*, 1988 WL 55021, at *3.

Indeed, more than 140 years ago, in *Lynn*, 76 Tenn. 121, the Tennessee Supreme Court, by a 4-1 vote, expressly rejected the argument that state taxpayers should not have the same rights to challenge unconstitutional state spending that local taxpayers have with respect to local spending. One Justice made that argument in a dissenting opinion, but the other four Justices—each of whom wrote separately due to the importance of the case—disagreed. *Compare id.* at 123–24 (opinion of Turney, J.), 156 (opinion of Freeman, J.), 264–65 (opinion of McFarland, J.), and 326–27 (opinion of Deaderick, C.J.), *with id. at* 287–93 (Ewing, Sp. J., dissenting). The four Justices in the majority on the taxpayer-standing issue agreed that a group of state taxpayers had standing to challenge the constitutionality of an act passed by the state legislature that provided for the funding of settlement of state debt. *See id.* at 122–25 (Turney, J.), 156 (Freeman, J.), 264–65 (McFarland, J.), 326–27 (Deaderick, C.J.).

The Tennessee Supreme Court has allowed taxpayers to challenge the constitutionality of actions of the Tennessee legislature on a number of other occasions. For example, in *Southern*, 195 S.W.2d at 280–81, the Court permitted a taxpayer to challenge an enactment by the state

legislature that authorized a particular county to issue bonds to erect and repair school buildings. In *Ford v. Farmer*, 28 Tenn. (9 Hum.) 152, 158–59 (1848), and *Bridgenor v. Rodgers*, 41 Tenn. (1 Cold.) 259, 260 (1860), the Court allowed taxpayers to challenge state legislation that created new counties. And in *Dykes v. Hamilton County*, 191 S.W.2d 155, 156–57 (Tenn. 1945), the Court permitted taxpayers to challenge a legislative act that created a juvenile court and a juvenile-court commission for a county. Moreover, according to an article that surveyed the taxpayer-standing law of other states, "the majority rule is that, by case law and/or statutes, state taxpayers generally have standing to challenge state taxes and expenditures in the state courts." See Edward A. Zelinsky, *Putting State Courts in the Constitutional Driver's Seat: State Taxpayer Standing after* Cuno *and* Winn, 40 Hastings Const. L.Q. 1, 46 (2012).

The defendants do not cite any cases that denied the right to sue to state taxpayers who were challenging unlawful state spending. Instead, the defendants rely (Defs.' Mem. 11–14) on cases in which taxpayers attacked something other than unlawful state expenditures. *See Parks v. Alexander*, 608 S.W.2d 881, 883–84 (Tenn. 1980) (plaintiffs argued that amendment to state constitution was enacted in an invalid manner); *Buford v. State Bd. of Elections*, 334 S.W.2d 726, 727 (Tenn. 1960) (plaintiffs challenged state election board's appointment of election commissioners for a particular county); *England v. City of Knoxville*, 194 S.W.2d 489, 490 (Tenn. 1946) (city taxpayers challenged city's decision to switch city to different time zone).

The defendants' position is that local taxpayers have a right to challenge unlawful local spending, but that state taxpayers have a right to sue only when they can demonstrate an increased tax burden. *See* Defs.' Mem. 11–14. But the case that they cite (Defs.' Mem. 11) for this proposition—the 1946 decision in *England*—involved local taxpayers, not state taxpayers. *See* 194 S.W.3d at 490. More recent decisions have clarified that taxpayers who have made a demand need only allege that public funds are being spent in an illegal manner. *See, e.g.*, *Fannon*, 329 S.W.3d at 427; *Cobb*, 771 S.W.2d at 126. And the Tennessee Supreme Court's 1881 decision in *Lynn* allowed state taxpayers to challenge a legislative spending enactment even though there was debate about whether it would have increased the burdens on taxpayers or reduced them, for the enactment lowered the interest rate on outstanding state debt from six percent to three percent. *See* 76 Tenn. at 124–25 (Turney, J.), 161 (Freeman, J.), 288 (Ewing, Sp. J., dissenting).

Nor is there a logical basis for the defendants' proposed—and unsupported by case law—distinction between state and local taxpayers. Relying on the principle "that private citizens, as such, cannot maintain an action complaining of the wrongful acts of public officials unless such private citizens aver special interest or a special injury not common to the public generally" (*Bennett v. Stutts*, 521 S.W.2d 575, 576 (Tenn. 1975)), the defendants seem to argue that allowing a taxpayer to challenge unlawful state spending is problematic because it permits any other state taxpayer to do the same (*see* Defs.' Mem. 14). That is also true when a taxpayer is allowed to challenge a state action that results in a greater tax burden, however. And similarly, when a local taxpayer is permitted to challenge either unlawful local spending or local action that results in an increased tax burden, any other taxpayer in that locality can do that too. But the Tennessee Supreme Court explained in *Badgett*, 436 S.W.2d at 295, that taxpayers have the right to challenge "alleged wrongful disposition of tax funds" even though that is "an injury to all taxpayers" of the relevant jurisdiction. Because not all citizens are taxpayers, this result does not conflict with the principle (*see Bennett*, 521 S.W.2d at 576) that suit should not be permitted when the injury is common to all citizens.

C. The plaintiffs suffer a special injury to their right to not be taxed for the support of religion.

Even if Tennessee standing law does require state taxpayers to allege a special injury beyond simple unlawful use of state tax dollars, the plaintiffs do so here. For the plaintiffs allege that Tennessee's funding of a child-placing agency that discriminates in state-funded programming and services based on religion violates Article I, Section 3 of the Tennessee Constitution. Am. Compl. ¶¶ 55–56, 73–78, 129–34. This constitutional provision states:

> That all men have a natural and indefeasible right to worship Almighty God according to the dictates of their own conscience; that no man can of right be compelled to attend, erect, or support any place of worship, or to maintain any minister against his consent; that no human authority can, in any case whatever, control or interfere with the rights of conscience; and that no preference shall ever be given, by law, to any religious establishment or mode of worship.

Article I, Section 3 "guarantees freedom of worship and separation of church and state." *City of Nashville v. State Bd. of Equalization*, 360 S.W.2d 458, 469 n.5 (Tenn. 1962). The provisions of Article I, Section 3 are the state counterparts of the U.S. Constitution's Establishment and Free Exercise Clauses. *See Carden v. Bland*, 288 S.W.2d 718, 721 (Tenn. 1956). But the state's non-establishment guarantee provides protections greater than those of its

federal counterpart. *See id.* (while the federal and state establishment and free-exercise clauses "are practically synonymous," "[i]f anything, [Tennessee's] own organic law is broader and more comprehensive in its guarantee of freedom of worship and freedom of conscience"); *State ex rel. Comm'r of Transp. v. Eagle*, 63 S.W.3d 734, 761–62 (Tenn. Ct. App. 2001) (Tennessee's establishment clause is "stronger than its federal counterpart"); *see also* Tenn. Op. Att'y Gen. 15-34, 2015 WL 1872222, at *1 (Apr. 13, 2015) (describing Tennessee's "constitutional protection against religious establishment as 'substantially stronger' than the protection afforded by the Establishment Clause of the federal Constitution" (quoting *Eagle*, 63 S.W.3d at 761)).

Unlike most state courts, federal courts do not recognize a general right by state (or federal) taxpayers to challenge unlawful governmental spending. *See* Zelinsky, *supra*, at 46. Federal courts, however, make an exception to this rule and allow taxpayers to challenge public spending when they allege that the spending is in aid of religion and violates the Establishment Clause. *See Ariz. Christian Sch. Tuition Org. v. Winn*, 563 U.S. 125, 138–41 (2011); *DaimlerChrysler Corp. v. Cuno*, 547 U.S. 332, 348–49 (2006); *Flast v. Cohen*, 392 U.S. 83, 103–04 (1968).

The U.S. Supreme Court has explained that the federal Establishment Clause was intended to prevent government from "employ[ing] its taxing and spending powers to aid one religion over another or to aid religion in general." *Flast*, 392 U.S. at 104. The Establishment Clause's framers viewed this type of taxation and spending as "coerc[ing] a form of religious devotion in violation of conscience." *See Winn*, 563 U.S. at 141. "[T]he 'injury' alleged in Establishment Clause challenges to [governmental] spending" is thus "the very 'extract[ion] and spend[ing]' of 'tax money' in aid of religion alleged by a plaintiff." *DaimlerChrysler*, 547 U.S. at 348 (quoting *Flast*, 392 U.S. at 106). "[A]n injunction against that spending would of course redress that injury, regardless of whether lawmakers would dispose of the savings in a way that would benefit the taxpayers personally." *Id.* at 348–49. As the non-establishment guarantee of Section 3 of Article I of the Tennessee Constitution provides protections greater than those of the federal Establishment Clause, it would be anomalous for Tennessee taxpayers not to have at least the same rights to challenge governmental spending in aid of religion in state court under the Tennessee Constitution that taxpayers have in federal court under the U.S. Constitution.

And the plaintiffs here suffer the same injury that the U.S. Supreme Court has recognized to be sufficient for standing in federal court in Establishment Clause challenges. All of the

plaintiffs object to the Department's use of their tax payments to fund Holston or any other child-placing agency that discriminates based on religion in state-funded programs or services. Am. Compl. ¶¶ 9–15. It violates each plaintiff's conscience to contribute tax dollars toward the support of discriminatory practices that advance Holston's religious beliefs in particular or religious beliefs in general. *Id.* When a state-funded child-placing agency serves only foster parents of a particular faith, that inherently advances that faith, including by directing state funds exclusively to the benefit of members of the faith, and by increasing the likelihood that children served by the agency will be taught or raised in that faith. *Id.* ¶ 80. Indeed, Holston itself has explained that it advances its religious beliefs by refusing to serve prospective foster or adoptive parents who do not subscribe to Holston's statement of faith. *Id.* ¶ 79 & Ex. E thereto, ¶¶ 25–28.

The injury to taxpayers' right of conscience inflicted by the Department's funding of Holston is particularly acute for the Rutan-Rams because their own tax payments are used to support discrimination against them. Am. Compl. ¶¶ 9, 48–49, 55–56, 61–62, 90, 116. Similarly, plaintiff Stoedter is an atheist and a Jew, and Holston is using her tax payments to support discrimination against people with beliefs like hers. *Id.* ¶¶ 15, 55–56, 61–62, 73–78.

To be sure, in addition to limiting taxpayer standing in federal court to challenges to spending in aid of religion, the U.S. Supreme Court has also required taxpayer plaintiffs to demonstrate a nexus between the challenged spending and legislative action. *See Hein v. Freedom From Religion Found.*, 551 U.S. 587, 603–09 (2007) (three-Justice plurality opinion). This Court should not import this "legislative nexus" requirement into Tennessee case law, because there is no logical basis for it. As six members of the U.S. Supreme Court agreed in *Hein* (while disagreeing about whether there should be taxpayer standing in Establishment Clause cases at all), the injury to taxpayers' conscience rights from governmental spending in aid of religion is the same regardless of whether the spending results from legislative or executive-branch action. *See id.* at 618, 628–31 (Scalia, J., concurring in the judgment, joined by Thomas, J.); *id.* at 637–39 (Souter, J., dissenting, joined by three other Justices).

In any event, there is a strong nexus between legislative action and the challenged spending here. The U.S. Supreme Court has held that the legislative-nexus test was satisfied when Congress authorized federal grant spending for a particular purpose, even though the Executive Branch was responsible for selecting the grant recipients that allegedly used federal funds to advance religion. *See Bowen v. Kendrick*, 487 U.S. 589, 619–20 (1988). The Sixth

Circuit has concluded that, to satisfy the legislative-nexus test, it is sufficient to show that the legislature intended or understood that the funding at issue would aid religion. *See Murray v. U.S. Dep't of Treasury,* 681 F.3d 744, 750–52 (6th Cir. 2012). On the other hand, the U.S. Supreme Court has concluded that the legislative-nexus test was not met when taxpayers challenged "purely discretionary" expenditures for internal executive-branch operations that were financed by general, unrestricted appropriations not designated for any particular purpose. *See Hein*, 551 U.S. at 595, 615 (plurality opinion).

Here, the General Assembly has specifically authorized the Department to receive, administer, allocate, disburse, and supervise grants and funds to private child-placing agencies. Am. Compl. ¶ 21 (citing Tenn. Code Ann. §§ 37-5-105, 37-5-111). The General Assembly has also granted responsibility and authority to the Department to license, approve, supervise, and regulate child-placing agencies. *Id.* ¶¶ 19–20 (citing Tenn. Code Ann. §§ 36-1-108, 37-5-109(1), 37-5-112). And the General Assembly annually appropriates state funds to the Department—itemizing how the funds can be used—that the Department then pays to private child-placing agencies for placement, training, supervision, and support services for current and prospective foster parents. *Id.* ¶¶ 63–65 (citing 2021 Tenn. Pub. Acts. Ch. 454, at 11, https://bit.ly/3uO7wlV).

Moreover, by enacting Tenn. Code Ann. § 36-1-147, the General Assembly expressly authorized private child-placing agencies to discriminate based on religion in services funded by state tax dollars. *See* Am. Compl. ¶¶ 23–24; Tenn. Code Ann. § 36-1-147(c). In addition, the General Assembly was well aware that such religious discrimination could occur as a result of the legislation. During debate on the legislation, its Senate sponsor stated that a number of religiously affiliated child-placing organizations in Tennessee contract with Tennessee and receive state funding from Tennessee. Am. Compl. ¶ 31. After another senator introduced a proposed amendment that would have rendered the legislation inapplicable to child-placing agencies that receive public funds, the Senate sponsor strongly objected to the amendment because it would have prevented religiously affiliated child-placing agencies that receive state funds from engaging in religion-based discrimination, and the amendment was rejected by a voice vote. *Id.* ¶¶ 32–33. Further, in response to questions during debate on the legislation about whether it would allow private child-placing agencies to discriminate against Jews, Muslims, and

atheists, the sponsors of the legislation either agreed or did not dispute that it would have that effect. *Id.* ¶¶ 28–30.

Thus, even if Tennessee taxpayers challenging state spending in aid of religion must meet the legislative-nexus test, the decision in *Valley Forge Christian College v. Americans United for Separation of Church & State*, 454 U.S. 464 (1982), cited by the defendants (Defs.' Mem. 12), is inapplicable here. There, unlike here, the challenged aid to religion resulted solely from executive-branch action. *See* 454 U.S. at 479. Also, it was important to the Court that the aid was in the form of a property transfer and—again, unlike here—did not consist of payments of governmental funds. *See id.* at 480.

III. Denying standing to the plaintiffs would be contrary to the intent of the recently enacted Tenn. Code Ann. § 1-3-121.

In 2018, the General Assembly enacted Tenn. Code Ann. § 1-3-121. *See* 2018 Pub. Acts, ch. 621, § 1. This statute states: "Notwithstanding any law to the contrary, a cause of action shall exist under this chapter for any affected person who seeks declaratory or injunctive relief in any action brought regarding the legality or constitutionality of a governmental action." Though the phrase "affected person" precludes the statute from being properly construed as granting an unrestricted right to any Tennessee citizen to challenge any state action, the statute's legislative history shows that the General Assembly intended to broaden Tennesseans' rights to challenge unlawful governmental actions, especially through taxpayer lawsuits.

During House floor discussion of the legislation, its sponsor Representative Casada explained: "This legislation . . . has to do with giving the right of the citizen to take government to court if they violate our state law or our constitutional rights. It makes it very clear and cold we have that right. . . . That's what this bill does." *House Floor Session*, 110 Gen. Assemb., 1:07:09–1:07:34 (Mar. 15, 2018), https://bit.ly/3dLdagE. Representative Clemmons then asked Representative Casada, "Well you still have a standing issue. The standing issue, is that what you're trying to address? Or are you saying everybody regardless if they're impacted or not has standing." *Id.* at 1:08:50–1:09:03. Representative Casada responded, "No, I'm giving standing to the citizens in that particular jurisdiction that they—so, I'm giving standing, you are correct." *Id.* at 1:09:04–1:09:10. After Representative Clemmons asked for clarification, Representative Casada referred the question to the late Representative Carter, then Chair of the House Civil Justice Committee. *Id.* at 1:09:20–1:09:33.

Representative Clemmons restated his question: "Are you trying to create standing for everyone to bring a cause of action whether or not they actually have standing as that's defined in the rules and the law?" *Id.* at 1:09:40–1:10:02. Representative Carter responded, "Currently, the law generally in Tennessee is that a taxpaying citizen does not have standing to bring a case. This changes that and says if you are affected and are a taxpayer you can bring a case. These statutes are going throughout America now everywhere. So it's nothing unusual." *Id.* at 1:10:04–1:10:22. Representative Casada subsequently added, "I think we as taxpaying citizens of this state have a right to take our government to court if they don't comply with, for example, state law." *Id.* at 1:11:32–1:11:40. Representative Casada later elaborated, "[C]ourts have opined that citizens don't have this right. So we're making it very clear that we as citizens of this state do have a right to take our governments to court." *Id.* at 1:13:07–1:13:17.

It would be contrary to this legislative intent to narrowly construe standing law and deny the plaintiffs standing here.

CONCLUSION

For the foregoing reasons, the defendants' motion to dismiss should be denied. And even if the motion is granted, the plaintiffs should be granted leave to amend their complaint to cure any deficiencies that may exist. *See, e.g.*, *Richland Country Club, Inc. v. CRC Equities, Inc.*, 832 S.W.2d 554, 559 (Tenn. Ct. App. 1991) ("[W]hen the court grants a motion to dismiss . . . only extraordinary circumstances would prohibit the plaintiff from exercising the right to amend its complaint.").

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Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that, on April 8, 2022, I caused the foregoing document and any supporting documents submitted therewith to be served via the Court's electronic filing system and email on the following attorneys for the defendants:

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