IN THE COURT OF APPEALS OF TENNESSEE
AT NASHVILLE

Elizabeth Rutan-Ram, et al.,	)	
	)	
Plaintiffs/Appellants,	)	
	)	
v.	)	Case No.
	)	M2022-00998-COA-R3-CV
Tennessee Department of	)	
Children's Services, et al.,	)	
	)	
Defendants/Appellees.	)	

Rule 3 Appeal from the Final Judgment of the
Chancery Court for Davidson County, Case No. 22-80-III

APPELLANTS' REPLY BRIEF

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Oral Argument Requested

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INTRODUCTION

The defendants put forward a series of hurdles to standing that the law does not impose. Under their incorrect legal theories, neither those who are personally victimized by nor those whose tax payments pay for state-funded, state-authorized discrimination would ever have standing to challenge the state's support for the discrimination.

That result would ignore the General Assembly's intent to give Tennesseans broad rights to challenge unlawful governmental conduct and spending. It would disregard the practical and stigmatic harms that Elizabeth and Gabriel Rutan-Ram have suffered from being denied state-funded service options because they are Jews. And it would devalue the injury to freedom of conscience that all the plaintiffs endure as they are taxed to subsidize religious discrimination.

The Court should reverse the decision below and permit adjudication of the important substantive issues raised by this case.

ARGUMENT

I. The Court should construe standing in light of the purposes of the Declaratory Judgment Act and Tenn. Code Ann. § 1-3-121.

In deciding whether the plaintiffs have standing, the Court should keep in mind that the Declaratory Judgment Act and Tenn. Code Ann. § 1-3-121 were intended to give Tennesseans broad rights to obtain equitable relief against unlawful governmental conduct. To be sure, *Colonial Pipeline Co. v. Morgan*, 263 S.W.3d 827, 838 (Tenn. 2008) (cited at Appellees' Br. 18), holds that "[t]he justiciability doctrines of standing, ripeness, mootness, and political question continue as viable defenses" in

declaratory-judgment actions. But that same case emphasizes that the Declaratory Judgment Act is "remedial in nature and should be construed broadly in order to accomplish [its] purpose." *Id.* at 837.

And contrary to what the defendants contend (Appellees' Br. 20–22), this Court should not ignore legislative history that makes clear (*see* Appellants' Br. 24–25) that Tenn. Code Ann. § 1-3-121 was intended to expand the rights of Tennesseans to challenge illegal governmental actions—especially as taxpayers. "The cardinal rule of statutory construction is to effectuate legislative intent, with all rules of construction being aid[s] to that end." *Browder v. Morris*, 975 S.W.2d 308, 311 (Tenn. 1998). "When the words of a statute are ambiguous or when it is just not clear what the legislature had in mind, courts may look beyond a statute's text for reliable guides to the statute's meaning," including "to legislative history." *BellSouth Telecomm., Inc. v. Greer*, 972 S.W.2d 663, 673 (Tenn. Ct. App. 1997). Moreover, "[a]ny initial perception on whether a statute appears ambiguous should not be used in a mechanistic manner that disregards essential interpretive information." *Coffee Cnty. Bd. of Educ. v. City of Tullahoma*, 574 S.W.3d 832, 845 (Tenn. 2019).

Here, Tenn. Code Ann. § 1-3-121 gives "any affected person" a right to seek equitable relief against unlawful governmental conduct. Whether "affected person" was intended to reflect pre-existing caselaw on standing or to modify that caselaw is ambiguous. The legislative history supports the latter interpretation: "the law generally in Tennessee [had been] that a taxpaying citizen does not have standing to bring a case," but Tenn. Code Ann. § 1-3-121 "*changes that* and says if you are affected and are a

taxpayer you can bring a case." *House Floor Session*, 110th Gen. Assemb., 1:10:04–1:10:17 (Mar. 15, 2018), https://bit.ly/3dLdagE (emphasis added). The agreement by the statute's House sponsor with the proposition "that this bill does nothing more than what is in the law already" is not to the contrary; he explained that Tenn. Code Ann. § 1-3-121 "clarif[ied]" a pre-existing right of taxpayers that courts had incorrectly failed to recognize. *See id.* at 1:08:35–49, 1:12:56–1:13:31.

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

A. Injury.

The defendants argue that the Rutan-Rams have suffered no injury because the services they initially sought from Holston would have been for an out-of-state child and therefore would not have been funded by Tennessee. (Appellees' Br. 23–25.) But as explained in our opening brief (at 36), the Rutan-Rams now need and will continue to need placement, training, supervision, and support services for Tennessee children; the Department funds Holston to provide those services; and Holston has made clear that it will not provide *any* services to *any* non-Christian foster parents. The denial of service that the Rutan-Rams have suffered and continue to face thus fully encompasses services funded by Tennessee.

The defendants further argue that the Rutan-Rams have no injury because the Department itself is serving them. (Appellees' Br. 25–27.) As also explained in our opening brief (at 29–31), however, that argument ignores both that the Department's services are of poorer quality than ones provided by private agencies and that discrimination inherently inflicts stigmatic injury that is sufficient by itself for standing.

The defendants respond with a variation of their first argument, noting that the Rutan-Rams initially sought from Holston services needed for certification as foster parents, and that the Rutan-Rams' allegations of differences in quality of services focus on post-certification services. (Appellees' Br. 27.) But as noted above, Holston's state-funded services encompass post-certification services such as placement, supervision, and support (A13 ¶ 55; A17 ¶ 92); the Rutan-Rams need and will continue to need those services (A18–20 ¶¶ 100–01, 110–11); and Holston refuses to provide any services to Jewish parents (A12 ¶¶ 48–49; A15–16 ¶¶ 73–78). Nor is it relevant that the Rutan-Rams did not reapply to Holston for post-certification services after Holston made clear that it would not provide any services to them, for "[w]hen doing so would be futile, [the law] does not require plaintiffs to take actions simply to establish standing." *Mays v. LaRose*, 951 F.3d 775, 782 (6th Cir. 2020); *accord Sporhase v. Nebraska*, 458 U.S. 941, 944 n.2 (1982).

The defendants also contend that the Rutan-Rams suffer no stigmatic injury because Section 36-1-147 authorizes all religious child-placing agencies to discriminate against foster parents of another religion. (Appellees' Br. 33–34.) As our opening brief explained (at 36–38), however, victims of state-supported discrimination suffer stigmatic harms regardless of whether members of other protected groups may suffer similar injuries, and minorities such as Jews are more likely to be victimized by discrimination in any event.

The defendants additionally err in arguing (Appellees' Br. 36–37) that the chilling effect that state-supported discrimination has on the Rutan-Rams' consideration of seeking future services from private

agencies is not a cognizable injury. The Rutan-Rams need not show that they are chilled from engaging in an activity that is itself constitutionally protected (*cf. id.* at 36); rather, they need allege only that they are chilled from "engag[ing] in a course of conduct *arguably affected with a constitutional interest*" (*Glenn v. Holder*, 690 F.3d 417, 421 (6th Cir. 2012) (quoting *Johnson v. Turner*, 125 F.3d 324, 337 (6th Cir. 1997)) (emphasis added)). That test is met when, as here, a plaintiff alleges a chilling effect from religious or other discrimination that implicates the plaintiff's constitutional rights. *See, e.g.*, *303 Creative LLC v. Elenis*, 6 F.4th 1160, 1170–72, 1185 (10th Cir. 2021), *cert. granted in part on other grounds*, 142 S. Ct. 1106 (2022); *Singh v. Joshi*, 152 F. Supp. 3d 112, 122 (E.D.N.Y. 2016). And the requirement that a plaintiff show a threat of prosecution applies only in the context of challenges to criminal statutes (*cf. Glenn*, 690 F.3d at 421; Appellees' Br. 37); in the civil context, when government supports discrimination, the resulting chilling effects on a plaintiff's conduct constitute cognizable injury (*see Jordan v. Evans,* 355 F. Supp. 2d 72, 82 (D.D.C. 2004); *Cath. League for Religious & C.R. v. City & County of San Francisco*, 624 F.3d 1043, 1048–49, 1053 (9th Cir. 2010) (en banc)).

The defendants similarly misread the law in arguing that the Rutan-Rams' injuries are speculative because a "threatened injury must be certainly impending" (Appellees' Br. 28 (quoting *Buchholz v. Meyer Njus Tanick, PA*, 946 F.3d 855, 865 (6th Cir. 2020)). Though that is one way to show injury based on potential future harm, it is also sufficient to allege that "there is a 'substantial risk that the harm will occur.'" *Susan*

B. Anthony List v. Driehaus, 573 U.S. 149, 158 (2014) (quoting *Clapper v. Amnesty Int'l USA*, 568 U.S. 398, 414 n.5 (2013)); *accord Frogge v. Joseph*, No. M2020-01422-COA-R3-CV, 2022 WL 2197509, at *11 (Tenn. Ct. App. June 20, 2022), *perm. app. not sought*. The Rutan-Rams have alleged more: they currently suffer injury and face likely future injury, as our opening brief explained in detail (at 17–20, 27–28, 41). They suffer injury now because the Department's support of Holston's religious discrimination has relegated the Rutan-Rams to the Department's inferior services and makes the Rutan-Rams feel humiliated and disfavored. (*Id.* at 17–20, 27–28.) The Rutan-Rams will likely continue to suffer these kinds of harms because they plan to take on at least one more long-term foster placement and will continue to need placement, training, supervision, and support services. (*Id.* at 17–20, 27–28, 41.)

By contrast, in the defendants' cases on this issue (cited at Appellees' Br. 28–30), the alleged harm was unlikely to occur. *See West v. Schofield*, 460 S.W.3d 113, 129–31 (Tenn. 2015) (plaintiffs' allegations that state employees might make mistakes in implementing execution protocol were entirely speculative); *Mills v. Shelby Cnty. Election Comm'n*, 218 S.W.3d 33, 40 (Tenn. Ct. App. 2006) (potential harm from use of electronic voting machines could arise only under remote possibility that election would be so close as to require recount or election contest); *Super Flea Mkt. of Chattanooga, Inc. v. Olsen*, 677 S.W.2d 449, 451 (Tenn. 1984) (entirely speculative that plaintiff market operator would mistakenly fail to collect tax payments from vendors and would consequently be prosecuted); *Clapper*, 568 U.S. at 410–14 (discussed in

detail at Appellants' Br. 44); *Buchholz*, 945 F.3d at 859, 865 (not likely that law firm would sue debtor for failure to pay debt where it had not threatened to do so, debtor admitted that debt was valid, and debtor did not profess intent not to pay it); *cf. State v. Rodgers*, 235 S.W.3d 92, 97–99 (Tenn. 2007) (court held case to be justiciable).

B. Causation.

The defendants attempt to erect yet another hurdle that the law does not support, contending that "harms resulting from the independent action of some third party not before the court are generally not traceable to the defendant" and that a plaintiff must show that the defendant's "actions had a determinative or coercive effect" upon the third party (Appellees' Br. 38 (quoting *Turaani v. Wray*, 988 F.3d 313, 316 (6th Cir.), *cert. denied*, 142 S. Ct. 225 (2021))). These propositions, even if accurate under some circumstances, do not apply when the state substantially aids a private entity that discriminates *or* when the state authorizes conduct that otherwise would have been illegal. Here, Tennessee has done both.

In *Allen v. Wright*, 468 U.S. 737, 762–63 (1984), on which the defendants lean (Appellees' Br. 41–43), the U.S. Supreme Court discussed two cases in which it had permitted plaintiffs to challenge the provision of substantial aid to private, discriminatory institutions. The Court explained that in *Norwood v. Harrison*, 413 U.S. 455, 456–57, 467 (1973), *vacating and remanding* 340 F. Supp. 1003, 1004 (N.D. Miss. 1972), parents of Black schoolchildren had standing to challenge their state's provision of textbooks to racially discriminatory schools. *See Allen*, 468 U.S. at 763. And the Court noted that in *Gilmore v. City of*

Montgomery, 417 U.S. 556, 562–63, 566–67, 570 n.10 (1974), Black city residents had standing to challenge their city's decision to give racially discriminatory private schools exclusive (though temporary) access to certain city parks. *See Allen*, 468 U.S. at 762. Similarly, the D.C. Circuit has held that victims of race and sex discrimination by state and local law-enforcement agencies had standing to challenge federal funding of those agencies. *See Nat'l Black Police Ass'n v. Velde*, 631 F.2d 784, 786, 787 n.16 (D.C. Cir. 1980), *vacated and remanded*, 458 U.S. 591 (1982), *and reinstated in relevant part*, 712 F.2d 569, 572 n.3 (D.C. Cir. 1983). In none of these cases was there any suggestion that government had coerced or required the aided entities to discriminate. And as in these cases, the Rutan-Rams challenge substantial state aid—here in the form of contractual funding—to an institution that discriminates against them. (A12–13 ¶¶ 48–49, 55–56; A15–16 ¶¶ 73–78.)

What is more, "[U.S.] Supreme Court precedent establishes that the causation requirement for constitutional standing is met when a plaintiff demonstrates that the challenged [governmental] action authorizes the [third-party] conduct that allegedly caused the plaintiff's injuries, if that conduct would allegedly be illegal otherwise." *Animal Legal Def. Fund, Inc. v. Glickman*, 154 F.3d 426, 440 (D.C. Cir. 1998) (en banc). The "[C]ourt has [n]ever stated that the challenged law must *compel* the third party to act in the allegedly injurious way." *Id.* at 442. Here, as explained in our opening brief (at 32–34), Section 36-1-147 authorized Holston to engage in religious discrimination that had been banned both by the

Tennessee Human Rights Act and by Holston's contract with the Department.

The defendants contend (Appellees' Br. 40–41) that the Human Rights Act did not prohibit Holston from discriminating based on religion, because the U.S. Supreme Court concluded in *Fulton v. City of Philadelphia*, 141 S. Ct. 1868, 1880–81 (2020), that a Philadelphia public-accommodations ordinance did not apply to foster-care agencies. But unlike Philadelphia's ordinance (*see id.* at 1880), Tennessee's Human Rights Act defines "places of public accommodation" to "include[] any place, store or other establishment . . . that is supported directly or indirectly by government funds" (Tenn. Code Ann. § 4-21-102(15)), and the Department supports Holston with state funds (A13 ¶ 55). This Court has made clear that "the plain and unambiguous definition of 'places of public accommodation' found in" the Human Rights Act controls over federal case law that interprets public-accommodations statutes that have different language. *See Arnett v. Domino's Pizza I, L.L.C.*, 124 S.W.3d 529, 539 (Tenn. Ct. App. 2003).

The defendants further assert that Holston's contract with the Department calls on Holston to provide services only to children and that the contract therefore prohibits Holston only from discriminating against children, not foster parents. (Appellees' Br. 40.) That is not correct either, for the contract's definition of "Services" covers all services listed in Attachment 1 to it (A31 § A.2.e), and the "Standard Foster Care" services listed in Attachment 1 include that "foster parents receive standard foster parent training and are supervised and supported by agency staff" (A61, second non-header row). Furthermore, the scope of the contract's

antidiscrimination clause is very broad: "*no person* shall be *excluded from participation in*, be *denied benefits of*, *or* be *otherwise subjected to discrimination in* the performance of this Contract" based on "creed," "religion," or various other grounds. (A39 § D.9 (emphasis added).)

Pointing out that Holston's January 2021 email denying services to the Rutan-Rams states that "our executive team made the decision several years ago" not to serve non-Christian foster parents (A28), the defendants argue (Appellees' Br. 39, 43) that Holston's discrimination predates Section 36-1-147 (which was enacted in January 2020 (A9 ¶ 23)) and therefore is not causally connected to the statute. Holston's email does not state when the decision to discriminate was *implemented*, however. (A28–29.) And if Holston had discriminated before Section 36-1-147 was enacted, it would have been subject to suit under the Human Rights Act (*see* Tenn. Code Ann. § 4-21-311) and to serious sanctions under its contract with the Department (*see* A38 § D.6; A41 § D.19). The passage of Section 36-1-147 allowed Holston to discriminate with impunity. (*See* Appellants' Br. 32–34.) Holston thus denied services to the Rutan-Rams one year after Section 36-1-147 gave Holston free rein to do so. (A9 ¶ 23; A12 ¶ 48.)

Indeed, in all four federal foster-care cases on which we rely, the courts held that the causation element of standing was satisfied even though the foster-care agencies there commenced their discrimination *before* the governmental actions that authorized them to do so, where—as here—the plaintiffs were victimized by the discrimination *after* those authorizing actions. *See Maddonna v. U.S. Dep't of Health & Hum.*

Servs., 567 F. Supp. 3d 688, 700–01, 708–11 (D.S.C. 2020); *Rogers v. U.S. Dep't of Health & Hum. Servs.*, 466 F. Supp. 3d 625, 635–37, 642–44 (D.S.C. 2020); *Marouf v. Azar*, 391 F. Supp. 3d 23, 27–28, 34–36 (D.D.C. 2019); *Dumont v. Lyon*, 341 F. Supp. 3d 706, 716–17, 719–20, 722–24 (E.D. Mich. 2018). The situation here is unlike the aspect of *Maddonna* cited by the defendants (Appellees' Br. 39) that denied standing to challenge one federal action that occurred (unlike the others at issue there) *after* the plaintiff had suffered discrimination. *See* 567 F. Supp. 3d at 708–09.

Likewise inapposite are the other cases that the defendants cite (Appellees' Br. 38, 41–43) for their causation arguments. *See Allen*, 468 U.S. at 746 (plaintiffs had not personally experienced or faced challenged discrimination); *Simon v. E. Ky. Welfare Rts. Org.*, 426 U.S. 26, 42–43 & n.23, 45–46 (majority opinion), 52–54 (Brennan, J., concurring in the judgment) (1976) (in challenge to change to IRS rule governing circumstances in which certain hospitals must provide charity care to receive certain tax benefits, plaintiffs presented no evidence that hospitals whose conduct affected them were covered by rule change, plaintiffs might not have been entitled to greater care under earlier version of rule, and rule change merely affected whether donors could receive tax deductions for charitable contributions that accounted for only four percent of private-hospital revenues); *Turaani*, 988 F.3d at 315–16 (federal agent was not responsible for gun dealer's decision not to sell gun where agent merely told dealer of concerns about customer's associates); *URI Student Senate v. Town of Narragansett*, 631 F.3d 1, 9–

10 (1st Cir. 2011) (addressed at Appellants' Br. 35). In none of these cases had the government funded or authorized discrimination that the plaintiffs then encountered, as Tennessee has here.

Finally, the defendants' argument (also made in their discussion of injury) that, because Tennessee gives all religions an equal right to discriminate, there is no causal link between the state's conduct and the stigmatic harm to the Rutan-Rams (Appellees' Br. 42) fails for the reasons we gave previously, including that the stigmatic harms of discrimination are amplified when the state supports the discrimination (*see* Appellants' Br. 36–38; *supra* at p. 11).

C. Redressability.

The defendants emphasize that the plaintiffs cannot guarantee that the relief they seek will cause Holston and other private agencies to stop discriminating based on religion, and that it is possible that agencies such as Holston may instead stop accepting state funds. (Appellees' Br. 44–45.) But as explained in our opening brief (at 39), the complaint specifically alleges that the former outcome is far more likely, at least with respect to Holston. (A22 ¶ 126.) In that case, the requested relief will remedy the Rutan-Rams' injuries by, among other things, providing greater service options for them. (Appellants' Br. 39.) And even if all discriminatory private agencies instead stop accepting state funds, the requested relief would end the stigmatic harms that the Rutan-Rams suffer because of Tennessee's support for discrimination against them. (*Id.* at 39–40.)

The U.S. Supreme Court has held that relief that removes a government-imposed obstacle to equal treatment satisfies the

redressability element of standing even when the plaintiffs might not ultimately obtain the material benefit that the obstacle had blocked. (*Id.* at 40 (citing *Heckler v. Mathews*, 465 U.S. 728, 738–40 (1984); *Ne. Fla. Chapter of Associated Gen. Contractors v. City of Jacksonville*, 508 U.S. 656, 666 & n.5 (1993).) Thus, three of the four federal foster-care cases on which we rely held that the redressability element was satisfied even though it was uncertain whether the relief sought would cause foster-care agencies to stop discriminating or instead to stop taking state funds. (*Id.* at 40–41.) Those cases are not materially distinguishable on the ground that the Department is itself serving the Rutan-Rams here (*cf.* Appellees' Br. 45–46), as the plaintiffs there were able to receive services from nondiscriminatory foster-care agencies (Appellants' Br. 31).

The defendants contend that the relief that the plaintiffs seek, which would prevent the Department from funding child-placing agencies that discriminate in state-funded services based on religion (A25 ¶¶ 1–3), "would likely violate" the Tennessee Preservation of Religious Freedom Act and the Free Exercise Clause of the federal First Amendment. (Appellees' Br. 44–45.) The Court should not consider this argument because it goes to the merits, not standing. *See, e.g.*, *City of Memphis v. Hargett*, 414 S.W.3d 88, 97, 100 (Tenn. 2013).

It is also incorrect. Governmental conduct does not violate the Religious Freedom Act when it "further[s] a compelling governmental interest" through "[t]he least restrictive means." Tenn. Code Ann. § 4-1-407(c). Preventing discrimination is a compelling state interest, and there are no less restrictive means to advance that interest than actually

stopping the discrimination. *See Roberts v. U.S. Jaycees*, 468 U.S. 609, 624, 628–29 (1984); *Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. 682, 733 (2014). In all events, the Religious Freedom Act cannot override the Tennessee Constitution, and the plaintiffs' substantive claims are that three clauses of the Tennessee Constitution prohibit state support for religious discrimination. (A23–25 ¶¶ 129–41; A65–66; A69–70.)

Nor does the federal Free Exercise Clause require the Department to fund child-placing agencies that discriminate based on religion. The defendants rely on *Fulton*, 141 S. Ct. 1868, but that case did not give religious organizations a general right to engage in religiously motivated discrimination while receiving public funds. Rather, the Supreme Court held that a provision barring discrimination based on sexual orientation in a city's standard contract with foster-care agencies triggered and failed strict scrutiny under the Free Exercise Clause because the contract allowed the city to grant exemptions from the provision on a discretionary basis and thereby to favor nonreligious agencies over religious ones. *See id.* at 1877–79, 1881–82. Here, by contrast, an order prohibiting the Department from funding discriminatory child-placing agencies would be based on constitutional provisions that do not permit any exemptions. (*See* A23–25 ¶¶ 129–41 & Request for Relief; A65–66; A69–70.) Likewise inapplicable is *Corporation of Presiding Bishop of Church of Jesus Christ of Latter-day Saints v. Amos*, 483 U.S. 327, 329–31, 339 n.17 (1987) (cited at Appellees' Br. 35), which held only that the U.S. Constitution's Establishment Clause did not prohibit Congress from exempting privately funded religious employers from Title VII's prohibition on

religious discrimination, without addressing what the Free Exercise Clause requires or the constitutional rules pertinent when public funds are involved.

III. All the plaintiffs have standing as taxpayers.

The defendants contend that only local taxpayers have the right to challenge unlawful governmental spending and that state taxpayers only have standing to challenge laws that increase their tax burden. (Appellees' Br. 47–53.) But as emphasized in our opening brief (at 50–51), the Tennessee Supreme Court in *Lynn v. Polk*, 76 Tenn. 121 (1881), allowed a group of state taxpayers to challenge the constitutionality of a state spending enactment and rejected the proposition that state taxpayers should not have the same rights as local taxpayers to challenge illegal public spending. Contrary to what the defendants assert (Appellees' Br. 52), it was uncertain whether the challenged enactment would have increased or reduced the plaintiffs' tax burden, for the enactment provided for the settlement of outstanding state debt while lowering the interest rate on it from six percent to three percent. *See* 76 Tenn. at 124–25 (Turney, J.), 161 (Freeman, J.), 288 (Ewing, Sp. J., dissenting). And though the defendants are correct that most of the other cases our opening brief cited were brought by local taxpayers (Appellees' Br. 51), those cases articulated the rule that taxpayers may challenge unlawful spending unqualifiedly, without restricting it to local taxpayers (*see* Appellants' Br. 46–47, 50).

Indeed, the defendants cite no case stating that Tennessee state taxpayers lack the same rights to challenge unlawful spending that local taxpayers have—and no such case exists. In the only two cases cited by

the defendants (Appellees' Br. 50) that denied standing to taxpayers to sue state departments or officials, the taxpayers did not identify any allegedly unlawful state spending. *See Parks v. Alexander*, 608 S.W.2d 881, 883–84, 892 (Tenn. Ct. App. 1980) (state taxpayers argued that amendment to state constitution was enacted in invalid manner, but no state funds had been appropriated or spent to implement amendment); *Buford v. State Bd. of Elections*, 334 S.W.2d 726, 727 (Tenn. 1960) (county residents challenged state election board's appointment of election commissioners for their county, not any measure that appropriated or governed public spending).

Furthermore, there is no logical basis for the defendants' proposed distinction between state and local taxpayers. The defendants argue that permitting state taxpayers to challenge unlawful spending contradicts the principle that a plaintiff's injury "not be common to the body of citizens as a whole." (Appellees' Br. 52 (quoting *Badgett v. Rodgers*, 436 S.W.2d 292, 294 (Tenn. 1969).) But not all citizens are taxpayers, so 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. *See Badgett*, 436 S.W.2d at 295. And the defendants concede that state taxpayers have a right to challenge state actions that increase their tax burden (Appellees' Br. 48–49), even though that injury is common to all state taxpayers.

The defendants also contend that affirming that state taxpayers have the right to challenge unlawful state spending would lead to a "profusion of lawsuits from taxpayers." (Appellees' Br. 53 (quoting *Fannon v. City of LaFollette*, 329 S.W.3d 418, 427 (Tenn. 2010)).) But

there has been no "profusion" of state-taxpayer lawsuits since the Tennessee Supreme Court established state taxpayers' right to challenge illegal state spending back in 1881, in *Lynn*, 76 Tenn. 121. Instead, as there is only one state government and numerous local ones, taxpayer suits are typically brought against local actions. *See* cases cited at Appellants' Br. 46–51.

The defendants' brief devotes only two cursory sentences (Appellees' Br. 50) to supporting the trial-court panel's erroneous (as explained at Appellants' Br. 48–49) conclusion that the plaintiffs failed to meet the requirement that they allege a "specific illegality in the expenditure of public funds" (A133 (quoting *Fannon*, 329 S.W.3d at 427)). The defendants make no effort to argue that the plaintiffs' challenge to the Department's funding of Holston does not satisfy this requirement; the defendants specifically contend only that the plaintiffs' challenge to Section 36-1-147 does not qualify because the statute does not appropriate state funds. Section 36-1-147 expressly authorizes state funds to be paid to discriminatory agencies, however, and taxpayers have repeatedly been allowed to challenge state legislation that did not appropriate funds but authorized or resulted in spending for particular purposes. *See Southern v. Beeler*, 195 S.W.2d 857, 861–62 (Tenn. 1947); *Dykes v. Hamilton County*, 191 S.W.2d 155, 156–57 (Tenn. 1945); *Bridgenor v. Rodgers*, 41 Tenn. (1 Cold.) 259, 260 (1860); *Ford v. Farmer*, 28 Tenn. (9 Hum.) 152, 158–59 (1848) (all discussed in more detail at Appellants' Br. 51).

Even if the defendants were correct that state taxpayers do not have a general right to challenge unlawful state spending, the plaintiffs

here have standing as taxpayers because they contest the use of their tax payments to advance religion in violation of their constitutionally protected right of conscience. (*See* Appellants' Br. 51–57.) The defendants rely on *Association of American Physicians & Surgeons v. FDA*, 13 F.4th 531, 538 (6th Cir. 2021), in arguing that this Court should not recognize standing on that basis (Appellees' Br. 53–54), but that opinion did not address taxpayer standing and instead argued that the doctrine of associational standing should be abrogated because it lacks "historical support." The U.S. Supreme Court's recognition of taxpayer standing to challenge spending in aid of religion *is* rooted in careful historical analysis, on the other hand. *See Ariz. Christian Sch. Tuition Org. v. Winn*, 563 U.S. 125, 140–42 (2011); *Flast v. Cohen*, 392 U.S. 83, 103–04 (1968).

But there is neither historical nor logical support for limiting state-taxpayer lawsuits against state spending in aid of religion to situations where the spending has a nexus to legislative action, as done under federal law in *Hein v. Freedom From Religion Foundation*, 551 U.S. 587, 603–09 (2007) (plurality opinion). (*See* Appellants' Br. 55; *cf.* Appellees' Br. 54.) In all events, the legislative-nexus test is met when the legislature "intended," "knew," or had an "understanding" that "money might be used for a religious purpose" based on a statute it enacted. *See Murray v. U.S. Dep't of Treasury*, 681 F.3d 744, 752 (6th Cir. 2012); *cf.* Appellees' Br. 54. Here, both the text of Section 36-1-147 and its legislative history demonstrate that the General Assembly intended, knew, and understood that the statute would result in taxpayer dollars

being paid to child-placing agencies that discriminate based on religion. (*See* Appellants' Br. 56–57.)

Finally, *Valley Forge Christian College v. Americans United for Separation of Church & State*, 454 U.S. 464 (1982) (cited at Appellees' Br. 49), 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 tax funds. *See id.* at 480.

CONCLUSION

The Rutan-Rams have standing as foster parents, and all the plaintiffs have standing as taxpayers. The decision below should be reversed.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

This brief complies with the word limit of Tennessee Rule of Appellate Procedure 30(e) because, excluding the parts of the brief exempted by the rule, it contains 4,981 words.

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CERTIFICATE OF SERVICE

I certify that, on December 9, 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-appellees:

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