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May 2, 2011

**VIA ELECTRONIC AND FIRST CLASS MAIL**

Senator Ken Yager  
Chair  
State and Local Government Committee  
State Senate of Tennessee  
Tennessee State Capitol  
600 Charlotte Avenue  
Nashville, Tennessee 37219

Re: Senate Bill 632

Dear Senator Yager:

We write regarding Senate Bill 632, which will be considered in a hearing of the Senate State and Local Government Committee tomorrow. We write jointly to bring to your attention concerns about the bill's constitutionality. We do not attempt to address every defect in the bill in this letter. We have chosen instead to highlight just some of the ways that Senate Bill 632 runs afoul of prohibitions contained in the United States Constitution. We hope that you will give these concerns due consideration.

Senate Bill 632 is meant to do one thing: to make it impossible for lesbian, gay, bisexual and transgender ("LGBT") Tennesseans to seek protection from discrimination in the cities and towns where they live. It suffers from at least two constitutional infirmities. First, it is motivated by animus towards the LGBT community, which is a constitutionally impermissible basis for legislation. Second, it deprives LGBT Tennesseans of their right to participate in the political process and to seek help from their local governments. That privation – which turns LGBT Tennesseans into strangers to a broad swath of Tennessee's government – is a violation of constitutional guarantees of equal protection.

**What Senate Bill 632 Does**

Senate Bill 632 is designed to strike down all local legal protections from discrimination for LGBT Tennesseans. By its terms, it would prohibit any Tennessee

municipality or county from outlawing, “by ordinance, resolution, or any other means,” any “discriminatory practices” not included in Title 4, Chapter 21, Section 102 of the Tennessee Code (the “Tennessee Human Rights Act”) or other state law.<sup>1</sup> The Tennessee Human Rights Act prohibits discrimination “because of race, creed, color, religion, sex, age or national origin.”<sup>2</sup> Lesbian, gay, bisexual and transgender people are not among Tennessee state law’s protected classes. The effect of Senate Bill 632 would be to force local laws to conform to state limitations and to strike down all local legal protection from discrimination for lesbian, gay, bisexual and transgender Tennesseans. No municipality or county could in the future enact such protection.

Hundreds of thousands of Tennesseans live in jurisdictions where the local authorities – the cities, counties and metropolitan governments that are most directly responsive to local concerns – have enacted civil rights ordinances and other non-discrimination policies that would be affected by Senate Bill 632. Tennesseans have spoken through their local governments, indicating their desire for protections against discrimination for a broader range of groups than those specifically covered by Tennessee state law. Senate Bill 632 would overrule the will of local residents and would invalidate these protections. Affected laws include the municipal contracting ordinances of Metropolitan Nashville,<sup>3</sup> Oak Ridge,<sup>4</sup> Clarksville,<sup>5</sup> and Sevierville;<sup>6</sup> the anti-discrimination laws of Brentwood,<sup>7</sup> Hendersonville,<sup>8</sup> and Jefferson City;<sup>9</sup> the fair housing policy of Franklin;<sup>10</sup> and the infectious disease control policies of Adamsville,<sup>11</sup> Ashland,<sup>12</sup> Baileyton,<sup>13</sup> Belle Meade,<sup>14</sup> Bolivar,<sup>15</sup> Burns,<sup>16</sup> Charleston,<sup>17</sup> Charlotte,<sup>18</sup>

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<sup>1</sup> Senate Bill 632, § 3. This Section contains an exemption “with respect to employees of a local government.” *Id.* It does not affect our conclusion that Senate Bill 632 is unconstitutional.

In addition, a separate section of Senate Bill 632 defines “sex” for purposes of the Tennessee Human Rights Act as “the designation of an individual person as male or female as indicated on the individual’s birth certificate.” *Id.* § 2. To the extent that this provision is an attempt to limit Tennesseans’ protections from discrimination based upon their gender identity or expression, it is further evidence that Senate Bill 632 is based upon animus towards transgender people. We do not address it in depth at this juncture because of the manifest constitutional infirmities related to Section 3 of the bill.

<sup>2</sup> Tenn. Code § 4-21-102 (2006). Other state laws additionally prohibit discrimination in very limited circumstances, such as disability discrimination in housing. *See* Tenn. Code § 4-21-601(2006).

<sup>3</sup> Metropolitan Nashville, Tenn., Ordinance No. BL2011-838 (2011) (requiring that city contractors not discriminate in employment based upon gender identity, sexual orientation or disability).

<sup>4</sup> Oak Ridge, Tenn., Mun. Code § 4-5-423 (2004) (requiring that metropolitan government contractors not discriminate in employment based upon sexual orientation or disability).

<sup>5</sup> Clarksville, Tenn., Ordinance 58-2003-04 (2004) (requiring that city contractors not discriminate in employment based upon disability).

<sup>6</sup> Sevierville, Tenn., Mun. Code § 5-5-516 (1996) (requiring that city contractors not discriminate in employment based upon “handicap”).

<sup>7</sup> Brentwood, Tenn., Mun. Code 1978 § 10-203 (2010) (prohibiting “civil rights intimidation” based upon ancestry).

<sup>8</sup> Hendersonville, Tenn., Mun. Code § 3-20-301 (1996) (establishing a grievance procedure for discrimination on account of “handicap” in city programs).

<sup>9</sup> Jefferson, Tenn., Mun. Code § 3-20-301 (1989) (same).

<sup>10</sup> Franklin, Tenn., Ordinance Sec. 21-601(2008) (establishing a policy to promote fair housing without regard to marital status).

<sup>11</sup> Adamsville, Tenn., Mun. Code § 2-4-216 (1998) (establishing a municipal policy against discrimination based upon HIV, tuberculosis, or hepatitis B status).

<sup>12</sup> Ashland, Tenn., Mun. Code § 4-4-406 (1992) (same).

Dickson,<sup>19</sup> Elizabethton,<sup>20</sup> Hendersonville,<sup>21</sup> Minor Hill,<sup>22</sup> Morristown,<sup>23</sup> Mountain City,<sup>24</sup> Rutherford,<sup>25</sup> South Carthage,<sup>26</sup> Sparta,<sup>27</sup> Spring City,<sup>28</sup> Tracy City,<sup>29</sup> and White House.<sup>30</sup> All of these laws and policies protect people from discrimination based upon gender identity, sexual orientation, or some other ground that could no longer be protected if Senate Bill 632 became law.

### The Origin of Senate Bill 632

In September 2009, the Metropolitan Government of Nashville and Davidson County (“Metro Nashville”) passed an ordinance prohibiting discrimination based upon gender identity and sexual orientation in government employment (the “2009 anti-discrimination ordinance”).<sup>31</sup> In December 2010, an incident occurred that brought widespread attention to the issue of anti-LGBT discrimination: Lisa Howe, a soccer coach at Nashville’s Belmont University, came out as lesbian and was threatened with termination.<sup>32</sup> She resigned under pressure, and a public furor ensued.

Elected officials in Metro Nashville took action and quickly proposed legislation to strengthen the 2009 anti-discrimination ordinance. Belmont University leases land for its athletic facilities from Metro Nashville. The proposed legislation sought to bar the

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<sup>13</sup> Baileyton, Tenn., Mun. Code § 5-4-516 (2005) (same).  
<sup>14</sup> Belle Meade, Tenn., Mun. Code § 4-4-416 (2007) (same).  
<sup>15</sup> Bolivar, Tenn., Mun. Code § 3-4-316 (1992) (same).  
<sup>16</sup> Burns, Tenn., Mun. Code § 3-4-317 (1980) (same).  
<sup>17</sup> Charleston, Tenn., Mun. Code § 5-4-516 (1992) (same).  
<sup>18</sup> Charlotte, Tenn., Mun. Code § 4-4-419 (1992) (same).  
<sup>19</sup> Dickson, Tenn., Mun. Code § 5-4-516 (1980) (same).  
<sup>20</sup> Elizabethton, Tenn., Mun. Code § 4-4-416 (1982) (same).  
<sup>21</sup> Hendersonville, Tenn., Mun. Code § 5-4-508 (1992) (same).  
<sup>22</sup> Minor Hill, Tenn., Mun. Code § 2-4-216 (1992) (same).  
<sup>23</sup> Morristown, Tenn., Mun. Code § 4-4-416 (1992) (same).  
<sup>24</sup> Mountain City, Tenn., Mun. Code § 5-4-516 (1994) (same).  
<sup>25</sup> Rutherford, Tenn., Mun. Code § 5-4-516 (1997) (same).  
<sup>26</sup> South Carthage, Tenn., Mun. Code § 4-4-416 (1999) (same).  
<sup>27</sup> Sparta, Tenn., Mun. Code § 5-4-516 (1999) (same).  
<sup>28</sup> Spring City, Tenn., Mun. Code § 4-4-417 (1992) (same).  
<sup>29</sup> Tracy City, Tenn., Mun. Code § 3-4-306 (1996) (same).  
<sup>30</sup> White House, Tenn., Mun. Code § 4-4-416 (1996) (same).  
<sup>31</sup> Metropolitan Nashville, Tenn., Ordinance No. BL2009-502 (2009).  
<sup>32</sup> T.J. Quinn, *Belmont players discuss gay coach’s departure*, ESPN W. (Dec. 19, 2010), <http://w.espn.go.com/espnw/news-opinion/5936795/belmont-players-discuss-circumstances-gay-coach-departure>; Erik Eckholm, “Even on Religious Campuses, Students Fight for Gay Identity,” N. Y. Times (Apr. 18, 2011) *available at* [http://www.nytimes.com/2011/04/19/us/19gays.html?\\_r=1&scp=1&sq=Even%20on%20Religious%20Campuses,%20Students%20Fight%20for%20Gay%20Identity,&st=cse](http://www.nytimes.com/2011/04/19/us/19gays.html?_r=1&scp=1&sq=Even%20on%20Religious%20Campuses,%20Students%20Fight%20for%20Gay%20Identity,&st=cse); William Williams, “Conservatives Open Playbook to Defeat Nondiscrimination Bill”, City Paper (Jan. 23, 2011), *available at* <http://nashvillecitypaper.com/print/523526>; Joey Garrison, “Casada Wants to Keep Cities from Extending Nondiscrimination Policies”, Nashville City Paper (Jan. 12, 2011), *available at* <http://nashvillecitypaper.com/content/city-news/casada-wants-keep-cities-extending-nondiscrimination-policies>.

Metro Nashville government from doing business with any entity that did not prohibit discrimination based upon, among other things, gender identity and sexual orientation.<sup>33</sup>

The protections in this second ordinance (the “2011 anti-discrimination ordinance”) were meant to address the rampant discrimination that LGBT people face. According to a recent national survey, 47% of transgender people report being fired or denied a job or promotion because of who they are.<sup>34</sup> Metro Nashville sought to remedy this through local legislation protecting vulnerable citizens from discrimination.

Before it became law last month, the 2011 anti-discrimination ordinance was the subject of much debate in Nashville. All sides participated in the democratic process leading to its enactment. Indeed, as soon as it was proposed, opponents of the 2011 anti-discrimination ordinance mobilized to prevent its passage. The Family Action Council of Tennessee (“Family Action Council”), an anti-transgender and anti-gay organization whose ostensible “mission is to promote and defend a culture that values the traditional family,”<sup>35</sup> called on its supporters to “object to Metro Council forcing Christian business owners and Christian employees and other businesses to expressly affirm homosexual and cross dressing conduct.”<sup>36</sup>

Family Action Council is the Tennessee representative to Focus on the Family’s Network of Family Policy Councils.<sup>37</sup> As a Focus on the Family partner, Family Action Council has collaborated with Focus on the Family to create voter guides,<sup>38</sup> lobby state legislators,<sup>39</sup> and recruit volunteers.<sup>40</sup> Focus on the Family calls transgender people “examples of human brokenness,”<sup>41</sup> and refers to supporters of transgender rights as

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<sup>33</sup> Ordinance No. BL2011-838 (2011). *See also* Williams, *supra* note 32 (“Three council members individually on their own accord went to our legal adviser and asked, ‘What legislation could have prevented this in the first place?’ bill co-sponsor Councilman Mike Jameson said, referring to Howe’s departure and the fact that Belmont has a contract with Metro. ‘This is the legislation that resulted.’”); Joey Garrison, “Howe issue spurs council members to seek Metro policy changes”, *City Paper* (Dec. 19, 2010), *available at* <http://nashvillecitypaper.com/content/city-news/howe-issue-spurs-council-members-seek-metro-policy-changes>.

<sup>34</sup> Jaime M. Grant, Lisa A. Mottet, Justin Tanis, Jack Harrison, Jody L. Herman, and Mara Keisling, “Injustice at Every Turn: A Report of the National Transgender Discrimination Survey” Washington: National Center for Transgender Equality and National Gay and Lesbian Task Force, at 51 (2011), [http://www.thetaskforce.org/downloads/reports/reports/ntds\\_full.pdf](http://www.thetaskforce.org/downloads/reports/reports/ntds_full.pdf).

<sup>35</sup> *See* Family Action Council of Tennessee: What is FACT? *available at* <http://www.factn.org/organization.htm>.

<sup>36</sup> *See* Family Action Council of Tennessee, FACT Report (Mar. 30, 2011), *available at* [http://www.factn.org/factreport/Holding\\_Our\\_Ground\\_Biblical\\_Values\\_03-30-11.mp3](http://www.factn.org/factreport/Holding_Our_Ground_Biblical_Values_03-30-11.mp3).

<sup>37</sup> David Fowler, Executive Director of Family Action Council of Tennessee at 00:09 (July 6, 2010), *available at* <http://www.citizenlink.com/2010/07/06/david-fowler-executive-director-of-family-action-council-of-tennessee>.

<sup>38</sup> Family Action Council of Tennessee, 2010 Voter Guide, *available at* <http://www.factn.org/voterguide.htm>.

<sup>39</sup> Family Action Council of Tennessee, 2007 Family Action’s Year in Review (Dec. 21, 2007), *available at* <http://www.factn.org/FAN/12-21-07.htm>.

<sup>40</sup> Family Action Council of Tennessee, 2009: Key Training Launched (Dec. 21, 2009), *available at* [http://www.factn.org/about/2009/key\\_training\\_launched\\_122109.htm](http://www.factn.org/about/2009/key_training_launched_122109.htm).

<sup>41</sup> Jeff Johnston, “We’re in a World of Gender Confusion”, *CitizenLink* (Dec. 3, 2010), *available at* <http://www.citizenlink.com/2010/12/03/were-in-a-world-of-gender-confusion/>.

“pagans.”<sup>42</sup> It opposes laws that prohibit gender identity discrimination.<sup>43</sup> It believes that homosexuality should be cured through “reparative therapy”<sup>44</sup> that America’s leading medical and health professional associations have condemned as unscientific and harmful to human health.<sup>45</sup> In recent years, Focus on the Family has unsuccessfully opposed civil rights protections for lesbian, gay, bisexual and transgender people across America, including in Colorado,<sup>46</sup> Kansas,<sup>47</sup> Montana,<sup>48</sup> and Maryland,<sup>49</sup> as well as at the national level.<sup>50</sup>

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<sup>42</sup> Focus on the Family, *Our Position (Transgenderism)* (2008), <http://www.focusonthefamily.com/socialissues/sexual-identity/transgenderism/our-position.aspx>

<sup>43</sup> Focus on the Family, *Cause for Concern (Transgenderism)* (2008), <http://www.focusonthefamily.com/socialissues/sexual-identity/transgenderism/cause-for-concern.aspx>

<sup>44</sup> Focus on the Family, *Cause for Concern (Same-Sex Counseling)* (2008), <http://www.focusonthefamily.com/socialissues/sexual-identity/counseling-for-unwanted-same-sex-attractions/cause-for-concern.aspx>; Focus on the Family, *Talking Points (Same-Sex Counseling)* (2008), <http://www.focusonthefamily.com/socialissues/sexual-identity/counseling-for-unwanted-same-sex-attractions/talking-points.aspx>

<sup>45</sup> *Just the Facts about Sexual Orientation and Youth: A Primer for Principals, Educators, and School Personnel* (American Association of School Administrators; American Counseling Association American Federation of Teachers; American Psychological Association; American School Counselor Association; American School Health Association; Interfaith Alliance Foundation; National Association of School Psychologists; National Association of Secondary School Principals; National Association of Social Workers; National Education Association; School Social Work Association of America; 2008), *available at* <http://www.apa.org/pi/lgbt/resources/just-the-facts.pdf>. *See also generally, e.g.,* American Psychiatric Association, *Attempts to Change Sexual Orientation (Reparative or Conversion Therapies)* (May 2000), *available at* <http://www.psych.org/Departments/EDU/Library/APAOfficialDocumentsandRelated/PositionStatements/200001.aspx>; Press Release, *Insufficient Evidence that Sexual Orientation Change Efforts Work, Says APA* (American Psychological Association, Aug. 5, 2009), *available at* <http://www.apa.org/news/press/releases/2009/08/therapeutic.aspx>; Jay S. Whitman, Harriet L. Glossoff, Michael M. Kocet and Vilia Tarvydas, *Counseling Today Online: Exploring ethical issues related to conversion or reparative therapy*, American Counseling Association (July 1, 2006), *available at* <http://www.counseling.org/Publications/CounselingTodayArticles.aspx?AGuid=4b4ac742-9a58-4086-bcff-96e925cc3599>; Committee on Adolescence, *Homosexuality and Adolescence*, Official Journal of the American Academy of Pediatrics (Oct. 1993), *available at* <http://pediatrics.aappublications.org/cgi/reprint/92/4/631>.

<sup>46</sup> Aaron Leichman, “Pro-Family Group Blasts Colo. Anti-Sexual Discrimination Law”, *The Christian Post* (May 30, 2008), *available at* <http://www.christianpost.com/news/pro-family-group-blasts-colo-anti-sexual-discrimination-law-32597>; Tom Minnery, Editorial, “Proposed anti-bias law would open a Pandora’s box”, *Denver Post* (May 24, 2008), *available at* [http://www.denverpost.com/opinion/ci\\_9362339](http://www.denverpost.com/opinion/ci_9362339).

<sup>47</sup> Kyle Daly, “Focus on the Family Pushing Bills to Protect Anti-Gay Discrimination,” *The Colorado Independent* (Feb. 25, 2011), *available at* <http://coloradoindependent.com/76672/focus-on-the-family-pushing-bills-to-protect-anti-gay-discrimination>.

<sup>48</sup> *Id.*

<sup>49</sup> Kathleen Miller, “MontCo referendum seen as guide to nixing transgender laws in U.S.,” *The Examiner* (Washington) (Aug. 4, 2008), *available at* [http://dev.www.washingtonexaminer.com/local/MontCo\\_referendum\\_seen\\_as\\_guide\\_to\\_nixing\\_transgender\\_laws\\_in\\_US.html](http://dev.www.washingtonexaminer.com/local/MontCo_referendum_seen_as_guide_to_nixing_transgender_laws_in_US.html).

<sup>50</sup> Anderson Cooper 360 Degrees, “Powerful Hurricane Earl Headed for U.S.; Hostage Standoff; Bullying Battle; Trapped Underground; Warm Words from Icy Adversaries; Eco-Friendly Fashion” (Sept. 1, 2010), *available at* <http://transcripts.cnn.com/TRANSCRIPTS/1009/01/acd.02.html>.

## A Rose By Any Other Name

In addition to opposing the proposed 2011 anti-discrimination ordinance while it was pending, Family Action Council made contingency plans in the event that the ordinance passed. It convened a strategy meeting to lay the groundwork for legislation like Senate Bill 632, which would overturn the 2011 anti-discrimination ordinance if it could not be stopped at the local level. That meeting was held on January 12, 2011. Its purpose, according to an invitation circulated in advance, was to “lay out the wide-reaching impact of [the 2011 anti-discrimination] ordinance [and] what can be done to defeat it.”<sup>51</sup> The invitation called the then-proposed 2011 anti-discrimination ordinance “the next item on the homosexual agenda.”<sup>52</sup> Forty people attended, including State Rep. Glen Casada, the author and prime sponsor of House Bill 600 and its companion Senate Bill 632.<sup>53</sup>

The meeting organizers wanted to conceal the anti-transgender and anti-gay animus behind what would become Senate Bill 632. They “discussed the advantage of framing the debate as a business issue rather than a moral, Christian one.”<sup>54</sup> Family Action Council distributed “Two Proposed Responses” to the Nashville ordinance: one framed the debate as a business issue, while the other described “[t]he issue of homosexual behavior [as] a moral issue,” and proposed a strategy based on “feel[ings] that homosexual behavior is immoral.”<sup>55</sup> The first course was chosen and Senate Bill 632’s proponents have hewn closely to it.

Yet their best efforts have not concealed the animus behind the bill. Family Action Council’s so-called Truth Project Trainer, Dr. David Shelley, told a reporter who was denied entrance to the January 12 meeting that the real motive behind a bill – like Senate Bill 632 – to overturn Metro Nashville’s then-proposed 2011 anti-discrimination ordinance was this: “homosexual behavior is not only morally wrong, it’s abhorrent, it’s unnatural. It prevents the species from reproducing and continuing and it’s certainly not something that should be given special protection by law.”<sup>56</sup> Shelley similarly has called upon people to oppose anti-discrimination legislation, including the 2009 anti-discrimination ordinance, because “[h]omosexuality is clearly a perversion of God’s design...”<sup>57</sup> Rep. Casada also told the press that the purpose of the legislation he was

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<sup>51</sup> Williams, *supra* note 32.

<sup>52</sup> Williams, *supra* note 32; *see also* Stephen George “Nashville Biz Leaders, Christian Conservatives and the GOP: A Straight Alliance”, Nashville Scene, (Jan. 12, 2011), *available at* <http://www.nashvillescene.com/pitw/archives/2011/01/12/nashville-biz-leaders-christian-conservatives-and-the-gop-a-straight-alliance>.

<sup>53</sup> Joey Garrison, “Business Leaders, Christian Conservatives Work with GOP to Defeat Nondiscrimination Bill, City Paper (Jan. 12, 2011), *available at* <http://nashvillecitypaper.com/print/522898>.

<sup>54</sup> Williams, *supra* note 32.

<sup>55</sup> George, *supra* note 53.

<sup>56</sup> Williams, *supra* note 32.

<sup>57</sup> David Shelley, “Legislation that could impact Religious Liberty in Tennessee”, Church and State Report, <http://www.drdauidshelley.com/ChurchandStateReport.html>. He further directs readers to the Family Action Council website for additional related information. As compared to its “business” messaging, Dr. Shelley’s “off-message” statements are consistent with Family Action Council’s ostensible mission, which has never been about business. Indeed, the campaign for Senate Bill 632 is the *only* purportedly business-related issue that Family Action Council has ever worked on. Family Action Council

drafting had nothing to do with fostering a good businesses climate. Rather, he said of his bill, its purpose is to ensure that “[t]he local government won’t be able to implement their morality on our local businesses.”<sup>58</sup>

Metro Nashville Council members who voted against the 2009 and 2011 anti-discrimination ordinances have acknowledged similar motives. Discussing the 2009 anti-discrimination ordinance, Council member Jim Hodge said, “As a Christian, I cannot endorse a lifestyle that is condemned in both the Old Testament and New... I cannot endorse or support a lifestyle that is unhealthy.... [W]e as a government should be encouraging our folks to make better lifestyle choices than this.”<sup>59</sup> Similarly, when asked if his opposition to the 2011 anti-discrimination ordinance was “based on the explicit protection for gay citizens,” Council member Robert Duvall stated, “I’m not going to say that doesn’t play a part of it.”<sup>60</sup> Council member Phil Claiborne also opposed the 2011 anti-discrimination ordinance because “[i]n the case of sexual orientation, the vast majority of the world... do[es] not find [homosexual] actions acceptable.”<sup>61</sup> Council member Duane Dominy added, “We are incentivizing businesses to condone a practice that multiple religions find wrong.”<sup>62</sup>

Finally, Family Action Council resorted to scare tactics. Its lobbying arm, Family Action of Tennessee, released a video and website claiming that the failure to pass House Bill 600 (and, by extension, Senate Bill 632) would leave women and children vulnerable to sexual predation by virtue of the protections that Metro Nashville had afforded to transgender Tennesseans in the 2011 anti-discrimination ordinance.<sup>63</sup> It was a claim fabricated from whole cloth, designed only to inflame anti-transgender bias. In fact, the 2011 anti-discrimination ordinance did one simple thing when it came to transgender Tennesseans: it barred Metro Nashville’s government from doing business with entities that refuse to offer them equal employment opportunity.<sup>64</sup>

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has *never* advocated for or against any other type of businesses regulation. On Family Action Council’s website, the only pieces of legislation it lists under the policy areas of “business and commerce” are Senate Bill 632 and its variants. *See* Family Action Council of Tennessee, Status of Family Bills in Tennessee, *available at* <http://www.factn.org/legislation.htm>.

<sup>58</sup> Garrison, *supra* note 32. We are not the first to recognize the use of business jargon to reframe and conceal bias against lesbian, gay, bisexual and transgender people as a political strategy in support of Senate Bill 632. *See, e.g.*, Jeff Woods, “Legislators Squash Gay, Lesbian Component of Casada Bill Limiting Local Governments”, City Paper (Mar. 6, 2011), *available at* <http://nashvillecitypaper.com/content/city-news/legislators-squash-gay-lesbian-component-casada-bill-limiting-local-governments>. (“Focus on the Family [, with which Family Action Council collaborates,] obviously is trying to stop the advancement of gay rights. But in an apparent attempt to avoid putting off more moderate lawmakers, the group couches its opposition as aimed at preventing new burdensome business regulations and laws.”).

<sup>59</sup> Testimony of Jim Hodge, Nashville Metro Council Meeting, (Aug. 18, 2009), *available at* [http://www.nashville.gov/multimedia/council\\_meetings](http://www.nashville.gov/multimedia/council_meetings).

<sup>60</sup> Williams, *supra* note 32.

<sup>61</sup> Testimony of Phil Claiborne, Nashville Metro Council Meeting (Feb. 15, 2011), *available at* [http://www.nashville.gov/multimedia/council\\_meetings](http://www.nashville.gov/multimedia/council_meetings).

<sup>62</sup> *Id.*

<sup>63</sup> Gender Does Matter, *available at* <http://www.genderdoesmatter.org>.

<sup>64</sup> Ordinance No. BL2011-838 (2011).

## Senate Bill 632 is Unconstitutional Because it is Motivated by Animus Against LGBT Tennesseans

The United States Supreme Court has been clear: a law motivated by animus towards a group of people violates the Equal Protection Clause of the United States Constitution and cannot stand.<sup>65</sup> In *Romer v. Evans*, the state of Colorado adopted Amendment 2 to the Colorado Constitution, which forbade any local government from passing any law or policy protecting gay people from discrimination.<sup>66</sup> Amendment 2 was challenged for, among other things, violating the Equal Protection Clause of the United States Constitution, which requires, at a minimum, that a law that classifies people for different treatment must be rationally related to a legitimate government interest.<sup>67</sup>

Colorado argued, among other things, that the rationale for Amendment 2 was Colorado's "respect for other citizens' freedom of association, and in particular the liberties of landlords or employers who have personal or religious objections to homosexuality."<sup>68</sup> Colorado further argued that Amendment 2 was rationally related to its interest in conserving resources to fight discrimination against other groups.<sup>69</sup> The Court rejected Colorado's alleged rationales, stating that "[t]he breadth of the amendment is so far removed from these particular justifications that we find it impossible to credit them."<sup>70</sup>

The Court could find no legitimate state interest related to Amendment 2, and found instead that it was "a classification of persons undertaken for its own sake, something the Equal Protection Clause does not permit."<sup>71</sup> Moreover, said the Court, the inevitable conclusion was that Amendment 2 was motivated by animus towards gay people. Such animus, the Court ruled, can *never* be a legitimate basis for enacting a law.<sup>72</sup>

United States Supreme Court precedent governs here and leads to only one conclusion: *Senate Bill 632 is unconstitutional*. It is unrelated to *any* legitimate interest of the state of Tennessee. As with the justifications offered in *Romer*, the justification offered for Senate Bill 632 – that it would promote a uniform statewide standard for

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<sup>65</sup> *Romer v. Evans*, 517 U.S. 620, 632 (1996).

<sup>66</sup> *Id.* at 624-25.

<sup>67</sup> *Id.* at 631.

<sup>68</sup> *Id.* at 635.

<sup>69</sup> *Id.*

<sup>70</sup> *Id.*

<sup>71</sup> *Id.*

<sup>72</sup> *Id.* at 634. Indeed, *Romer's* holding that animus cannot be a constitutional basis for lawmaking is a longstanding one. Nearly forty years ago, in *Department of Agriculture v. Moreno*, the Supreme Court ruled that "a bare... desire to harm a politically unpopular group cannot constitute a legitimate governmental interest." 413 U.S. 528, 534 (1973). Similarly, in *City of Cleburne v. Cleburne Living Center*, the Supreme Court repeated that while "[p]rivate biases may be outside the reach of the law[,]... the law cannot, directly or indirectly, give them effect." 473 U.S. 432, 448 (1985) (quoting *Palmore v. Sidoti*, 466 U.S. 429, 433 (1984)). The Justices wrote that "mere negative attitudes or fear" cannot ever form a legitimate basis for a law. *Id.*

conducting business<sup>73</sup> – is so far removed from what Senate Bill 632 actually does, that it is impossible to credit it.<sup>74</sup>

It is clear from the factual record of Senate Bill 632's introduction that it is motivated by nothing more than animus towards lesbian, gay, bisexual and transgender people. That is an unlawful justification which renders Senate Bill 632 unconstitutional.

### **Senate Bill 632 Unconstitutionally Denies LGBT Tennesseans the Right to Seek Help from their Government**

Senate Bill 632 targets lesbian, gay, bisexual and transgender people by denying them the right to seek the government's help in fighting discrimination. It excludes them from the local political process and thereby violates the United States Constitution. In *Romer*, gay Coloradans were barred by Amendment 2 from seeking any redress from government throughout Colorado. No matter how local the grievance, they could get no relief from their local government under the terms of Amendment 2. They were literally locked out of the political process when it came to advocating for their own interests in fighting the discrimination that they faced.

The Supreme Court was adamant in rejecting Amendment 2 as unconstitutional. "A law declaring that in general it shall be more difficult for one group of citizens than for all others to seek aid from the government," wrote the Court, "is itself a denial of

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<sup>73</sup> See Testimony of Rep. Casada, Tennessee General Assembly House Commerce Committee (Apr. 12, 2011) available at [http://tnga.granicus.com/MediaPlayer.php?view\\_id=196&clip\\_id=4008](http://tnga.granicus.com/MediaPlayer.php?view_id=196&clip_id=4008).

<sup>74</sup> See *Romer*, 517 U.S. at 635. Senate Bill 632's proponents take refuge in their bill's silence regarding the group it targets: lesbian, gay, bisexual and transgender Tennesseans. Family Action Council has produced a lengthy "Frequently Asked Questions" about Senate Bill 632, stating that it "does not specifically target any particular group or class of persons as did the *Romer* amendment." Available at <http://www.factn.org/commerce/equal-access-intrastate-commerce-act-faq-sb0632-hb0600.htm#Q12>. However, that silence offers no refuge. As discussed above, Senate Bill 632's proponents have made clear that LGBT Tennesseans are the targets of the bill. Rep. Casada has said the bill is targeted specifically at transgender people, in order to prevent them from enacting anti-discrimination protections statewide: "My concern is every city in this state having a hodgepodge of laws related in business, in this case, to transgender – that kind of thing." Williams, *supra* note 32. In the same vein, Family Action Council's "FACT Report" described House Bill 598 – an earlier version of Senate Bill 632 containing similar language – as "prohibiting local government from imposing on private business certain personnel mandates, including a requirement they give special rights to homosexuals and cross dressers." Tennessee's Equal Access to Intrastate Commerce Act at 00:18 (March 9, 2011), available at [http://www.factn.org/factreport/Tennessees\\_Equal\\_Access\\_Intrastate\\_Commerce\\_Act\\_Act\\_03-09-11.mp3](http://www.factn.org/factreport/Tennessees_Equal_Access_Intrastate_Commerce_Act_Act_03-09-11.mp3) and Are Tennessee House Republicans Really Pro-Jobs? at 00:17 (March 16, 2011), available at [http://www.factn.org/factreport/Are\\_Tennessee\\_House\\_Republicans\\_Really\\_Pro-Jobs\\_03-16-11.mp3](http://www.factn.org/factreport/Are_Tennessee_House_Republicans_Really_Pro-Jobs_03-16-11.mp3).

The Supreme Court will look to whether the purpose, not just the language, of Senate Bill 632 is discriminatory. See, e.g. *Washington v. Seattle Sch. Dist. 1*, 458 U.S. 457, 471 (1982) ("Initiative 350 nowhere mentions 'race' or 'integration.' . . . [D]espite its facial neutrality, there is little doubt that the initiative was effectively drawn for racial purposes. Neither the initiative's sponsors, nor the District Court, nor the Court of Appeals had any difficulty perceiving the racial nature of the issue settled by Initiative 350.").

equal protection of the laws in the most literal sense.”<sup>75</sup> The Court rejected such laws as being outside the bounds of the American political tradition:

The resulting disqualification of a class of persons from the right to seek specific protection from the law is unprecedented in our jurisprudence.... It is not within our constitutional tradition to enact laws of this sort. Central to both the idea of the rule of law and to our own Constitution’s guarantee of equal protection is the principle that government and *each of its parts* remain open on impartial terms to all who seek its assistance.<sup>76</sup>

As Amendment 2 did in *Romer*, Senate Bill 632 targets a particular class – lesbian, gay, bisexual and transgender Tennesseans – and makes it impossible for them to petition their local governments for redress from local discrimination. Senate Bill 632 makes them strangers to their own government and to the local political processes that govern their everyday lives. It is unconstitutional.

### Conclusion

We hope that you will consider the issues raised in this letter as you review Senate Bill 632. While other serious concerns exist about the lawfulness of Senate Bill 632 under federal and Tennessee law, we believe that the concerns we raise are a sufficient basis to reject Senate Bill 632. Senate Bill 632’s proponents drive its passage for one purpose: to permit discrimination against lesbian, gay, bisexual and transgender Tennesseans. Senate Bill 632 serves no legitimate government interest and is unconstitutional.

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<sup>75</sup> *Id.*

<sup>76</sup> *Id.* (emphasis supplied). Indeed, the Supreme Court has long held that laws may not restrict the political process to disfavor certain groups that are seeking protection against discrimination. In *Hunter v. Erickson*, the Court struck down as violative of the Equal Protection Clause an amendment to the Akron, Ohio city charter stating that laws prohibiting housing discrimination along certain lines required approval by a referendum of voters, while laws prohibiting housing discrimination for other reasons could be passed merely by an act of the city council. The Court ruled that the Constitution bars the government from enacting legislation to “disadvantage any particular group by making it more difficult to enact legislation in its behalf.” 393 U.S. 385, 393 (1969).

Similarly, in *Washington v. Seattle School District No. 1*, the Court struck down a measure that would have permitted local school districts to bus their students among schools for any purpose other than racial desegregation. 458 U.S. at 487. The Court reiterated, “the Fourteenth Amendment [prohibits] a political structure that treats all individuals as equals yet more subtly distorts governmental processes in such a way as to place special burdens on the ability of minority groups to achieve beneficial legislation.” *Id.* at 467 (internal citations and punctuation omitted). The Court especially disapproved of the state’s use of its power to deprive local governments of the authority to address discrimination. It noted that the law “burdens all future attempts to integrate Washington schools in districts throughout the State by lodging decisionmaking authority over the question at a new and remote level of government. . . . This imposes direct and undeniable burdens on minority interests.” *Id.* at 483-84.

Please contact us with any questions or concerns you may have about Senate Bill 632 or any of the issues raised in this letter. Thank you for your attention to this matter.

Respectfully submitted,



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