



April 25, 2016

The Honorable Bill Haslam
Governor of Tennessee
Office of Governor Bill Haslam
1st Floor, State Capitol
Nashville, TN 37243

Dear Governor Haslam,

On behalf of thousands of American Civil Liberties Union supporters across the state, we write to urge you to veto SJR 467, which is nothing more than a thinly-veiled attempt to halt refugee resettlement in Tennessee.

SJR 467 directs the attorney general to file a lawsuit against the federal government for allegedly failing to consult with the state on refugee resettlement, consultations that you have made clear, according to the media, are ongoing and satisfactory to your office.¹ The resolution also mandates that the state enter into protracted litigation claiming that the federal government requires appropriations of state revenue regarding refugees. Should the attorney general fail to file such an ill-advised lawsuit, the resolution attempts to vest the General Assembly with the authority to embroil the state in a lawsuit and retain private counsel to file it.

This resolution conveys a dangerous message of intolerance to Tennessee's refugee population and gives rise to serious questions about the separation of powers and the authority of the General Assembly.

This resolution violates the separation of powers.

This resolution tramples on the checks and balances that are the very foundation of Tennessee government. The Tennessee Constitution specifically set up three distinct branches of government in order to prevent the abuse of power. But by directing the state attorney general to file a lawsuit against the federal government, under this resolution the legislative branch attempts to direct the actions of the judicial branch, trespassing in the domain of the executive branch in the process.

Under Tennessee statutes, the state attorney general is the only one who can pursue a lawsuit on behalf of the state.² No state division or entity can file a lawsuit without the

¹ <http://www.nashvillescene.com/pitw/archives/2016/02/17/haslam-stops-grandstanding-on-syrian-refugees>

² T.C.A. § 8-6-109-110.

attorney general's approval.³ If the attorney general has a conflict of interest and cannot represent the state, the decision to employ outside counsel is made by the governor in consultation with the attorney general.⁴

The Tennessee General Assembly has no authority under the Tennessee Constitution nor under any statute to file lawsuits or to retain counsel on behalf of the state. The legislature may, in very limited circumstances, be party to a lawsuit when the legislature itself is the aggrieved party and has itself suffered some harm. For example, in *Arizona State Legislature v. Arizona Independent Redistricting*,⁵ the U.S. Supreme Court held that the state legislature had standing to bring a lawsuit on its own behalf because it, as a body, was directly affected by a new redistricting plan. But the legislature is not the branch that can assert the state's sovereign interests in the courts. In other words, the state legislature cannot force the state of Tennessee as a whole into litigation.

The legislature, through the speakers of both chambers, may authorize retaining outside counsel when the attorney general declines to defend the constitutionality of a state statute.⁶ This scenario only applies, however, when a lawsuit has been initiated by another party against the state directly or when a state statute is challenged, thus making the state an indispensable party to the litigation. That obviously is not what is happening here.

T.C.A. § 8-6-109(e) further confirms that the lawsuit contemplated by the resolution is improper and unlawful. That statute provides that in limited circumstances speakers may retain legal counsel to advise them, but underscores that even when they do so "the attorney general and reporter shall remain the state's sole representative in federal and state court proceedings."

Through SJR 467, the General Assembly seeks to rewrite the existing statutes governing the state's decision to bring lawsuits and to invest itself with authority rightfully within the powers and province of the chief executive and attorney general. In dictating when the state should get involved in a lawsuit as a party plaintiff, the General Assembly oversteps its already broad authority by attempting to take the reins of the state away from the executive and judicial branches.

The litigation mandated by SJR 467 has been tried in other states and it failed.

The lawsuit that the General Assembly demands under this resolution is identical to a recent case in which the state of Texas attempted to use the consultation portion of the Refugee Act to impede refugee resettlement in that state. The federal district court denied a preliminary injunction in that case, finding that the state "has no viable cause of action" against the federal government. The court stated that the Refugee Act "do[es] not contemplate a judicial remedy" and that the consultation that the Act envisions is "an ongoing, dynamic process" not reviewable by federal courts.

³ T.C.A. § 8-6-301.

⁴ T.C.A. § 8-6-106.

⁵ 135 S.Ct. 2652 (2015).

⁶ T.C.A. § 8-6-109(c).

In any event, the Office of Refugee Resettlement (ORR) website clearly shows that the ORR has held numerous yearly and quarterly consultations and encouraged representatives of the states to participate in order to comply with the requirements of the Refugee Act.⁷ Moreover, according to media reports you have stated that you are satisfied with the information coming from the federal government on refugee placement. Therefore, the allegation from legislators that information is not being shared and that the federal government is not complying with the consultation provision is incorrect.

This resolution calls for discriminatory treatment of refugees, in violation of the Equal Protection Clause of the U.S. Constitution.

Under the Fourteenth Amendment, the state cannot “deny to any person within its jurisdiction the equal protection of the laws.” This includes citizens and non-citizens alike. The federal government requires that when states administer programs for which federal funds are provided, they do not discriminate. The U.S. Supreme Court has “long recognized that Congress may use this power to grant federal funds to the States, and may condition such a grant upon the States’ ‘taking certain actions...’”⁸ Tennessee cannot simply decide to withhold benefits from qualified refugees—such an action would be unconstitutional discrimination, pure and simple.

This resolution calls for action that would violate the Supremacy Clause of the U.S. Constitution and is based on a fundamental misapplication of *National Federation of Independent Business v. Sebelius*.

Immigration is in the exclusive province of the federal government. Refugee admission is a federal matter, reflecting our values as a nation. The resettlement of refugees is determined by the U.S. State Department. States do not have veto power in this area. Tennessee may not simply close its borders to refugees who are duly recognized and vetted by the federal government.

SJR 467 evokes the 10th Amendment and claims that the federal government has overstepped its authority and required the state to appropriate funds without authority. It cites a recent Supreme Court decision, *National Federation of Independent Business v. Sebelius*, as precedent for these alleged violations. However, this resolution relies on a misapplication of this lawsuit.

The Court stated in *National Federation of Independent Business* that the federal government and the states essentially enter into a contract to administer the Medicaid program. Like all contracts, there are limits to how much the parties can change the contract once they have entered into it without renegotiating it. In the case of *National Federation of Independent Business*, the Court found that the Affordable Care Act went too far in that it attempted to create a whole new entitlement program,

⁷ <http://www.acf.hhs.gov/programs/orr/resource/state-letter-11-05>;
<http://www.acf.hhs.gov/programs/orr/resource/state-letter-12-05>;
<http://www.acf.hhs.gov/programs/orr/resource/state-letter-10-07>;
<http://www.acf.hhs.gov/programs/orr/programs/coordinated-placement>;
<http://www.acf.hhs.gov/programs/orr/resource/key-indicators-for-refugee-placement-fy2014-report-released>. All sites accessed April 25, 2016.

⁸ *National Federation of Independent Business v. Sebelius*.

different in kind from the existing Medicaid program, and threatened to withhold existing Medicaid funds from states if they did not also participate in the new program.

But refugee resettlement does not change the terms of the original Medicaid agreement, nor that of any other federal benefit program, in any way. As the Court itself said in *National Federation of Independent Business*, “Nothing in our opinion precludes Congress from offering funds under the Affordable Care Act to expand the availability of health care, and requiring that States accepting such funds comply with the conditions on their use.” There is nothing unlawful about the federal government holding Tennessee to the terms of its contract, including the longstanding requirement that it provide Medicaid benefits to certain refugees and not discriminate in its administration of the program.

The Thomas More Law Center’s extremist ideology is not representative of Tennessee.

Disturbingly, lawmakers have identified the Thomas More Law Center, located in Michigan, as the firm that will represent the state of Tennessee should the attorney general decline to pursue litigation as directed under SJR 467. The Thomas More Law Center is known for its extremist anti-Muslim and anti-gay ideology. A review of the organization’s website clearly demonstrates that it does not represent the values of our state.

In a blog post entitled “Stopping the Muslim Invasion of America,” Thomas More Law Center president Richard Thompson writes, “Muslims are not arriving on American shores to assimilate, but to conquer... [The Thomas More Law Center] stand[s] ready to defend our nation from the threat of the Muslim Invasion disguised as Refugee Resettlement.”⁹ Thompson has also made assertions that the Muslim Brotherhood has taken “over the education system of the United States military,” as well as the FBI.¹⁰

According to RightWingWatch, the Thomas More Law Center “believes that Islam is trying to ‘destroy America,’ demanded a state investigation into the sale of a school to a Muslim group, and thinks that a school teaching Arabic will train kids to become terrorists. When not attacking the rights of Muslim-Americans, the group warns that Christians will soon be imprisoned due to hate crimes laws and that the ‘homosexual agenda’ will cause America to ‘disintegrate.’”¹¹

Allowing this polarizing organization to represent our state would send an alarming message that Tennessee embraces its extremist ideology. The fact that legislators have specifically identified this firm to represent the state is not only dangerous, it illuminates the underlying animus toward Muslims that is the true motivation underlying this resolution.

⁹ <https://www.thomasmore.org/stopping-the-muslim-invasion-of-america/>. Accessed April 25, 2016.

¹⁰ <http://www.rightwingwatch.org/content/thomas-more-law-muslim-brotherhood-military-fbi#sthash.FSEh8ehF.dpuf>

¹¹ <http://www.rightwingwatch.org/content/thomas-more-law-center-names-michele-bachmann-advisory-board#sthash.KwcLqpcl.dpuf>

Conclusion

This resolution would mire the state in a multi-year legal battle and could require taxpayers to cover court costs, expert witness costs, travel, printing and other costs common to any lawsuit. The authority to embroil the state in such a lawsuit resides in the offices of the governor and attorney general. The General Assembly may of course advise those officers, but it should not be allowed to institute litigation by operation of a joint resolution over the well-considered opinion of these constitutional officers.

This bill is clearly motivated by needless suspicion of Muslims and people from the Middle East. It betrays our values as Tennesseans to turn people away because of their faith or where they come from. Tennessee has long benefitted from having a robust refugee population that contributes to our state in many ways. This resolution undermines our values of justice, fairness and aiding those in need, mandating that we turn our backs on families fleeing violence and terror. Closing our doors in the faces of people in crisis is not who we are as Tennesseans.

We urge you to veto this fear-based, discriminatory measure. Thank you for your consideration.

Sincerely,



Hedy Weinberg
Executive Director



Thomas H. Castelli
Legal Director