

April 9, 2018

Representative Chris Kannady  
Chair, House Judiciary Committee  
2300 N. Lincoln Blvd.  
Oklahoma City, OK 73105  
405-557-7337

RE: SB 1140

Dear Representative Kannady:

Lambda Legal is the oldest and largest national legal organization whose mission is to achieve full recognition of the civil rights of lesbians, gay men, bisexuals, transgender people, and everyone living with HIV through impact litigation, education, and public policy work. Through the Youth in Out-of-Home Care Project, Lambda Legal advocates for the rights and protection of lesbian, gay, bisexual, transgender and questioning (“LGBTQ”) young people experiencing homelessness, in foster care, and in juvenile justice settings.

We write to you today to express our strong opposition to SB 1140, and urge you and all House Judiciary Committee members to vote against this bill which will harm Oklahoma’s most vulnerable children. SB 1140 would decrease the number of foster and adoptive homes available to youth in Oklahoma’s child welfare system and send a harmful message to children in care that Oklahoma endorses discrimination. By permitting providers to discriminate against potential families, SB 1140 is inconsistent with constitutional guarantees and violates recommended professional standards of child welfare experts, such as the Child Welfare League of America.<sup>1</sup> And, if enacted, SB 1140 likely would be vulnerable to a legal challenge, at taxpayer expense. For these reasons, Lambda Legal opposes the enactment of this bill.

#### **I. SB 1140 Would Decrease the Number of Foster and Adoptive Homes for Youth**

SB 1140 would decrease access to permanent, loving homes for foster children. It is estimated that around 20,000 youth “age out” of the foster care system across the country each year without ever finding a permanent home, leaving them vulnerable to higher rates of poverty, homelessness, incarceration, and early parenthood.<sup>2</sup> There are nearly 10,000 children in state

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<sup>1</sup> See Child Welfare League of Am., et al., *Recommended Practices to Promote the Safety and Well-Being of Lesbian, Gay, Bisexual, Transgender and Questioning (LGBTQ) Youth and Youth at Risk of or Living with HIV in Child Welfare Settings* (2012), <https://www.lambdalegal.org/sites/default/files/publications/downloads/recommended-practices-youth.pdf>. These recommendations will be discussed in more detail in Section III.

<sup>2</sup> ECDF Act Facts, FAMILY EQUALITY COUNCIL (2017), [https://www.familyequality.org/get\\_informed/advocacy/ecdf/ecdf-facts/](https://www.familyequality.org/get_informed/advocacy/ecdf/ecdf-facts/).

custody in Oklahoma.<sup>3</sup> According to Kids Count, in 2015, 4,288 were waiting for adoption<sup>4</sup> and fifty percent of those children had been waiting for adoption for over two years.<sup>5</sup> 311 children ultimately were emancipated or aged out without a permanent home through reunification with parents, adoption or legal guardianship.<sup>6</sup> Bills that permit discrimination against LGBTQ parents, or other parents to whom child welfare providers may assert religious objections, serve to decrease the number of eligible placements for youth in foster care. In fact, it has been demonstrated that same-sex couples are four times more likely to adopt or foster children than different-sex couples.<sup>7</sup> Rather than increasing opportunities for foster youth, SB 1140 would decrease the number of safe and loving homes available for potential matching.

While Oklahoma has had a long history of welcoming and utilizing faith-based providers, it has not actively and fully recruited LGBTQ foster and adoptive parents. These populations remain a largely untapped resource. In fact, the federal agency that oversees, funds, and supports state child welfare systems, the Administration of Children and Families' ("ACF") Children's Bureau, recommends that "[a]gencies that have not already done so should develop mechanisms to recruit, train and provide ongoing support to families, including LGBT individuals and families, who are able to provide a safe, loving family placement for young people who are LGBTQ and are involved with the child welfare system" and notes that "LGBT foster and adoptive parents can provide a loving, stable home, responsive to the needs of LGBTQ youth in care, and are a largely untapped resource- an estimated 2 million LGB individuals [nationwide] are interested in adopting."<sup>8</sup> Oklahoma is home to 99,000 LGBT adults and 6,100 same-sex couples. 24% of same-sex couples with children are raising adoptive children compared to 4% of different-sex couples.<sup>9</sup> In a subsequent brief, ACF's Office of Planning, Research and Evaluation found that "[i]n qualitative studies and surveys of purposive samples of lesbians and gay people, substantial minorities report challenges related to their sexual orientation in interactions with public child welfare agencies. These include legal insecurity due to state and local policies that may hinder adoption by same-sex couples and the possibility of prejudice or social stereotyping based on sexual orientation by agency staff and others involved in the foster care or adoption process."<sup>10</sup>

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<sup>3</sup> *Statistics*, OKLAHOMA FOSTERS INITIATIVE, <http://www.oklahomafosters.com/statistics/> (last visited April 9, 2018).

<sup>4</sup> *Children in foster care waiting for adoption*, KIDS COUNT DATA CTR., <https://datacenter.kidscount.org/data/tables/6670-children-in-foster-care-waiting-for-adoption?loc=38&loct=2#detailed/2/38/false/573,869,36,868,867/any/13705> (last visited April 9, 2018).

<sup>5</sup> *Id.*

<sup>6</sup> *Children Aged Out/Emancipated from Foster Care*, KIDS COUNT DATA CTR., <https://datacenter.kidscount.org/data/tables/6364-children-aged-out-emancipated-from-foster-care?loc=38&loct=2#detailed/2/any/false/870,573,869,36,868/any/13234,13235> (last visited April 9, 2018).

<sup>7</sup> Gary J. Gates, *LGBT Parenting in the United States*, WILLIAMS INST. (Feb. 2013), <https://williamsinstitute.law.ucla.edu/wp-content/uploads/LGBT-Parenting.pdf>.

<sup>8</sup> Bryan Samuels, Comm'r, Admin. for Children & Families, Info., *Memorandum ACYF-CB-IM-11-03, Lesbian, Gay, Bisexual, Transgender and Questioning Youth in Foster Care* (April 6, 2011), <https://www.acf.hhs.gov/sites/default/files/cb/im1103.pdf>.

<sup>9</sup> THE WILLIAMS INST., *LGBT People in Oklahoma*, <https://williamsinstitute.law.ucla.edu/wp-content/uploads/Oklahoma-fact-sheet.pdf> [hereinafter "WILLIAMS INST., *LGBT People in Oklahoma*"].

<sup>10</sup> ADMIN. FOR CHILDREN & FAMS. OFFICE OF PLANNING, RESEARCH & EVALUATION ET AL., *OPRE Report #2015-24, LGBT Populations and the Child Welfare System: A Snapshot of the Knowledge Base and Research Needs* (2015), [https://www.acf.hhs.gov/sites/default/files/opre/chapter\\_brief\\_child\\_welfare\\_508\\_nologo.pdf](https://www.acf.hhs.gov/sites/default/files/opre/chapter_brief_child_welfare_508_nologo.pdf) (citing Chris A. Downs & Steven E. James, *Gay, Lesbian, and Bisexual Foster Parents: Strengths and Challenges for the Child Welfare System*, 85 CHILD WELFARE 281-296 (2006); Abbie E. Goldberg, April M. Moyer, Lori A. Kinkler, &

Any action by Oklahoma that signals to potential families that they are not welcome has a chilling effect on new foster and adoptive parents stepping forward. Legislation endorsing discrimination by government-funded providers, sends a message to LGBTQ people that they are second-class citizens and is a reminder of other unwarranted “separate but equal” systems in Oklahoma’s history.

Almost forty years of research has overwhelmingly concluded that children raised by same-sex couples are just as healthy, socially adjusted, and psychologically fit as children with heterosexual parents.<sup>11</sup> Thus, there is no reasonable justification for SB 1140 when considering the best interest of children in foster care, who would be harmed by decreasing the number of potential foster and adoptive homes available for them.

## II. SB 1140 Would Harm LGBTQ Youth in Care

LGBTQ youth have the same basic needs as their non-LGBTQ and gender-conforming peers, but often have unique life experiences that drive them into care in disproportionate numbers and require particular services. In addition, LGBTQ children are at heightened risk for emotional and physical victimization, trafficking, self-harm, and other negative health outcomes while in care and, too often, exiting care to homelessness. LGBTQ youth make up almost half of youth experiencing homelessness, and many of them cite lack of acceptance in foster care as a reason they ended up on the street: According to a study from New York City conducted before comprehensive nondiscrimination policies and accompanying training were put in place, 78 percent of LGBTQ youth were removed or ran away from foster care because of abuse or discrimination, and 56 percent chose live on the street rather than stay in a foster care placement because they felt safer there.<sup>12</sup> Child welfare agencies are statutorily required to ensure the safety, permanency, and well-being and that the civil rights of the youth in their care are protected. The increased risk of victimization and other poor outcomes LGBTQ youth face in care necessitate that state child welfare agencies enact specific policies to protect and serve this population, not laws which permit discrimination against vulnerable children.

LGBTQ youth are over-represented in child welfare systems across the country.<sup>13</sup> According to one recent federally-funded study by the Williams Institute at UCLA School of

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Hannah B. Richardson. “*When You’re Sitting on the Fence, Hope’s the Hardest Part*”: Challenges and Experiences of Heterosexual and Same-Sex Couples Adopting through the Child Welfare System, 15 ADOPTION QUARTERLY 288–315 (2012)).

<sup>11</sup> ECDF Act Facts, FAMILY EQUALITY COUNCIL (2017), [https://www.familyequality.org/get\\_informed/advocacy/ecdf/ecdf-facts/](https://www.familyequality.org/get_informed/advocacy/ecdf/ecdf-facts/).

<sup>12</sup> Lambda Legal, Children’s Rights & Ctr. for the Study of Soc. Policy, *Safe Havens: Closing the Gap Between Recommended Practice and Reality for Transgender and Gender-Expansive Youth in Out-of-Home Care* (Apr. 2017), [https://www.lambdalegal.org/sites/default/files/publications/downloads/tgnc-policy-report\\_2017\\_final-web\\_05-02-17.pdf](https://www.lambdalegal.org/sites/default/files/publications/downloads/tgnc-policy-report_2017_final-web_05-02-17.pdf).

<sup>13</sup> U.S. DEP’T OF HEALTH & HUMAN SERVS., ADMIN. ON CHILDREN, YOUTH & FAMILIES, Information Memorandum ACYF-CB-IM-11-03, *Lesbian, Gay, Bisexual, Transgender and Questioning Youth in Foster Care* (Apr. 6, 2011). See also Shannan Wilber, Caitlin Ryan & Jody Marksamer, *CWLA Best Practice Guidelines for Serving LGBT Youth in Out-of-Home Care* 1 (2006); Child Welfare League of Am. & Lambda Legal, *Getting Down to Basics: Tools to Support LGBTQ Youth in Care* (2010) [hereinafter *Getting Down to Basics*].

Law, 19 percent of youth in foster care identify as LGBTQ.<sup>14</sup> Given the number of LGBTQ youth in the general population, the data collected in this survey shows that LGBTQ youth are disproportionately represented in foster care: it is estimated that there are between 1.5 and 2 times as many LGBTQ youth living in foster care than living outside foster care.<sup>15</sup>

The Williams Institute Study also documented that LGBTQ youth experience negative disparities in their experiences within the foster care system. In addition to having a higher average number of foster care placements, LGBTQ youth are more likely to be living in a group home environment.<sup>16</sup> They are also more likely to report being treated badly by the child welfare system,<sup>17</sup> are more likely to be hospitalized for emotional reasons,<sup>18</sup> and are more likely to become homeless at some point in their life.<sup>19</sup>

LGBTQ youth need more affirming placement options and not fewer. Placements in family homes reduce placements in costly and often harmful congregate care and increase permanency outcomes for those youth who cannot safely return home. Government funding to agencies that have clearly indicated their intent to discriminate against LGBTQ people results in reducing the pool of homes that are welcoming. Moreover, passing such legislation sends a harmful message to LGBTQ youth, who already face poor public health outcomes due to discrimination and societal stigma, that Oklahoma endorses the message that LGBTQ people are second-class citizens. According to the Williams Institute, polls have found that 78% of Oklahoma residents think that LGBTQ people experience discrimination in the state.<sup>20</sup> The government of Oklahoma should not contribute further to this perception, and send a negative message to Oklahoma's LGBTQ children, by enshrining government-funded discrimination in law. Rather than serving the most vulnerable youth in care, SB 1140 would add to the harms already being experienced by LGBTQ youth in care. In order to improve the wellbeing of children in foster care, SB 1140 should not be enacted.

### **III. SB 1140 Goes Against Professional Standards Recommended by Child Welfare Organizations**

Under federal law, state child welfare agencies are required to provide care consistent with professional standards. Professional organizations that advocate for the rights of children and the treatment of youth in care have repeatedly recognized the importance of affirming and

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<sup>14</sup> Bianca D.M. Wilson, Khush Cooper, Angel Kastanis, Sheila Nezhad, *New Report: Sexual and Gender Minority Youth in Foster Care*, WILLIAMS INST., at 6 (Aug. 2014), [https://williamsinstitute.law.ucla.edu/wp-content/uploads/LAFYS\\_report\\_final-aug-2014.pdf](https://williamsinstitute.law.ucla.edu/wp-content/uploads/LAFYS_report_final-aug-2014.pdf) [hereinafter *Sexual and Gender Minority Youth in Foster Care*].

<sup>15</sup> *Id.*

<sup>16</sup> *Id.*

<sup>17</sup> 18.5 percent of all youth in the Williams Institute study reported having experienced some form of discrimination based on their actual or perceived sexual orientation, gender identity, or gender expression. *Id.* at 35.

<sup>18</sup> The Williams Institute concluded that 13.47 percent of LGBTQ youth in foster care were hospitalized for emotional reasons, compared to 4.25 percent of non-LGBTQ youth. *Id.* at 38.

<sup>19</sup> Compared with 13.90 percent of non-LGBTQ respondents, 21.09 percent of LGBTQ youth surveyed in the Williams Institute study reported that they had ever been homeless. *Id.*

<sup>20</sup> WILLIAMS INST., *LGBT People in Oklahoma*.

supporting LGBTQ youth.<sup>21</sup> In a recent case before the United States Supreme Court, the American Psychiatric Association, the American Academy of Pediatrics, and 16 other physical and mental health professionals weighed in on the importance of affirmation of identity for the health of transgender youth: “[E]vidence confirms that policies excluding transgender individuals from facilities consistent with their gender identity . . . undermine well-established treatment protocols for gender dysphoria and exacerbate the condition; expose these individuals to stigma and discrimination as well as potential harassment and abuse by singling them out from their peers; harm their physical health by causing them to avoid restroom use; and impair their social and emotional development, leading to poorer health outcomes throughout life.”<sup>22</sup>

Notably, in 2012 the Child Welfare League of America (“CWLA”) and several national experts consolidated and summarized the work of multiple leaders in the fields of medicine, law, and social sciences to draft the *Recommended Practices to Promote the Safety and Well-Being of Lesbian, Gay, Bisexual, Transgender and Questioning (LGBTQ) Youth and Youth at Risk of or Living with HIV in Child Welfare Settings*.<sup>23</sup> The *Recommended Practices* explicitly outlines the need for providers to support and affirm youth in their sexual orientation, gender identity, and gender expression (“SOGIE”). CWLA’s Blueprint for Excellence requires agencies to protect youth from discrimination and harassment on account of SOGIE and ensure that they receive supportive and affirming care and services. However, Oklahoma’s proposed SB 1140 would allow for child welfare service providers to dramatically depart from the recommended practices of professional organizations, and would leave the state with no ability to take action against agencies who actively discriminate in the name of their religious beliefs.

#### **IV. SB 1140 Would Be Vulnerable to Legal Challenge at Taxpayer’s Expense**

Among the potential constitutional and other legal infirmities of SB 1140, which would put the state at potential risk of having to defend the bill through state-funded litigation, are those related to excessive entanglement between state funding and religion, and the bill’s potential facilitation of the unlawful use of religion to harm others.

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<sup>21</sup> See, e.g., Am. Acad. Child & Adolescent Psychiatry, *Sexual Orientation, Gender Identity, and Civil Rights* (rev’d 2009), [https://www.aacap.org/AACAP/Policy\\_Statements/2009/Sexual\\_Orientation\\_Gender\\_Identity\\_and\\_Civil\\_Rights.aspx](https://www.aacap.org/AACAP/Policy_Statements/2009/Sexual_Orientation_Gender_Identity_and_Civil_Rights.aspx); Am. Acad. Family Physicians, *Discrimination, Patient* (rev’d 2015), <https://www.aafp.org/about/policies/all/patient-discrimination.html>; Am. Medical Ass’n, *Support of Human Rights and Freedom H-65.965* (2017), [https://policysearch.ama-assn.org/policyfinder/detail/\\*?uri=%2FAMADoc%2FHOD.xml-0-5094.xml](https://policysearch.ama-assn.org/policyfinder/detail/*?uri=%2FAMADoc%2FHOD.xml-0-5094.xml); Nat’l Adoption Ctr., *Adoption by Members of the LGBT Community* (rev’d 2008), <http://www.adopt.org/our-policies#LGBT>; Nat’l Ass’n Soc. Workers, *Social Work Speaks: National Association of Social Workers Policy Statements* at 340 (9th ed. 2012).

<sup>22</sup> Brief of Amici Curiae Am. Acad. of Pediatrics, Am. Psychiatric Ass’n, Am. College of Physicians & 17 Additional Medical & Mental Health Orgs. in Support of Respondent at 24, *Gloucester Cty. Sch. Bd. v. G.G. ex rel. Grimm*, 136 S. Ct. 2442 (2016) (<https://www.aclu.org/legal-document/gloucester-county-school-board-v-gg-american-academy-pediatrics-et-al>).

<sup>23</sup> Child Welfare League of Am., et al., *Recommended Practices to Promote the Safety and Well-Being of Lesbian, Gay, Bisexual, Transgender and Questioning (LGBTQ) Youth and Youth at Risk of or Living with HIV in Child Welfare Settings* (2012), <https://www.lambdalegal.org/sites/default/files/publications/downloads/recommended-practices-youth.pdf>.

## A. SB 1140 Would Be Vulnerable to Legal Challenge

The Establishment Clause of the First Amendment bars the State from providing or refusing to provide government services, such as the care of children in the foster care system, based on religious criteria. The Establishment Clause also prohibits the State from delegating a government function to religious organizations and then allowing those organizations to perform that government function pursuant to religious criteria.

Oklahoma's Department of Human Services ("DHS") is responsible for all children in the Oklahoma foster care system. A child's case with DHS typically starts after Child Protective Services removes the child from their family for abuse or neglect and a court orders that the child be placed into foster care. If the child cannot ultimately be reunited with their parent or parents despite the provision of services to the parents and parental rights are terminated, DHS seeks to find a permanent family for the child, typically through adoption. DHS's responsibilities for children who come into its care include recruiting and identifying appropriate families to care for these children either temporarily as foster parents, until the children can be reunited with their families, or permanently as adoptive parents.

DHS performs this public function in part by contracting with private agencies that are licensed by DHS's Child Care Facilities Licensing Division as "child placing agencies" to arrange for or place children in foster family homes, adoptive homes, or independent living programs. OKLA. STAT. ANN. § 402(5); OKLA. ADMIN. CODE § 340:110-5-3. To fund the state's child welfare system, the Oklahoma legislature annually makes appropriations for adoption and foster care services. With these appropriated funds, DHS pays private child placing agencies under contract with the State to provide adoption and foster care services.

Although DHS retains ultimate supervisory responsibility in all cases, much of the on-the-ground foster care and adoption work is performed by taxpayer-funded child placing agencies. Through statute and regulation, DHS has conferred authority on private child placing agencies to make decisions regarding licensing and contracting with foster homes for the care and supervision of children. OKLA. STAT. ANN. § 404.1(B)(1)(a); OKLA. ADMIN. CODE § 340:110-5-1. DHS has entered into service contracts with 61 child placing agencies,<sup>24</sup> many of which are religiously affiliated.

If the State of Oklahoma were to pass SB 1140, it would permit a religiously-affiliated agency to use religious criteria in the performance of a taxpayer-funded public service and would prohibit DHS from taking any action against the agency for doing so. However, when a State hires private agencies to perform a government function, it must ensure those services are provided in accordance with the U.S. Constitution, just as if the State provided those services directly. Because the State could not, consistently with the Establishment Clause, disqualify prospective families from fostering and adopting children based solely on religious objections to such families, the State's authorization of such conduct by the contractors it hires would be unconstitutional. Thus it is most likely that SB 1140 would be subject to challenge as a violation of the Establishment Clause. In fact, a similar law which recently took effect in Michigan is

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<sup>24</sup> OKLA. DEP'T OF HUMAN SERVS., *We are That Agency*, at 52 (2017), [http://www.okdhs.org/OKDHS%20Report%20Library/WeAreThatAgency2017DHSAnnualReport\\_02022018.pdf](http://www.okdhs.org/OKDHS%20Report%20Library/WeAreThatAgency2017DHSAnnualReport_02022018.pdf).

currently being challenged in federal court for violating both the Establishment Clause and the Fourteenth Amendment's Equal Protection Clause. *See Dumont v. Lyon*.<sup>25</sup> In another case as well, Lambda Legal recently filed a lawsuit in federal district court in Washington, D.C. challenging the U.S. Department of Health and Human Services' funding of a faith-based provider that turned away a same-sex couple seeking to foster a refugee child. In addition to violations of the Establishment Clause, we are challenging government-funding of the agency based on Due Process and Equal Protection violations.<sup>26</sup>

SB 1140 would be vulnerable to challenge under the Establishment Clause for several reasons. First, the law can be seen to be endorsing and promoting religion. As described by the United States Supreme Court, "the core rationale underlying the Establishment Clause is preventing a fusion of governmental and religious functions." *Larkin v. Grendel's Den, Inc.*<sup>27</sup> By providing taxpayer funding to religious organizations, the State of Oklahoma risks violating the Establishment Clause principle that "civil power must be exercised in a manner neutral to religion." *Bd. Of Educ. of Kiryas Joel Village Sch. Dist. v. Grumet*.<sup>28</sup>

Additionally, SB 1140 could be subject to challenge for privileging religion to the detriment of third parties—not only prospective families, but also the very children the foster care system was created to serve. The First Amendment forbids accommodations of religion that impose substantial burdens on third parties.<sup>29</sup> In *Estate of Thorton v. Caldor, Inc.*, the Supreme Court rejected the argument that the government can accommodate religion even when it causes harm to third parties.<sup>30</sup> By allowing state-contracted, taxpayer-funded child placing agencies to use religious eligibility criteria when performing public services, SB 1140 runs afoul of the Establishment Clause by imposing a significant burden on children in care, who lose out on qualified families, and on the families who are turned away from fostering and adopting. As will be described in subsection (B), despite arguments made by advocates of religious exemption laws, the Supreme Court's recent decision in *Trinity Lutheran Church v. Comer*<sup>31</sup> does not make bills like SB 1140 constitutionally sound.

Finally, the bill appears to advance a particular religious view, namely one which opposes same-sex relationships. In *Edwards v. Aguillard*, the Supreme Court struck down a Louisiana law which forbade the teaching of evolution in public schools unless the lesson also included the theory of "creation science."<sup>32</sup> In striking down the law, the Court made clear that because the law "advance[s] a particular religious belief, the Act endorses religion in violation of the First Amendment."<sup>33</sup> Similarly, SB 1140 advances a particular religious viewpoint which

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<sup>25</sup> See Complaint, *Dumont v. Lyon*, No. 2:17-cv-13080 (E.D. Mich. Sept. 20, 2017) (2017 WL 4161971).

<sup>26</sup> See Complaint, *Marouf v. Azar*, Case No. 1:18-cv-378 (filed D.D.C. Feb. 20, 2018), [https://www.lambdalegal.org/in-court/legal-docs/marouf\\_dc\\_20180220\\_complaint](https://www.lambdalegal.org/in-court/legal-docs/marouf_dc_20180220_complaint)

<sup>27</sup> *Larkin v. Grendel's Den, Inc.*, 459 U.S. 116, 126 (1982) (quoting *Sch. Dist. of Abington Twp. V. Schempp*, 374 U.S. 203, 222 (1963)).

<sup>28</sup> *Bd. Of Educ. Of Kiryas Joel Village Sch. Dist. v. Grumet*, 512 U.S. 687, 704 (1994).

<sup>29</sup> *Cutter v. Wilkinson*, 544 U.S. 709 (2005) (following *Estate of Thorton v. Caldor, Inc.*, 472 U.S. 703 (1985)).

<sup>30</sup> *Estate of Thorton v. Caldor, Inc.*, 472 U.S. 703, 708-09 (1985) (striking down a statute requiring "those who observe a Sabbath . . . must be relieved of the duty to work on that day, no matter what burden or inconvenience this imposes on the employer or fellow workers.").

<sup>31</sup> *Trinity Lutheran Church of Columbia, Inc. v. Comer*, 137 S. Ct. 2012 (2017).

<sup>32</sup> *Edwards v. Aguillard*, 482 U.S. 578, 581 (1987).

<sup>33</sup> *Id.* at 593.

opposes same-sex relationships and LGBTQ individuals—including children in care—more generally. By allowing for an exemption to a generally applicable law for a specific religious belief, SB 1140 endorses religion in violation of the Establishment Clause.

In order to avoid litigation for violating the Establishment Clause, Oklahoma should not enact SB 1140.

B. *Trinity Lutheran* Does Not Provide Constitutional Cover for Religiously-Based Discrimination by Government-Funded Child Placing Agencies

Although some proponents of SB 1140 and similar bills in other states have invoked the recent Supreme Court case *Trinity Lutheran Church v. Comer* as sanctioning such legislation, that case does not provide constitutional cover for the type of religion-cloaked discrimination by recipients of state contracts that inevitably will occur should SB 1140 become law. There is a substantial difference between the type of public funding that is constitutionally allowed under *Trinity Lutheran* and the type of public funding of discriminatory conduct that SB 1140 would enable. *Trinity Lutheran* requires that both religious and secular schools be considered eligible for public funding put to secular use—in that case, funding for the use of recycled materials to resurface playgrounds. What SB 1140 would allow, in contrast, is state funding for discriminatory conduct by those asserting religious beliefs as justification for the discrimination. Chief Justice Roberts and other members of the Supreme Court in *Trinity Lutheran* indeed cautioned against just such a broad application of that case, explaining in footnote 3 of that case that, “[t]his case involves express discrimination based on religious identity with respect to playground resurfacing. We do not address religious uses of funding or other forms of discrimination.”<sup>34</sup> Consequently, that case only addresses public funding of secular programs, not funding of discriminatory conduct explicitly cloaked in religion.

Furthermore, courts of appeals across the country have addressed many recent attempts to create religious exemptions from compliance with anti-discrimination laws and professional standards, creating a powerful body of published precedents establishing that religion cannot be used as a weapon to violate others’ civil rights.<sup>35</sup> Indeed, the U.S. Supreme Court’s 2014

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<sup>34</sup> *Trinity Lutheran*, at 2024 n.3.

<sup>35</sup> See, e.g., *Knight v. Connecticut Dep’t of Pub. Health*, 275 F.3d 156 (2d Cir. 2001) (rejecting free exercise wrongful termination claim of visiting nurse fired for antigay proselytizing to home-bound AIDS patient). See also Physician’s objection to working with an LGB person; *Bruff v. North Miss. Health Servs., Inc.*, 244 F.3d 495, 497-98 (5th Cir. 2001) (employee not entitled to refuse on religious grounds to counsel patients about non-marital relationships); *Berry v. Dep’t of Social Servs.*, 447 F.3d 642 (9th Cir. 2006) (employee not entitled to discuss religion with clients); *North Coast Women’s Care Med. Grp., Inc. v. San Diego Cnty. Superior Court (Benitez)*, 189 P.3d 959 (Cal. 2008) (physicians not entitled to refuse on religious grounds to provide infertility medical care to lesbian patient). See also *Bellmore v. United Methodist Children’s Home of the N. Georgia Conf., Inc.*, Fulton Cty. Super. Ct. (filed July 31, 2002) (settled Nov. 5, 2003 with defendants Children’s Home and State of Georgia agreeing not to use taxpayer dollars to discriminate in employment or services), [https://www.lambdalegal.org/news/dc\\_20031105\\_in-first-of-its-kind-example-lambda-announces-settlement](https://www.lambdalegal.org/news/dc_20031105_in-first-of-its-kind-example-lambda-announces-settlement); *Hyman v. City of Louisville*, 132 F. Supp. 2d 528, 539-540 (W.D. Ky. 2001) (physician’s religious beliefs did not exempt him from law prohibiting employment discrimination based on sexual orientation or gender identity), *vacated on other grounds* by 53 Fed. Appx. 740 (6th Cir. 2002); *Stepp v. Review Bd. of Indiana Emp. Sec. Div.*, 521 N.E.2d 350, 352 (Ind. 1988) (lab technician not entitled to refuse to do tests on specimens labeled with HIV warning based on his religious belief that “AIDS is God’s plague on man and performing the tests would go against God’s will”).



decision in *Burwell v. Hobby Lobby* reinforced that accommodation of religious rights of some must not have adverse impacts on the rights of others.<sup>36</sup> That was consistent with the Supreme Court’s prior admonitions in *Cutter* and *Estate of Thornton* that any accommodation of religious interests always must be “measured so that it does not override other significant interests” or “impose unjustified burdens on other[s].”<sup>37</sup> There is no reason to believe that the Court will suddenly take a different approach in *Masterpiece Cakeshop* and condone using religion as a means of discriminating against others in this country.

In the meantime, legislation that would threaten to enable the violation of the constitutional and civil rights of youth in out-of-home-care or their prospective foster or adoptive parents is vulnerable to being challenged in court. Rather than risk wasting taxpayer money in such a manner, it would be prudent for the legislature to avoid exposing children to further harm in a system that already struggles to adequately keep them safe and meet their needs.

Respectfully submitted,



M. Currey Cook, Esq.  
Youth in Out-of-Home Care Project Director  
Lambda Legal

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<sup>36</sup> *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751, 2760 (2014). Indeed, every member of the Court, whether in the majority or in dissent, reaffirmed that the burdens on third parties must be taken into account. *See id.* at 2781 n.37.; *id.* at 2786–87 (Kennedy, J., concurring); *id.* at 2790, 2790 n.8 (Ginsburg, J., joined by Breyer, Kagan, and Sotomayor, JJ., dissenting).

<sup>37</sup> *Cutter v. Wilkinson*, 544 U.S. at 722, 726.