Lambda Legal
making the case for equality

May 4, 2018

The Office of Governor Mary Fallin
Oklahoma State Capitol
2300 N. Lincoln Blvd., Room 212
Oklahoma City, OK 73105
(405)-521-2342

RE: SB 1140

Dear Governor Fallin,

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") youth experiencing homelessness, in foster care, and in juvenile justice settings.

We implore you to veto SB 1140, an unconstitutional 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, including those receiving government funding, to discriminate against potential families, SB 1140 violates recommended professional standards of child welfare experts, such as the Child Welfare League of America.[1] And, if enacted, SB 1140 may be vulnerable to a legal challenge, at taxpayer expense.

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.[2] There are nearly 10,000 children in state

[1] *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.
[2] ECDF Act Facts, FAMILY EQUALITY COUNCIL (2017), https://www.familyequality.org/get_informed/advocacy/ecdf/ecdf-facts/.

custody in Oklahoma.[3] According to Kids Count, in 2015, 4,288 were waiting for adoption[4] and fifty percent of those children had been waiting for adoption for over two years.[5] 311 children ultimately were emancipated or aged out without a permanent home through reunification with parents, adoption or legal guardianship.[6] 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.[7] 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."[8] 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.[9] 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."[10]

---

[3] *Statistics*, OKLAHOMA FOSTERS INITIATIVE, http://www.oklahomafosters.com/statistics/ (last visited April 9, 2018).
[4] *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).
[5] *Id.*
[6] *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).
[7] Gary J. Gates, *LGBT Parenting in the United States*, WILLIAMS INST. (Feb. 2013), https://williamsinstitute.law.ucla.edu/wp-content/uploads/LGBT-Parenting.pdf.
[8] 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.
[9] 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*"].
[10] 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),

Lambda Legal
making the case for equality

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.[11] 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.[12] 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.

---

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, & 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)).

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

[12] 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.

LGBTQ youth are over-represented in child welfare systems across the country.[13] According to one recent federally-funded study by the Williams Institute at UCLA School of Law, 19 percent of youth in foster care identify as LGBTQ.[14] 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.[15]

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.[16] They are also more likely to report being treated badly by the child welfare system,[17] are more likely to be hospitalized for emotional reasons,[18] and are more likely to become homeless at some point in their life.[19]

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.[20] 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.

---

[13] 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*].

[14] 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 [hereinafter *Sexual and Gender Minority Youth in Foster Care*].

[15] *Id.*

[16] *Id.*

[17] 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.

[18] 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.

[19] 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.*

[20] WILLIAMS INST., *LGBT People in Oklahoma*.

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 supporting LGBTQ youth.[21] 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."[22]

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*.[23] 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.

---

[21] *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; 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; 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).

[22] 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).

[23] 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.

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.

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,[24] many of which are religiously affiliated.

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

If you were to sign SB 1140 into law, 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 currently being challenged in federal court for violating both the Establishment Clause and the Fourteenth Amendment's Equal Protection Clause. *See Dumont v. Lyon*.[25] 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.[26]

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.*[27] 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*.[28]

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.[29] 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. [30] 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

[25] *See* Complaint, *Dumont v. Lyon*, No. 2:17-cv-13080 (E.D. Mich. Sept. 20, 2017) (2017 WL 4161971).
[26] *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
[27] *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)).
[28] *Bd. Of Educ. Of Kiryas Joel Village Sch. Dist. v. Grumet*, 512 U.S. 687, 704 (1994).
[29] *Cutter v. Wilkinson*, 544 U.S. 709 (2005) (following *Estate of Thorton v. Caldor, Inc.*, 472 U.S. 703 (1985)).
[30] *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.").

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*[31] 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 and LGBT people. In *Edwards v. Aguillard*, the Supreme Court struck down a Louisiana law which forbad the teaching of evolution in public schools unless the lesson also included the theory of "creation science."[32] 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."[33] Similarly, SB 1140 advances a particular religious viewpoint which 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, you should veto 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."[34] Consequently, that case only addresses public funding of secular programs, not funding of discriminatory conduct explicitly cloaked in religion.

[31] *Trinity Lutheran Church of Columbia, Inc. v. Comer*, 137 S. Ct. 2012 (2017).
[32] *Edwards v. Aguillard*, 482 U.S. 578, 581 (1987).
[33] *Id.* at 593.
[34] *Trinity Lutheran*, at 2024 n.3.

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.[35] Indeed, the U.S. Supreme Court's 2014 decision in *Burwell v. Hobby Lobby* reinforced that accommodation of religious rights of some must not have adverse impacts on the rights of others.[36] 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]."[37] 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.

C. Even as Applied to Privately-Owned Child Welfare Agencies, SB 1140 is Constitutionally Infirm

As mentioned above, the Establishment Clause prohibits the State from delegating a government function to religious organizations and then allowing them to perform that government function pursuant to religious criteria. In the context of Fourteenth Amendment challenges as well, the fact that child welfare agencies are performing a government function may also render their discrimination a "state action," making SB 1140 even more vulnerable to constitutional challenge.

The Supreme Court has explained that actions of private parties may result in constitutional liability when the actions are "fairly attributable to the State." *Rendell-Baker v. Kohn*.[38] 457 U.S. 830, 838 (1982). This may be the case "when the State provides 'significant

[35] *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*; 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").

[36] *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).

[37] *Cutter v. Wilkinson*, 544 U.S. at 722, 726.

[38] *Rendell-Baker v. Kohn*, 457 U.S. 830, 838 (1982).

encouragement, either overt or covert,' of unconstitutional conduct, for example, when an agency is controlled by a state agency, "when it has been delegated a public function by the State, when it is 'entwined with governmental policies,' or when government is 'entwined in [its] management or control.'" *Brentwood Acad. v. Tennessee Secondary Sch. Athletic Ass'n*.[39]

Consequently, the Supreme Court in a number of decisions has held race discrimination by various private actors to amount to unconstitutional state action, with the private actors being engaged in government functions or otherwise supported by the State in their discrimination. In *Pennsylvania v. Bd. of Directors of City Trusts*,[40] for example, a private fund used to operate a school open only to "poor white male orphans" by administered by Philadelphia's Board of Directors of City Trusts was held to amount to unconstitutional race discrimination by the State itself. Even when, on remand, private trustees were appointed, the Third Circuit subsequently held that that substitution was unconstitutional. *Pennsylvania v. Brown*.[41] This case followed the precedent of *Shelley v. Kraemer*,[42] in which the Court held that judicial enforcement of racially restrictive covenants, even if created by private agreements, was unconstitutional. Similarly, in *Marsh v. Alabama*,[43] a privately-owned town that passed and functioned as a public municipality was subject to constitutional discrimination claims.

Importantly, when a private party acts pursuant to a state law, the private conduct may be considered state action if the state law authorizes discriminatory conduct that would not have been permissible prior to the enactment. *See Reitman v. Mulkey*.[44] If the State subsidizes unconstitutionally discriminatory behavior, that subsidization can even more easily result in a finding of state responsibility for the discrimination. *See Burton v. Wilmington Parking Authority*.[45]

Consequently, if signed into law, SB 1140, which permits discrimination in foster care and adoption systems, whether financially or otherwise lending State encouragement and support to such discrimination, could amount to unconstitutional discrimination by the State itself. This is the case because state laws that affirmatively encourage or enable unconstitutional actions by private entities engaged in unconstitutional behavior are themselves unconstitutional as a result.

---

[39] *Brentwood Acad. v. Tennessee Secondary Sch. Athletic Ass'n*, 531 U.S. 288, 296 (2001) (citations omitted).
[40] *Pennsylvania v. Bd. of Directors of City Trusts*, 353 U.S. 230, 231 (1957)
[41] *Pennsylvania v. Brown*, 392 F.2d 120 (3d Cir.), cert denied, 391 U.S. 921 (1968).
[42] *Shelley v. Kraemer*, 334 U.S. 1 (1948).
[43] *Marsh v. Alabama*, 326 U.S. 501, 507 (1946).
[44] *Reitman v. Mulkey*, 387 U.S. 369 (1967) (an amendment to the California constitution permitting private discrimination in real estate transactions amounted to the State's official encouragement of discrimination, which rendered the resulting private discrimination "state action" for purposes of constitutional challenge).
[45] *Burton v. Wilmington Parking Authority*, 365 U.S. 715 (1961) (actions of coffee shop engaging in racial segregation were held to be unconstitutional state action because of the public funds used to build the parking lot to which the coffee shop was adjacent).

In the context of child welfare agencies specifically, various federal courts have concluded that the discriminatory actions of privately-owned child welfare agencies may be treated as that of the State itself. *See, e.g., See Bartell v. Lohiser*;[46] *Wilder v. Bernstein*;[47] *Duchesne v. Sugarman*;[48] *Perez v. Sugarman*.[49] As explained in *Perez*, when city welfare officials transfer children to the care of private foster care agencies, "it is the State which in effect is providing the care through the private institutions. This exercise of the administrative placing prerogative does not affect in any way the State's ultimate responsibility for the well-being of the children, and, consequently, the public nature of the function being performed."[50] Similarly, in *Dixon v. Women's Christian All. Foster Care Agency*,[51] an employment case, a federal court wrote: "Plaintiffs challenge only Defendant's conduct in terminating their employment, and not any conduct relating to Defendant's foster care services. Defendant's termination of Plaintiffs, however, *unlike the placement and care of foster children*, was not a traditionally exclusive government function" (emphasis added). This passage indicates that placement and care of foster children can be viewed as a traditionally exclusive government function. While a Tenth Circuit case from sixteen years ago, *Johnson v. Rodrigues*,[52] came to a different conclusion in respect to Utah's adoption system, that decision does not provide certain cover for legislation like SB 1140 that provides "significant encouragement" by the state of discriminatory actions of state agencies in Oklahoma that would treat children differently based on factors such as sexual orientation and gender identity, through the State-endorsed enforcement of particular religious tenets.

The plain text of SB 1140 reveals explicit and significant encouragement of agencies to engage in what amounts to unconstitutional conduct. Consequently, between the text of the bill and the intertwined nature of private and State child welfare agencies, "there is such a close nexus between the State and the challenged action that the seemingly private behavior may be fairly treated as that of the State itself."[53]

Applying these principles and precedents, it is likely that in a challenge to SB 1140, a federal court would recognize a private agency's provision of child welfare services in this context as a government function, rendering the law subject to constitutional attack. 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

---

[46] *Bartell v. Lohiser*, 215 F.3d 550, 556 (6th Cir. 2000).
[47] *Wilder v. Bernstein*, 645 F. Supp. 1292, 1315–16 (S.D.N.Y. 1986), aff'd, 848 F.2d 1338 (2d Cir. 1988).
[48] *Duchesne v. Sugarman*, 566 F.2d 817, 822 n. 4 (2d Cir.1977).
[49] *Perez v. Sugarman*, 499 F.2d 761 (2d Cir.1974).
[50] *Perez*, 499 F.2d at 765.
[51] *Dixon v. Women's Christian All. Foster Care Agency*,[51] No. CIV.A. 13-3730, 2014 WL 5393541, at *5 (E.D. Pa. Sept. 26, 2014).
[52] *See Johnson v. Rodrigues*, 293 F.3d 1196, 1203 (10th Cir. 2002)(concluding that an adoption agency was not performing an exclusive state function when it facilitated the adoption of the defendant's child; "Johnson has not presented any evidence indicating that the adoption center or adoptive parents are the 'exclusive means to adopt children in Utah.' Indeed, four and a half pages of adoption agencies are listed in the Salt Lake City Yellow Pages. Because all actors involved here were private parties, and there was no exclusive state involvement in the adoption process, we agree that there was no state action under the public function test."),
[53] *Brentwood Acad.*, 531 U.S. at 295.

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.

Both the federal government and all major child welfare organizations have, for years, called for states to ensure that LGBTQ youth and families are protected from discrimination in child welfare systems. Discrimination against LGBTQ youth in foster care and lack of affirming placements contribute to extraordinarily high rates of homelessness and trafficking and other negative health and life outcomes. These poor outcomes also cost the State of Oklahoma by inhibiting the ability of these youth to be full and productive citizens and requiring expensive interventions and public services, such as residential treatment and shelters for homeless youth. Rather than enshrining discrimination into law and contributing to poor outcomes for Oklahoma's youth, Oklahoma should follow the lead of the majority of states in the country that are enacting policies and protections that allow LGBTQ youth to access affirming and supportive services and placements , not less. Currently twenty-eight states, including Tennessee and Florida, have either LGBTQ-specific policies or sexual orientation and gender-identity inclusive non-discrimination laws or government agency policies which protect youth in the child welfare system from discrimination based on sexual orientation and gender identity. Rather than signing discrimination into law, the State of Oklahoma should focus on enacting protections for these most vulnerable youth.

For these reasons, Lambda Legal implores you to veto the bill and ensure Oklahoma is on the rights side of history and assisting and protecting its most vulnerable youth rather than sending the message that they are less than human under the law.

Respectfully submitted,

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