

March 25, 2019

Tennessee State Senate
Senate Judiciary Committee
716 Cordell Hull Building
Nashville, TN 37243
(615) 741-3513

RE: SB 1304 / HB 836

Dear Committee Chair Mike Bell, 1st Vice-Chair Jon Lundberg, and 2nd Vice-Chair Dawn White:

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 child welfare systems, and in juvenile justice settings.

We submit this testimony to implore you not to pass SB 1304, an unconstitutional bill which will harm Tennessee’s most vulnerable children. SB 1304 would decrease the number of foster and adoptive homes available to youth in Tennessee’s child welfare system and send a harmful message to children in care that Tennessee endorses discrimination. By permitting providers, including those receiving government funding, to discriminate against potential families, SB 1304 violates recommended professional standards of child welfare experts, such as the Child Welfare League of America.¹ Tennessee’s own child welfare professionals are committed to the equal treatment of LGBTQ youth in its child welfare system: the Department of Children’s Services has enacted an affirming LGBTQ-specific policy² and the Tennessee Commission on Children and Youth is opposed to SB 1304.³ And, if enacted, SB 1304 would be vulnerable to a legal challenge at taxpayer expense for violating the Establishment Clause and other provisions of the U.S. Constitution, as well as other federal laws.

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 STATE OF TENN., DEP’T OF CHILDREN’S SERVS., *Administrative Policies and Procedures: 20.20, Guidelines for Managing Children/Youth in DCS Custody Related to Sexual Orientation, Gender Identity and Expression* (Jan. 30, 2015), <https://files.dcs.tn.gov/policies/chap20/20.20.pdf>.

³ TENN. COMM’N ON CHILDREN & YOUTH, 2019 LEGISLATIVE GUIDANCE, 32, <https://www.tn.gov/content/dam/tn/tccy/documents/leg/leg-guidance1.pdf>.

I. SB 1304 Would Decrease the Number of Foster and Adoptive Homes for Youth

SB 1304 would decrease access to temporary and permanent, loving homes for children in Tennessee’s child welfare system. It is estimated that around 20,000 youth “age out” of the child welfare 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.⁴ There are over 8,000 children in state custody in Tennessee.⁵ According to the Administration for Children & Families, in 2017, over 1,300 were waiting for adoption.⁶ 466 children ultimately were emancipated or aged out without a permanent home through reunification with parents, adoption or legal guardianship.⁷ 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 foster or adoptive placements for youth. In fact, it has been demonstrated that same-sex couples are four times more likely to adopt or foster children than different-sex couples.⁸ Rather than increasing opportunities for youth, SB 1304 would decrease the number of safe and loving homes available for potential matching.

While Tennessee 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

⁴ ECDF Act Facts, FAMILY EQUALITY COUNCIL (2017), https://www.familyequality.org/get_informed/advocacy/ecdf/ecdf-facts/.

⁵ *Children in foster care in Tennessee*, KIDS COUNT DATA CTR., <https://datacenter.kidscount.org/data/tables/6243-children-in-foster-care?loc=44&loct=2#detailed/2/44/false/870,573,869,36,868,867,133,38,35,18/any/12987> (last visited March 4, 2019).

⁶ *Trends in Foster Care and Adoption*, U.S. DEP’T OF HEALTH & HUMAN SERVS, CHILDREN’S BUREAU, <https://www.acf.hhs.gov/cb/resource/trends-in-foster-care-and-adoption> (last visited March 5, 2019).

⁷ *Children exiting foster care by exit reason in Tennessee*, KIDS COUNT DATA CTR., <https://datacenter.kidscount.org/data/tables/6277-children-exiting-foster-care-by-exit-reason?loc=44&loct=2#detailed/2/44/false/870,573,869,36,868,867,133,38,35,18/2631,2636,2632,2633,2630,2629,2635,2634/13050,13051> (last visited March 4, 2019).

⁸ Gary J. Gates, *LGBT Parenting in the United States*, WILLIAMS INST. (Feb. 2013), <https://williamsinstitute.law.ucla.edu/wp-content/uploads/LGBT-Parenting.pdf>.

care, and are a largely untapped resource- an estimated 2 million LGB individuals [nationwide] are interested in adopting.”⁹

As in other states, this is certainly true in Tennessee, which is home to 130,000 LGBT adults and 11,000 same-sex couples; 6 percent of same-sex couples with children in the state are raising adoptive children compared to 4% of different-sex couples.¹⁰ 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.”¹¹

Any action by Tennessee that signals to potential families that they are not welcome has a chilling effect on new adoptive (and foster-to-adopt) 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 Tennessee’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.¹² Thus, there is no reasonable justification for SB 1304 when considering the state’s responsibility to prioritize the best interest of children in its child welfare system, and the reality that these children would be harmed by decreasing the number of potential foster and adoptive homes available for them. Similarly, and it should go without saying, people of all

⁹ 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>.

¹⁰ THE WILLIAMS INST., *LGBT People in Tennessee*, <https://williamsinstitute.law.ucla.edu/wp-content/uploads/Tennessee-fact-sheet.pdf> [hereinafter “WILLIAMS INST., *LGBT People in Tennessee*”].

¹¹ 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 (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)).

¹² ECDF Act Facts, FAMILY EQUALITY COUNCIL (2017), https://www.familyequality.org/get_informed/advocacy/ecdf/ecdf-facts/.

faiths, can be good parents. Permitting agencies to use criteria that is unrelated to the actual ability to parent eliminates potential homes that Tennessee children need.

II. SB 1304 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 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.¹³ 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.¹⁴ 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.¹⁵ 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.¹⁶

¹³ 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.

¹⁴ 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*].

¹⁵ 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*].

¹⁶ *Id.*

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.¹⁷ They are also more likely to report being treated badly by the child welfare system,¹⁸ to be hospitalized for emotional reasons,¹⁹ to have juvenile justice system involvement,²⁰ and to become homeless at some point in their life.²¹

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 Tennessee endorses the message that LGBTQ people are second-class citizens – all contrary to Tennessee’s obligation to ensure the well-being of children in its care.²² According to the Williams Institute, opinion research has found that 80 percent of Tennessee residents think that LGBTQ people experience discrimination in the state.²³ The government of Tennessee should not contribute further to this perception, and send a negative message to Tennessee’s LGBTQ children, by enshrining government-funded discrimination in law.

Rather than serving the most vulnerable youth in care, SB 1304 would add to the harms already being experienced by LGBTQ youth in care. In order to improve the wellbeing of children in care, SB 1304 should not be enacted. Tennessee has, consistent with its legal obligations and professional standards, and informed by the research cited above, adopted an

¹⁷ *Id.*

¹⁸ 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.

¹⁹ 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.

²⁰ Bianca D. M. Wilson et al., *Disproportionality and Disparities among Sexual Minority Youth in Custody*, 46 J. OF YOUTH & ADOLESCENCE 1547 (2017), <https://link.springer.com/article/10.1007/s10964-017-0632-5>.

²¹ 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. *Sexual and Gender Minority Youth in Foster Care*, *supra* note 16, at 38.

²² Amicus Curiae Brief of Organizations Serving LGBTQ Youth in Support of Appellees and Intervenor-Appellees, *Fulton v. City of Philadelphia*, No. 18-2574 (3d. Cir. appeal filed July 16, 2018) (No. 003113052254), 2018 WL 4862578.

²³ WILLIAMS INST., *LGBT People in Tennessee*.

LGBTQ youth policy²⁴ and SB 1304 would be a step backwards inconsistent with this affirming, supportive policy and Tennessee’s commitment to meet the needs of this population.

III. SB 1304 Goes Against Professional Standards Recommended by Child Welfare Organizations

Under federal law, state child welfare agencies receiving federal funding are required to provide care consistent with professional standards.²⁵ The Child Welfare League of America, a leading voice on child welfare issues, has expressed support for same-sex parenting²⁶ and their Standards of Excellence for Family Foster Care Services establishes a nondiscrimination policy for the selection of foster parents which protects against discrimination on the basis of sexual orientation.²⁷ Further, 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.²⁸ 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 emphasized 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

²⁴ STATE OF TENN., DEP’T OF CHILDREN’S SERVS., *Administrative Policies and Procedures: 20.20, Guidelines for Managing Children/Youth in DCS Custody Related to Sexual Orientation, Gender Identity and Expression* (Jan. 30, 2015), <https://files.dcs.tn.gov/policies/chap20/20.20.pdf>.

²⁵ Social Security Act § 471, 42 U.S.C. § 671(a)(10) (“In order for a State to be eligible for payments under this part, it shall have a plan approved by the Secretary which . . . provides--(A) for the establishment or designation of a State authority or authorities that shall be responsible for establishing and maintaining standards for foster family homes and child care institutions which are reasonably in accord with recommended standards of national organizations concerned with standards for the institutions or homes, including standards related to admission policies, safety, sanitation, and protection of civil rights, and which shall permit use of the reasonable and prudent parenting standard[.]”).

²⁶ CHILD WELFARE LEAGUE OF AM., *CWLA’s Position on Same-Sex Parenting*, <https://www.cwla.org/position-statement-on-parenting-of-children-by-lesbian-gay-and-bisexual-adults/> (last visited March 5, 2019).

²⁷ *Id.* (“The family foster care agency should not reject foster parent applicants solely due to their age, income, marital status, race, religious preference, *sexual orientation*, physical or disabling condition, or location of the foster home.”) (quoting CHILD WELFARE LEAGUE OF AM., *CWLA STANDARDS OF EXCELLENCE FOR FAMILY FOSTER CARE*, § 3.18 (1995)).

²⁸ *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).

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.”²⁹

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*.³⁰ 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, Tennessee’s proposed SB 1304 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 when performing this government function with public funds.

As referenced above, Tennessee’s Commission on Children and Youth opposes SB 1304 and specifically noted that it “would inappropriately shrink the pool of potential foster and forever families for infants and children.”³¹ Further, the organization stated that “[t]his legislation is not in the best interest of children who need safe, stable and nurturing relationships and environments. Ensuring families who already are required to participate in a thorough screening process are able to foster and adopt will provide children the opportunity to thrive, excel and be an active participant of a more prosperous Tennessee.”³²

IV. SB 1304 Would Be Vulnerable to Legal Challenge at Taxpayer’s Expense

Among the potential constitutional and other legal infirmities of SB 1304, which would put the state at potential risk of having to defend the bill through state-funded litigation, are those

²⁹ 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>).

³⁰ 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>.

³¹ TENN. COMM’N ON CHILDREN & YOUTH, 2019 LEGISLATIVE GUIDANCE, 32, <https://www.tn.gov/content/dam/tn/tccy/documents/leg/leg-guidance1.pdf>.

³² *Id.*

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 1304 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 a government-funded foster care or adoption 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.

Tennessee's Department of Children's Services ("DCS") is responsible for all children in its child welfare system. A child's case with DCS typically starts after the Office of Child Safety determines a child should be removed from their family due to 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, DCS seeks to find a permanent family for the child, typically through adoption. DCS'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.

DCS performs this public function in part by contracting with private agencies that are licensed by DCS as "child placing agencies" to arrange for or place children in foster family homes, adoptive homes, or independent living programs. TENN. CODE ANN. § 36-1-108; *id.* at § 36-1-102; TENN. COMP. R. & REGS. § 0250-04-09-.04. To fund the state's child welfare system, the Tennessee legislature annually makes appropriations for adoption and foster care services. With these appropriated funds, DCS pays private child placing agencies under contract with the State to provide adoption and foster care services, including, in some cases, case management services

Although DCS 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, DCS has conferred authority on private child placing agencies to make decisions regarding licensing and contracting with foster and adoptive homes for the care and supervision of children. TENN. CODE ANN. § 36-1-108. Many of these organizations not only license and recruit foster and adoptive parents, but provide case management and therefore make decisions regarding placement and services for children in their care.

If the State of Tennessee were to enact SB 1304 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 DCS 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 and other governing laws, just as if the State provided those services directly. Accordingly, for example, because the State could not, consistently with the Establishment Clause, disqualify prospective families from fostering and adopting children based 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 1304 would be subject to challenge as a violation of the Establishment Clause. In fact, a Michigan’s Department of Health and Human Services is currently facing a lawsuit in federal court for violating both the Establishment Clause and the Fourteenth Amendment’s Equal Protection Clause by permitting state-contracted and taxpayer-funded child placing agencies to use religious criteria in screening prospective foster and adoptive parents.³³ In a lawsuit over similar issues, *Fulton v. City of Philadelphia*, a federal district court has ruled that providing faith-based child welfare providers with an exemption from nondiscrimination rules would “likely” give rise to viable “Equal Protection Clause and Establishment Clause claims[.]”³⁴

Lambda Legal also has filed a lawsuit in federal district court in Washington, D.C. against the U.S. Department of Health and Human Services (“HHS”) addressing related problems. *Marouf v. Azar* challenges HHS’s 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.³⁵

SB 1304 would be vulnerable to a similar challenge under the Establishment Clause for several reasons. First, the law appears to endorse and promote 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.*³⁶ By providing taxpayer funding to religious organizations for religion-based activities, the State of Tennessee would violate 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.*³⁷

Additionally, SB 1304 would be subject to challenge for privileging religion to the detriment of third parties—not only prospective families, but also the very children the child welfare system was created to serve. The First Amendment forbids accommodations of religion

³³ See Complaint, *Dumont v. Lyon*, No. 2:17-cv-13080 (E.D. Mich. Sept. 20, 2017) (2017 WL 4161971).

³⁴ See *Fulton v. City of Philadelphia*, 320 F. Supp. 3d 661, 685 (E.D. Pa. 2018).

³⁵ 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.

³⁶ *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)).

³⁷ *Bd. Of Educ. Of Kiryas Joel Village Sch. Dist. v. Grumet*, 512 U.S. 687, 704 (1994).

that impose substantial burdens on third parties.³⁸ 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.³⁹ By allowing state-contracted, taxpayer-funded child placing agencies to use religious eligibility criteria when performing public services, SB 1304 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) below, despite arguments made by advocates of religious exemptions, the Supreme Court’s recent decision in *Trinity Lutheran Church v. Comer*⁴⁰ does not make bills like SB 1304 constitutionally sound.

Finally, the bill appears to advance religious views over secular standards, such as religious beliefs which oppose equal treatment of same-sex couples and LGBTQ-identified individuals. 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.”⁴¹ 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.”⁴² Similarly, SB 1304 facilitates the imposition of particular religious viewpoints—such as those opposing equal treatment of same-sex couples and LGBTQ individuals (including children in care) or inclusion of people who follow different faith traditions. By allowing a special exemption to a generally applicable law for specific religious beliefs, SB 1304 endorses religion in violation of the Establishment Clause.

In order to avoid litigation for violating the Establishment Clause, Tennessee should not enact SB 1304.

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

Although proponents of 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 SB 1304 invites. 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

³⁸ *Cutter v. Wilkinson*, 544 U.S. 709 (2005) (following *Estate of Thorton v. Caldor, Inc.*, 472 U.S. 703 (1985)).

³⁹ *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.”).

⁴⁰ *Trinity Lutheran Church of Columbia, Inc. v. Comer*, 137 S. Ct. 2012 (2017).

⁴¹ *Edwards v. Aguillard*, 482 U.S. 578, 581 (1987).

⁴² *Id.* at 593.

discriminatory conduct that SB 1304 aims to enable. *Trinity Lutheran* requires that both religious and secular agencies 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 1304 would allow, in contrast, is state funding for discriminatory conduct in service of religious purposes. 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 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.”⁴³ Consequently, that case only addresses public funding of secular programs, not funding of discriminatory conduct explicitly based on religion.

Furthermore, courts of appeals across the country have addressed many attempts to create religious exemptions from anti-discrimination laws and professional standards, creating a powerful body of published precedents establishing that religion cannot be used as an excuse for violating others’ civil rights.⁴⁴ 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.⁴⁵ 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].”⁴⁶

⁴³ *Trinity Lutheran*, at 2024 n.3.

⁴⁴ 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”).

⁴⁵ *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).

⁴⁶ *Cutter v. Wilkinson*, 544 U.S. at 722, 726.

C. Even as Applied to Private Child Placing Agencies Not Utilizing Government Funds, SB 1304 is Constitutionally Infirm.

As discussed 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 commonly renders their discrimination a “state action,” making SB 1304 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*.⁴⁷ More recently, in *Brentwood Acad. v. Tennessee Secondary Sch. Athletic Ass’n*, the Supreme Court has affirmed that this may be the case “when the State provides ‘significant 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.’”⁴⁸

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*, for example, a private fund used to operate a school open only to “poor white male orphans” but administered by Philadelphia’s Board of Directors of City Trusts was held to constitute unconstitutional race discrimination by the State itself.⁴⁹ Even when, on remand, private trustees were appointed, the Third Circuit subsequently held that that substitution was unconstitutional.⁵⁰ This case followed the precedent of *Shelley v. Kraemer*,⁵¹ 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*,⁵² a privately-owned town that passed and functioned as a public municipality was subject to constitutional discrimination claims.

Importantly, it is well established that, when a private party acts pursuant to a state law, the private conduct may be considered state action if the state law authorizes discriminatory

⁴⁷ *Rendell-Baker v. Kohn*, 457 U.S. 830, 838 (1982).

⁴⁸ *Brentwood Acad. v. Tennessee Secondary Sch. Athletic Ass’n*, 531 U.S. 288, 296 (2001) (citations omitted).

⁴⁹ *Pennsylvania v. Bd. of Directors of City Trusts*, 353 U.S. 230, 231 (1957).

⁵⁰ *Pennsylvania v. Brown*, 392 F.2d 120 (3d Cir.), *cert denied*, 391 U.S. 921 (1968).

⁵¹ *Shelley v. Kraemer*, 334 U.S. 1 (1948).

⁵² *Marsh v. Alabama*, 326 U.S. 501, 507 (1946).

conduct that would not have been permissible prior to the enactment.⁵³ If the State subsidizes unconstitutionally discriminatory behavior, that subsidization can even more easily result in a finding of state responsibility for the discrimination.⁵⁴

Consequently, if signed into law, SB 1304, which explicitly authorizes discrimination in adoption systems, whether financially or by otherwise lending State encouragement and support to such discrimination, very likely would amount to unconstitutional discrimination by the State itself, just as state laws that affirmatively encouraged or enabled discriminatory actions by private entities have been held unconstitutional in the past.

Applying the above principles and precedents, it is very likely that in a challenge to SB 1304, the courts would recognize a private agency's provision of services to children in this context as a government function, rendering the law subject to constitutional attack. Because this legislation threatens to enable violations of the rights of children as well as of their prospective adoptive parents, ostensible justifications for these violations are unlikely to be persuasive. Rather than risk wasting taxpayer money to defend against such litigation, it would be prudent for the legislature to avoid exposing children to further harm in a system that already struggles to keep them safe and meet their needs.

V. Conclusion

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 out-of-home 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 Tennessee by inhibiting the ability of these youth to be full and productive citizens and by 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 Tennessee's youth, Tennessee should continue to stand with the majority of states in the country that are enacting professionally sound policies and protections that allow LGBTQ youth to access more affirming and supportive services and placements, not less. Tennessee currently is among the twenty-eight states which have either LGBTQ-specific policies or sexual orientation and gender-identity inclusive non-discrimination laws or government agency policies which

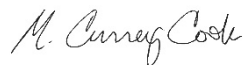
⁵³ See, e.g., *Reitman v. Mulkey*, 387 U.S. 369 (1967) (an amendment to the California constitution permitting private discrimination in real estate transactions amounted to the State's official encouragement of discrimination, which rendered the resulting private discrimination "state action" for purposes of constitutional challenge).

⁵⁴ See, e.g., *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).

protect youth in the child welfare system from discrimination based on sexual orientation and gender identity. The State of Tennessee should maintain this focus on protecting these most vulnerable youth, rather than endorsing discrimination against LGBTQ families and families of differing faiths. In fact, new federal legislation, the Families First Prevention and Safety Act,⁵⁵ requires states to expand family home options and reduce congregate care. Tennessee should focus its efforts on expanding family home options via legislation such as SB 1304 which allows fictive kin to receive foster care payments, versus enacting harmful legislation that is exclusionary.

For these reasons, Lambda Legal opposes the enactment of this bill and implores you to reject it and ensure that Tennessee fulfills its legal responsibilities by assisting and protecting its most vulnerable youth, rather than sending the harmful message that they are “less than” under the law.

Respectfully submitted,



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Lambda Legal

⁵⁵ Families First Prevention Services Act, H.R. 1892, Title VII, 115th Cong. (2018) (enacted), *available at* <https://www.congress.gov/115/plaws/publ123/PLAW-115publ123.pdf>.