

No. 19-123

**In The
Supreme Court of the United States**

SHARONELL FULTON, ET AL.,

Petitioners,

v.

CITY OF PHILADELPHIA, ET AL.,

Respondents.

**On Writ Of Certiorari To The United States
Court Of Appeals For The Third Circuit**

**BRIEF OF THE OFFICE OF THE
COOK COUNTY PUBLIC GUARDIAN
AS *AMICUS CURIAE*
IN SUPPORT OF RESPONDENTS**

CHARLES P. GOLBERT

Counsel of Record

CHRISTINA SCHLEICH

DANIELLE GOMEZ

ALISON L. STANKUS

JILL RUNK

NICHOLAS YOUNGBLOOD

JEFFREY STERBENC

KASS A. PLAIN

ALPA JAYANTI PATEL

JANET L. BARNES

CAROL CASEY

SARAH DONOVAN

KEVIN JEREMIAH

ULYSSES ROSALES

JEAN AGATHEN

OFFICE OF THE COOK COUNTY

PUBLIC GUARDIAN

2245 West Ogden Avenue,

Fourth Floor

Chicago, Illinois 60612

(312) 433-4300

charles.golbert@cookcountyil.gov

Counsel for Amicus Curiae

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**STATEMENT OF INTEREST
OF *AMICUS CURIAE*¹**

Office of the Cook County Public Guardian²

Over the last four decades, the Office of the Cook County Public Guardian has represented hundreds of thousands of children in abuse and neglect proceedings. The current Cook County Public Guardian, Charles P. Golbert, and his assistants, serve as attorney and guardian *ad litem* for more than 6,000 abused, neglected, and dependent children in the Circuit Court of Cook County, Illinois, Child Protection Division. Mr. Golbert has almost three decades of experience working as an attorney and guardian *ad litem* on behalf of children and the office currently has more than 200 attorneys, caseworker advocates, psychologists, investigators, paralegals and other support staff dedicated to advocating for the rights of children. The Office of the Cook County Public Guardian seeks to present in this brief the important perspective of the children who will be affected by this Court's ruling. Because the interest of the Office of the Cook County Public Guardian is based on its role and experience representing foster children as attorney and guardian

¹ The parties have consented to the filing of this brief. Pursuant to Rule 37.6, this brief was not authored in whole or in part by counsel for any party, and no person or entity other than the *Amicus Curiae* and its counsel made a monetary contribution to this brief's preparation or submission.

² For information on the Office of the Cook County Public Guardian and its additional functions, see www.publicguardian.org.

ad litem, the *Amicus Curiae* respectfully offers a brief account of a few of those children.³

The Children's Stories

Alan, 17 years old

Alan and his sister, Angelica, have a strong bond. Alan, who is five years older, cared for and protected Angelica when the adults in their lives did not. Alan and Angelica entered foster care together and were placed in the Barker foster home. The Barkers planned to adopt Alan and Angelica.

About three years after Alan and Angelica were placed with the Barkers, Alan, assigned female at birth, came out as transgender. Mr. Barker showed Alan acceptance, kindness, and support. However, Mrs. Barker disapproved and refused to support him if he dressed in a masculine fashion. Alan struggled with feelings of anxiety, depression, and rejection. He was psychiatrically hospitalized multiple times. Eventually, Mrs. Barker refused to allow him to return from the hospital.

At 14 years old, Alan spent most of the summer in a psychiatric hospital because his caseworker could not find a foster home for him. Despite Mrs. Barker's

³ The clients who consented to have their child protection cases described in this *Amicus* brief have a right to confidentiality under Illinois law, 705 ILCS 405/1-8. All names and other identifying information have been changed.

rejection, Alan felt conflicted about not returning to live with Angelica.

Alan was frightened and emotionally drained as he waited at the hospital for a home. He was aware of the difficulties in finding foster placements for youth, especially teenagers with mental health struggles. “They didn’t have people jumping up to take a trans teenager.” His caseworker decided that Alan should be placed in a home with a connection to the LGBTQ community to reduce the chance another home would not support him.

Clara and Ruby always planned to be foster parents. Ruby’s father aged out of the foster care system and was a foster parent himself. They read an article about teens staying in psychiatric hospitals for weeks and months because the Department of Children and Family Services (DCFS) did not have placements for them. They wanted to help.

Clara and Ruby recall that Alan was nervous when they first met. He wanted to know they would support his transition and that he would be able to express himself without being restricted.

Clara and Ruby adopted Alan when he was 16 years old and he describes his life as much better now. But leaving Angelica devastated Alan, who works hard to maintain that relationship though they are in separate homes.

Conner, 23 years old

“I think I’m gay. No, I AM gay.” Even as a resilient, successful young man, this is still difficult for him to say. Conner lacked support in exploring his identity, and others labeled him as gay before he was ready. “I felt forced out.”

Conner bounced between abusive relatives and foster care. At age 8, Conner was placed in a foster home with a pastor’s family. Conner had qualities the foster family felt were feminine. The pastor told him, “get it under control, or he would have a hard life,” and “God wouldn’t like it.” Conner believes the family was embarrassed by him and recalls entering rooms and everyone suddenly becoming silent.

At age 12, Conner was moved to a group home where he was the youngest boy by several years. The other residents assumed Conner was gay. The 16- and 17-year-old boys teased Conner while the staff watched and sometimes joined in. One staff member would take off his shirt and flex his muscles in front of Conner.

A staff member at a residential treatment center told Conner that if he continued on his current path, he would become the “program whore.” Other residents overheard the conversation and adopted “program whore” as Conner’s nickname. The staff would laugh and tell him that he needed to deal with the bullying, and that he was bringing his reputation on himself. “They kind of told me I was gay, but I was trying to figure it out.”

Daron, 10 years old

Samantha decided to become a foster parent because her career helping people find housing gave her firsthand perspective of the dismal outcomes for youth aging out of foster care.

Daron entered foster care shortly after birth. He endured more than ten placements prior to Samantha's home, triggering Reactive Attachment Disorder from the trauma of losing so many caregivers. He also came to Samantha's home with questions about his identity. Daron didn't enjoy "boy things" and preferred activities people told him were for girls.

At Samantha's, Daron gained a supportive community. His church encouraged his exploration, providing books about gender fluidity. Daron's foster care agency was supportive and acknowledged when traditions needed to change. Recognizing that gendering toys didn't achieve the agency's desired purpose, holiday party gifts were no longer labelled "girl" or "boy" and instead categorized "sports," "art and crafts," "dolls," etc., to better meet the desires of all the agency's children. The caseworker referred Samantha to a training on parenting a gender-fluid child and attended the training with her.

Samantha provided Daron with support and acceptance and adopted Daron, breaking his cycle of failed foster homes. They have come a long way together, but Daron continues to struggle with the heavy emotional baggage of Reactive Attachment

Disorder caused by many unsuccessful foster home placements.

Stacy, 27 years old

Stacy remembers at a very young age feeling that she was a girl. She recalls being happy when she was about 9 or 10, and a stranger thought she was a girl. Stacy's mother never accepted that she was a girl. She had Stacy psychiatrically hospitalized multiple times. When one hospital refused to admit Stacy, her mother brought her to another hospital. At the age of 12, Stacy entered foster care when she was ready for discharge and her mother refused to take her home from the hospital.

Stacy's first foster parent frequently told her, "that's not what boys do." Stacy was lonely, but it felt better than being at home. Eventually, Stacy was placed with her grandmother where she felt barely tolerated. After a particularly heated argument when Stacy told her grandmother she didn't care if she had to be beaten to express her true self, Stacy's grandmother became less disapproving and their relationship improved incrementally.

But Stacy had to find the support and courage she needed outside of her home. Stacy recalls her weekly Thursday therapy sessions as the best 50 minutes of her life at that time. The therapist did not judge her and connected her with LGBTQ community and resources. She made friends who were also transgender.

Despite these supports, Stacy still struggled with homelessness after aging out of foster care and had to make her way without sufficient support. Now an adult, Stacy works at a foster care agency and volunteers with an organization that helps LGBTQ youth at risk of homelessness and assists youth leaving toxic foster homes. She worries about the children in homes who have to bottle up who they are, and are afraid to ask for non-gender conforming toys and clothes. Stacy empathizes with their loneliness. “They are in a really difficult predicament.”

Noah, 17 years old

Noah came into care at the age of 9 when his mentally ill father held him and his sister, Nina, hostage in their bathroom, threatening to set the children and himself on fire. The children’s socks were soaked in the gasoline that filled the bathtub. Noah and Nina were physically unharmed when the police were able to convince Noah’s father to surrender.

Three months later, Noah’s father set fire to his home, killing himself, Noah’s mother and, after two agonizing days, Nina. Noah, the only survivor of his immediate family, suffered significant burns and grueling months of surgeries and rehabilitation therapy.

Noah’s aunt, Tracy, took two buses almost every morning for three months to Noah’s rehabilitation center where she stayed with Noah during his therapies and was trained to care for his severe burns.

Noah's agency approved Tracy and her wife, Shelly, to provide foster care for Noah when he was released from the rehabilitation facility. For three more months, Tracy took Noah back to the rehabilitation facility several times a week for all-day therapy and treatments.

Tracy and Shelly adopted Noah. They keep photo albums of Noah's family and talk to him about what his family was like before his father became so ill.

Francis, 21 years old

Francis and her siblings entered the foster care system when Francis was an infant. Francis and her siblings were sexually and physically abused in several foster homes. In one home, the foster mother beat them until the children held up signs saying, "help us" in the car windows. In another home, the foster mother's grandson molested Francis and her siblings, and the foster mother beat the children and kept them home from school to hide their marks.

Francis came out as gay in high school. Her foster mother was not supportive. She told Francis she would "go to hell." The foster mother did not want Francis to spend time with girls, so she forbade Francis from socializing with friends or participating in school sports, even though she was a top student in her class.

Francis ran away several times. She always returned when her sister, the only sibling left in the foster home, would call her crying. Finally, at 15 years

old, Francis left the foster home for good. She alternated between living on the streets and with friends. She dropped out of school and engaged in high-risk behaviors to survive. She managed to get a job at an ice cream store and at an after school program.

After two years struggling without housing and a lifetime of abusive foster homes, Francis found a home with her best friend's mother. "I felt like I was loved for the first time." Francis' best friend is also gay, and her mother was affirming and supportive. Francis is treated as a family member like everyone else. "She treats me like I'm her child and I call her mom."

Parker, 17 years old

Parker was adopted as an infant, but was placed back in foster care at the age of eight because the home was abusive. Yessenia became Parker's foster parent and then guardian.

There was always a lot of conflict between Yessenia and Parker regarding Parker's gender identity. Yessenia was uncomfortable with Parker, who was assigned male at birth, being involved in activities that Yessenia felt were meant for girls, and wanted Parker to play with toys that she felt were appropriate for boys. As Parker grew older, Yessenia struggled with Parker's sense of style. Parker reported that Yessenia would call her derogatory names and criticize the way she talked. At the age of 16, Parker reached a breaking point, attempted suicide, and was psychiatrically hospitalized. Parker went from house to house, living

with “friends” who took advantage of her. She was exposed to high-risk activities and engaged in survival sex – trading sex for food or shelter. She attempted to return to Yessenia’s home, but felt unwelcome and rejected. After two weeks, Parker left again.

For a third time, Parker was placed in foster care. Parker was happy to be back in school but she was moved from foster home to foster home and struggled to find the acceptance and support she needed. Parker was again psychiatrically hospitalized. She felt safe with the staff at the hospital who supported her gender transition. Parker participated in the programming on the girls’ unit. Upon discharge, Parker moved to a transitional living program for adolescent girls where she feels acceptance and support, but there is no longer a plan to find Parker a permanent family.



INTEREST OF *AMICUS CURIAE*

Because no party represents the unique perspective of these and thousands of other foster children across the country who will be affected by the Court’s ruling, and because the *Amicus Curiae* believes that it is important for this Court to have the benefit of that perspective, the Office of the Cook County Public Guardian respectfully submits this brief in support of Respondents.



SUMMARY OF ARGUMENT

The duty to provide for the well-being of foster children obligates the government to contract with foster care agencies that provide a diverse pool of foster homes. The government's duty arises from the special relationship created when a child enters state custody. The constitutional rights of foster children, state and federal statutes, and the basic tenets of child welfare policy, define the government's duty to the children in its care.

A foster care agency is the gatekeeper to loving and supportive permanent homes for the children assigned to its care. The pool of homes the agency makes available to its children must reflect the diversity of the children the agency serves. Every child who needs a foster home presents a singular set of needs. And every appropriate and viable foster family offers unique strengths. When an agency excludes families based on traits irrelevant to their ability to provide a loving, supportive foster home, that agency deprives all its children of an entire class of families, thereby needlessly diminishing their opportunity for a permanent home, violating their due process rights.

Same-sex couples are often uniquely well-equipped to care for LGBTQ children, many of whom have experienced discrimination and family rejection. An agency's exclusion of same-sex families disproportionately and unnecessarily harms its LGBTQ children by making them less likely to match with loving, permanent families and needlessly compounding the

harm they suffer in foster care, violating their due process and equal protection rights.

Exclusion of qualified same-sex couples from a foster care agency sends the message to LGBTQ foster children that they are not worthy of creating a family of their own – a rejection more profound for a child whose family life is already significantly compromised. Moreover, government-sanctioned policies of discrimination have a chilling effect on LGBTQ children’s genuine expression of their identity for fear of unequal treatment, violating their First Amendment rights, with potentially dire consequences.

A policy that excludes viable, appropriate foster homes at the expense of the best interest of children who need permanent, loving homes runs counter to myriad federal and state statutes and to the basic tenets of child welfare policy. Foster children are completely dependent on the government to meet their needs. At the very minimum, the government must refrain from endorsing policies that frustrate the purpose of the child welfare system and cause harm to the children in its care.



ARGUMENT**I. THE PARAMOUNT DUTY OF A FOSTER CARE AGENCY IS TO PROVIDE ITS ASSIGNED CHILDREN A PERMANENT HOME BECAUSE CHILDREN DETERIORATE EMOTIONALLY AND PSYCHOLOGICALLY WHEN THEY LANGUISH IN FOSTER CARE.**

A foster care agency is responsible to ensure its assigned children achieve permanency, a legally permanent outcome that ends their time in foster care.⁴ Foster children who are unable to return to their families need loving, supportive foster homes to provide them with a permanent family relationship.⁵ Permanency provides for children's physical safety and emotional, social, cognitive and spiritual well-being.⁶

When an agency fails to secure a permanent home for children, they spend years in a series of foster homes, or group homes, becoming substantially more likely than other children to face emotional, behavioral, and academic challenges.⁷ As adults, those

⁴ Child and Family Service Reviews Information Portal, "National Goals" <https://training.cfsrportal.acf.hhs.gov/section-2-understanding-child-welfare-system/2988>; Adoption and Safe Families Act of 1997, § 101 Pub. L. No. 105-89, 111 Stat. 2115 (1997) (codified at 42 U.S.C. § 671).

⁵ Jim Casey Youth Opportunities Initiative, Site-Level Logic Model (2013) at https://www.rhls.org/wp-content/uploads/Logic-Model_April-2013.pdf.

⁶ *Id.*

⁷ The Pew Comm'n on Children in Foster Care, *Fostering the Future: Safety, Permanency, and Well-being for Children in Foster*

children suffer increased risk for unemployment, food and housing insecurity, mental health disorders, and incarceration compared to foster children who achieve permanency.⁸ Languishing in foster care causes such significant harm that Illinois requires judges to consider the attendant risk of remaining in foster care when weighing any decision involving children's best interest, including permanency options.⁹

The assigned agency exerts significant control over children's lives.¹⁰ The agency matches children to the home where they will live. The agency investigates children's complaints about their foster homes. The agency intervenes to stabilize faltering placements and decides how many resources to employ to save the placement before removing children. When there is a placement change, the agency decides which of its homes would meet a child's needs and the services that will make the placement successful. Many aspects of foster children's lives are transient, but their assigned agency likely remains constant.

Care, pages 9-11, at https://www.pewtrusts.org/-/media/legacy/uploadedfiles/phg/content_level_pages/reports/0012pdf.pdf.

⁸ Lockwood, Katie, et al., *Permanency and the Foster Care System*, 45 *Current Problems in Pediatric and Adolescent Health Care* 306 (2015).

⁹ 705 ILCS 405/1-3(4.05)(i).

¹⁰ U.S. Department of Health and Human Services, Office of the Assistant Secretary for Planning and Evaluation, *Evolving Roles of Public and Private Agencies in Privatized Child Welfare Systems* (2008) at <https://aspe.hhs.gov/basic-report/evolving-roles-public-and-private-agencies-privatized-child-welfare-systems>.

Petitioner argues that it has caused no harm because it does not stand in the way of same-sex couples getting services elsewhere. JA 458-459. The children whose lives and futures hang in the balance get no choice in their assigned agency. In Illinois, for example, DCFS assigns children to private agencies randomly, in the interest of fairness in performance contracting. After taking protective custody of a child, DCFS assigns the agency next on the list to the child's case, assuming that agency has a placement immediately available. If the agency does not have an appropriate placement match for the child, the case is assigned to the agency next in line.

Children in the child welfare system are subject to their assigned agency and its pool of foster homes. In most cases, if children cannot return to their family, their only options for permanency are those homes recruited and approved by their assigned agency.¹¹ The lifelong implications of how well the agency's homes match up with the needs of its children are extensive.

Diversity in the foster home pool is essential to the well-being and permanency of the children assigned to the agency. Making a placement that has a high likelihood of success requires the agency to assess the needs of children with the strengths and capabilities of

¹¹ In Illinois and other jurisdictions, there are mechanisms that allow an agency to request foster home matches outside the assigned agency, but these mechanisms are used rarely and only after children move between a succession of unsuccessful homes within the assigned agency.

caregivers in prospective foster homes.¹² If an agency lacks licensed homes that can support and provide placement stability to all its assigned children, permanency outcomes for those children are greatly diminished.¹³

II. EXCLUDING A VIABLE CLASS OF FAMILIES FROM AN AGENCY'S POOL OF FOSTER HOMES VIOLATES THE CONSTITUTIONAL RIGHTS OF THE AGENCY'S ASSIGNED CHILDREN.

A. Excluding a viable class of foster parents from an agency's pool of available homes harms all the agency's assigned children by needlessly limiting their opportunities for a permanent home, violating their due process rights.

When the government assumes custody of children and places them in foster care, a special relationship is created that triggers substantive due process protections. *Nicini v. Morra*, 212 F.3d 798, 809 (3d Cir. 2000); *Norfleet v. Arkansas Dep't of Human Servs.*, 989 F.2d 289, 293 (8th Cir. 1993) (government has a duty to provide foster children with adequate

¹² National Ass'n of Social Workers, *NASW Standards for Social Work Practice in Child Welfare*, 23 (2013) at https://www.socialworkers.org/LinkClick.aspx?fileticket=_FIu_UDcEac%3D&portalid=0.

¹³ Casey Family Programs, *What impacts placement stability?* (2018) at https://caseyfamilypro-wpengine.netdna-ssl.com/media/SF_Placement-stability-impacts.pdf.

medical care, protection, and supervision); *K.H. v. Morgan*, 914 F.2d 846, 851 (7th Cir. 1990) (foster children have the right not to “deteriorate” “physically or psychologically”). Embodied in foster children’s right to physical safety and protection is the right to emotional well-being. *Id.* at 848; *Marisol A. v. Giuliani*, 929 F. Supp. 662, 675 (S.D. N.Y. 1996) (foster children have a “substantive due process right to be free of unreasonable and unnecessary intrusions into their emotional wellbeing”), *aff’d*, 126 F.3d 372 (2d Cir. 1997). Because children deteriorate emotionally and psychologically when they languish in foster care, the government violates their due process rights when it needlessly limits their opportunities for permanent, loving homes.

A foster care agency should always place children in homes based on the unique strengths and needs of the children and the prospective families.¹⁴ Excluding a class of viable and appropriate caregivers who would contribute to the diversity of the foster home pool limits children’s opportunities for compatible, loving homes.

Same-sex couples are an important resource for all foster children.¹⁵ Like all families, same-sex families

¹⁴ National Ass’n of Social Workers, *NASW Standards for Social Work Practice in Child Welfare* (2013) at https://www.socialworkers.org/LinkClick.aspx?fileticket=_FIu_UDcEac%3D&portalid=0.

¹⁵ LGBTQ parents are equally capable caregivers as heterosexual parents. See National Ass’n of Social Workers, Policy Statement, *Foster Care and Adoption* (2020); American Psychol. Ass’n (APA), *Resolution on Sexual Orientation, Gender*

bring varied qualities and strengths to their agency's foster home pool. Some same-sex foster homes offer children badly needed structure. Others function well while absorbing the chaos dysregulated children bring to a home. Some can meet the challenges of parenting older teens who are struggling to be independent while addressing emotionally stunting trauma. Some same-sex foster parents commit to children who must be the only child in the home, while others are prepared to care for a large sibling group. Some excel in addressing the needs of children with attachment disorder. Other same-sex foster parents possess special medical or psychological training.

Beyond their unique individual family profiles, the family composition of same-sex homes offers unique opportunities for children with gender-based trauma triggers. Same-sex couples can offer the resources of a two-parent home to children who need to live in a home free of men or free of women. Also, LGBTQ couples are statistically more willing to care for difficult-to-place children, including older teens and children with

Identity, Parents and Their Children (2020); American Academy of Child and Adolescent Psychiatry, Position Statement, *Gay, Lesbian, Bisexual, or Transgendered Parents* (2009); American Academy of Pediatrics, Policy Statement, *Promoting the Well-Being of Children Whose Parents are Gay or Lesbian* (2013); American Psychiatric Association, *Position Statement on Issues Related to Homosexuality* (2013); American Medical Ass'n, *Partner Co-Adoption H-60.940* (2014); Child Welfare League of America, *Position Statement on Parenting of Children by Lesbian, Gay, Bisexual, and Transgender Adults* (2015).

special needs.¹⁶ As illustrated by Alan's unusual adoption at the age of 16 by Ruby and Clara, same-sex couples are statistically more open to adoption of all children.¹⁷ Also, as in Noah's case, a same-sex couple may provide an extraordinary opportunity for a child to remain in the care of his family after suffering staggering family loss.

Foster children who are placed in ill-suited homes often suffer significant harm. Each move diminishes children's ability to attach to caregivers, making a subsequent successful placement less likely.¹⁸ Often, children end up in congregate care because the agency does not have homes that match the children's needs.¹⁹ Once children enter congregate care, they have poorer

¹⁶ Brodzinsky, David et al., Donaldson Adoption Institute, *The Modern Adoptive Families Study*, 10 (2015).

¹⁷ Gates, Gary J., *LGBT Parenting in the United States* (Feb. 2013) at <https://williamsinstitute.law.ucla.edu/wp-content/uploads/LGBT-Parenting-US-Feb-2013.pdf>.

¹⁸ Hamilton, Leah, *Foster Parent Support and Retention*, 2 *Humanities and Social Sciences Review* 377, 378 (2013) at <http://www.universitypublications.net/hssr/0203/pdf/P3G23.pdf>.

¹⁹ U.S. Department of Health and Human Services, Administration for Children and Families, Children's Bureau, *A National Look at the Use of Congregate Care in Child Welfare*, 15 (2015) at https://www.acf.hhs.gov/sites/default/files/cb/cbcongregatecare_brief.pdf; Annie E. Casey Foundation, *Every Kid Needs a Family: Giving Children in the Child Welfare System the Best Chance for Success*, 1-2 (2015) at <https://www.aecf.org/resources/every-kid-needs-a-family/>.

outcomes and have greater difficulty achieving permanency.²⁰

When children do not achieve permanency, they cycle through placements until they age out of the foster care system when they turn 18, 19, or 21 years old, depending on the jurisdiction. Children who never achieve legal permanency before aging out suffer particularly poor long-term outcomes.²¹ Child development research shows that having a stable relationship with even one caring adult is directly correlated with children’s resilience and long-term success.²² Unfortunately, foster children who are never provided a permanent home often have no access to a stable adult relationship. The importance of compatible foster home matches to the life of a child cannot be overestimated. As stated by Jamie in the *Amici Curiae* brief by former foster youth in support of CSS, “a foster home is the

²⁰ Casey Family Programs, *What are the outcomes for youth placed in congregate care settings?* (2017) at https://caseyfamilyprowpengine.netdna-ssl.com/media/SF_CC-Outcomes-Resource.pdf.

²¹ Rosenberg, Rachel & Abbott, Samuel, “Supporting Older Youth Beyond Age 18: Examining Data and Trends in Extended Foster Care” *Child Trends* (2019), available at <https://www.childtrends.org/publications/supporting-older-youth-beyond-age-18-examining-data-and-trends-in-extended-foster-care>.

²² Center on the Developing Child at Harvard University, “Resilience” at <https://developingchild.harvard.edu/science/key-concepts/resilience>.

difference between life and death.”²³ “Without one, you can fall through the cracks.”²⁴

A lack of diversity in foster homes leads to incompatible matches and taxes the entire child welfare system. For foster parents, an incompatible match often represents heartbreaking months of fruitless attempts to meet a child’s needs. Failed matches can disillusion families and dissuade them from fostering another child or sibling group.²⁵

Once the government brings children into care, it has a duty to ensure that an agency does not limit children’s options for a compatible, permanent parent-child relationship, unnecessarily forcing the children to languish in foster care until they age out of the system with inadequate long-term support. Depriving children of a class of potential foster parents unnecessarily diminishes children’s opportunities for permanency and violates their due process rights.

²³ Brief of the *Amici Curiae* Former Foster Children and Foster/Adoptive Parents and the Catholic Association Foundation in Support of Petitioners, p. 15.

²⁴ *Id.*

²⁵ Redding, Richard E., et al., *Predictors of Placement Outcomes in Treatment Foster Care: Implications for Foster Parent Selection and Service Delivery*, 9 *J. of Child & Fam. Studies* 425, 427 (2000).

B. Excluding same-sex couples from an agency's pool of foster parents disproportionately harms LGBTQ children by limiting their opportunities for a permanent home, violating their due process and equal protection rights.

1. Discrimination and stigma force LGBTQ children into foster care at disproportionate rates.

LGBTQ children are over-represented in the child welfare system.²⁶ Despite comprising 5-7% of the youth population, LGBTQ representation balloons to 19-25% in the child welfare system.²⁷

Family rejection is a common reason that LGBTQ children enter care at such a high rate.²⁸ When the rejection is so extreme as to upset the family system and cause a child to come into care, the implications to the child's sense of identity are profound.²⁹ Parker

²⁶ Human Rights Campaign, *LGBTQ Youth in the Foster Care System*, 2 at https://assets2.hrc.org/files/assets/resources/HRC-YouthFosterCare-IssueBrief-FINAL.pdf?_ga=2.45951588.1548747656.1596028389-675464629.1596028389.

²⁷ *Id.* at 2 and Remlin, Christina Wilson et al., *Safe Havens: Closing the Gap Between Recommended Practice and Reality for Transgender and Gender-Expansive Youth in Out-of-Home Care* (2017).

²⁸ Human Rights Campaign at 2; Annie E. Casey Foundation, *LGBTQ in Child Welfare: A Systematic Review of the Literature*, 3 (2016) at <https://www.aecf.org/m/resourcedoc/aecf-LGBTQ2inChildWelfare-2016.pdf>.

²⁹ Bregman, H. R. et al., *Identity Profiles in Lesbian, Gay, and Bisexual Youth: The Role of Family Influences*, 42 *Journal of Youth and Adolescence* 417 (2013).

attempted suicide after on-going badgering from her guardian to change how she talked and what she wore. Stacy's mother rejected basic aspects of Stacy's identity, had her psychiatrically hospitalized multiple times, and finally refused to care for her at all. These children enter care with a layer of trauma built on the fundamental idea of who they are.³⁰ LGBTQ children have often experienced stigma and discrimination in a very hurtful and personal context.

2. Discrimination and stigma cause LGBTQ foster children to suffer disparately poor outcomes.

The rejection LGBTQ children can experience in their homes too often carries over into LGBTQ children's foster care experience. Like Parker, Alan, Conner, and Francis, the number of LGBTQ children who run away from or are removed from foster homes based on hostility toward their sexual orientation or gender identity is staggering. Of the LGBTQ children surveyed, 78% of the LGBTQ children experiencing homelessness had run away from or been removed from a foster home and 56% of them reported that they preferred to live on the street rather than in their placement because they felt safer there.³¹ Parker and

³⁰ Human Rights Campaign at 1.

³¹ *Id.* at 3; Remlin, Christina Wilson et al., Children's Rights, Lambda Legal, & 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*, 3 (2017).

Francis, like many children, chose physically unsafe environments over their emotionally painful home lives. Francis sacrificed her successful academic career and her relationship with her sister because the rejection in her home was unbearable. These homeless children are often exposed to high-risk behaviors and exploitation.³² For instance, to escape the shame and isolation of her foster home, Parker engaged in high-risk survival sex to get food and housing.

As was painfully true for Conner's tumultuous journey of self-realization, children in the nascent stages of developing their sexual and gender identity often do so in a context of stigma and discrimination.³³ Conner suffered scorn and alienation from a family wholly unequipped to care for a questioning child, compounding his trauma, further compromising his self-image, and diminishing his likelihood of permanency. Despite Samantha's love and support, and his statistically rare adoption, the successive failures of the ten placements Daron suffered earlier in life will weigh on his mental health indefinitely. Children who do not directly identify as LGBTQ are also negatively impacted by LGBTQ stigma and discrimination. Like Angelina who suffered a terrible loss when Alan was forced to leave their pre-adoptive home, siblings of LGBTQ children are negatively impacted when

³² Human Rights Campaign at 3.

³³ Friedman, Mark, et al., *The Impact of Gender-Role Non-conforming Behavior, Bullying, and Social Support on Suicidality Among Gay Male Youth*, 38 J. Adolesc. Health 621 (2006).

discrimination against LGBTQ children causes placement instability and sibling separation.

Compatible, supportive foster home matches combat the discrimination and stigma that causes LGBTQ children to languish in the foster care system at a disproportionate rate. Incompatible, failed foster home matches increase children's trauma, compound their service needs, make them more difficult to match to a home, more likely to fail in the next home, and less likely to achieve permanency.³⁴ LGBTQ children have higher numbers of foster care placements.³⁵

Overall, LGBTQ foster children suffer more negative outcomes than their already vulnerable peers do.³⁶ LGBTQ children suffer significantly higher incidents of mental health distress and are more likely to be psychiatrically hospitalized than other foster children.³⁷ Both Alan and Stacy endured serial hospitalizations while living in homes with caregivers who rejected their gender identity. In fact, Stacy's mother would hospital shop to find a hospital willing to admit Stacy, even after another hospital found hospitalization was unnecessary. LGBTQ children are more likely to

³⁴ Hamilton at 378.

³⁵ Wilson, Bianca D.M., et al., *Sexual and Gender Minority Youth in Foster Care: Assessing Disproportionality and Disparities in Los Angeles*, 6 (Aug. 2014) at https://www.acf.hhs.gov/sites/default/files/cb/pii_rise_lafys_report.pdf?_ga=2.204768976.1180112752.1555525817-95035135.1555525817

³⁶ Annie E. Casey Foundation, *LGBTQ in Child Welfare: A Systematic Review of the Literature* at 3.

³⁷ Wilson, Bianca D.M. et al., at 6.

experience mood disorders, depression, anxiety, alcohol and drug use, and struggle with their self-image.³⁸

LGBTQ children are placed in congregate care at a higher rate than their peers are.³⁹ And the problems of congregate care are more pronounced for LGBTQ children, with 100% of polled LGBTQ children reporting verbal harassment and 70% reporting physical violence.⁴⁰ Conner was terrorized in the group home and the treatment center by children and staff alike. He was targeted for bullying and inappropriate sexualized behavior from the staff. Staff coined and tolerated the cruel and debasing nickname “program whore,” while blaming Conner for bringing the treatment on himself. This is not uncommon. Often, LGBTQ children are blamed for the harassment and abuse they suffer, making it more difficult for them to move from congregate care into appropriate foster homes.⁴¹

As Daron’s mother, Samantha, saw firsthand working with people in need of housing assistance, children too often age out of foster care without support or housing. LGBTQ foster children who age out of care are even more likely to experience

³⁸ Annie Casey Foundation, *LGBTQ in Child Welfare: A Systematic Review of the Literature* at 3; Bianca D.M. Wilson et al., at 40.

³⁹ Wilson, Bianca D.M. et al., at 6.

⁴⁰ Human Rights Campaign at 3.

⁴¹ Wilson, Bianca D.M. et al., at 11.

homelessness than their peers are.⁴² Stacy, bright and resourceful, aged out of care without permanency and suffered homelessness before she was finally able to obtain a stable home and job. Even as a young woman with stable employment and her own home, Francis recognized the importance of having a person to call “mom” and a home to return to. Thankfully, Francis was able to find her own supportive family outside her agency. A supportive family setting is necessary to children’s overall long-term stability and success.⁴³

3. When an agency excludes same-sex couples from its pool of foster parents, LGBTQ children suffer disproportionate harm, violating their due process and equal protection rights.

Unlawful discrimination based on sexual orientation violates the Equal Protection and Due Process Clauses. U.S. Const. amend. XIV, § 1. *Romer v. Evans*, 517 U.S. 620, 635-36 (1996) (a Colorado referendum that prohibited legal protections for LGBTQ individuals violated the Equal Protection Clause); *United States v. Windsor*, 570 U.S. 744, 769-70 (2013) (the Defense of Marriage Act, which defined “marriage” and “spouse” to exclude same-sex couples under federal

⁴² *Id.* at 38.

⁴³ Juvenile Law Center, Tools for Success: A Toolkit for Child Welfare Professionals to Achieve Permanency & Stability for Youth in Foster Care (2018) at <https://jlc.org/sites/default/files/attachments/2019-02/2018-YFCPermanencyToolkit-FINAL-DIGITAL.pdf>.

law, violated the due process and equal protection rights of same-sex couples); *Obergefell v. Hodges*, 576 U.S. 644, 672 (2015) (same-sex couples have a fundamental right to marry under the Due Process and Equal Protection Clauses of the Fourteenth Amendment). When LGBTQ foster home placements are withheld from LGBTQ foster children, the children are more likely to languish in foster care at a disproportionate rate in violation of their equal protection rights.

Same-sex couples often provide the home with a higher likelihood of success for LGBTQ children whose trauma history includes rejection based on immutable aspects of their identity.⁴⁴ Same-sex couples are likely to have strengths and life experience to effectively support LGBTQ children who struggle with stigma, discrimination, and identity issues based on family rejection.⁴⁵

For example, Clara and Ruby proved to be an excellent match with Alan who struggled with rejection and separation from his sister because of his gender identity. Same-sex foster parents can provide a safe and supportive home to children who have previously been unwilling to outwardly identify as LGBTQ for fear of discrimination and stigma.⁴⁶ A

⁴⁴ Gates, Gary J., et al., *Adoption and Foster Care by Gay and Lesbian Parents in the United States*, 17 (2007) at <https://escholarship.org/uc/item/3484484b>.

⁴⁵ Annie Casey Foundation, *LGBTQ in Child Welfare: A Systematic Review of the Literature* at 3.

⁴⁶ Wilson, Bianca D.M. et al., at 40.

same-sex couple is uniquely situated to model a relatable future of love and family for the LGBTQ children whose own families may no longer be accessible.

LGBTQ foster children have a right to equal treatment by the government that has taken them into custody, and not have that government needlessly deny them access to loving, permanent same-sex homes. Same-sex couples are exceptionally capable of filling the vacuum of stable, loving, permanent homes for LGBTQ foster children.

C. When the government sanctions an agency's discriminatory policies, it reinforces LGBTQ foster children's sense of inequity and has a chilling effect on LGBTQ children's expression, violating their constitutional rights.

An agency that excludes viable and appropriate same-sex couples based solely on their LGBTQ status discriminates against the LGBTQ community. When the government contracts with that agency to care for the children in its custody, the government harms the dignity and mental health of LGBTQ children. The LGBTQ children completely dependent on that assigned agency know that it sees their potential as limited compared to their peers. They know that their assigned agency would not support their most typical of aspirations – a future with a happy and stable family. The unavoidable message the agency sends to

its LGBTQ children is exclusion based on their sexual orientation or gender identity, violating LGBTQ foster children's equal protection rights.⁴⁷

An agency's discrimination against the LGBTQ community would also have a chilling effect on the expression of its assigned LGBTQ children. The First Amendment grants its citizens the right to free speech. U.S. Const. amend. I. Embodied in that right is the right to free expression. *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 514 (1969) (the wearing of black armbands by students to protest the Vietnam war was a constitutionally-protected form of expression). The freedom to express oneself includes the right to express one's identity. *Obergefell v. Hodges*, 576 U.S. 644, 651-52 (2015) (the Constitution guarantees its LGBTQ citizens the right to "define and express their identity"); *Fricke v. Lynch*, 491 F. Supp. 381, 388 (D. R.I. 1980) (banning a high school student from bringing a same-sex date to prom would stifle the student's right to freedom of expression).

LGBTQ children assigned to an agency that discriminates against same-sex foster parents may reasonably conclude they must conceal who they are in order to be treated with the same respect and regard as other children. When Francis came out as gay, her foster mother isolated and berated her. Alan was forced to choose between his true identity and an adoptive home with his beloved sister. Conner was outed and bullied in group homes and treatment centers by

⁴⁷ See Equal Protection discussion, *supra*, at 27-28.

children and staff alike, before he even understood his own identity.

Many LGBTQ children will remain invisible, never revealing their status as a member of the LGBTQ community until later in life, making the calculation that to do so is just too costly.⁴⁸ These children feel compelled to live in isolation, afraid to share who they are with the people around them. Like Stacy and the foster children she now works with, they may spend their birthday feigning excitement, knowing they will not receive gifts that recognize the most basic aspects of who they are and where their interests lie.

Most concerning, these children may stay silent. They may stay silent about being bullied at school. They may not seek out information or support. They may stay silent when they are feeling extreme emotional distress. Instead of asking for help they desperately need, like Francis, they may turn to self-harm and suicide. Chilling foster children's freedom to express basic aspects of their identity has dire consequences.

⁴⁸ Annie Casey Foundation, *LGBTQ in Child Welfare: A Systematic Review of the Literature* at 35.

III. DISCRIMINATORY POLICIES VIOLATE NUMEROUS FEDERAL AND STATE STATUTES INTENDED TO PROMOTE THE BEST INTEREST AND PERMANENCY OF FOSTER CHILDREN AND RUN CONTRARY TO THE BASIC TENETS OF EVIDENCE-BASED CHILD WELFARE POLICY.

An agency that allows discrimination in permanency planning violates multiple federal child welfare statutes. Federal law dictates that children’s physical safety, permanency, and well-being are the paramount goals of the child welfare system.⁴⁹ Federal statutes enacted throughout the last 50 years require that state child welfare systems prioritize timely permanency planning and safety for children while they are in care.⁵⁰ Significant federal resources are appropriated to the states each year to encourage and incentivize permanency.⁵¹

Federal permanency planning statutes require an agency to actively seek out children’s relatives for

⁴⁹ Child Welfare Information Gateway, *Federal Laws Related to Permanency* (August 14, 2020), <https://www.childwelfare.gov/topics/permanency/legal-court/fedlaws/>.

⁵⁰ *Id.*, citing the Indian Child Welfare Act of 1978, Adoption Assistance and Child Welfare Act of 1980, Adoption and Safe Families Act of 1997, Fostering Connections to Success and Increasing Adoptions Act of 2008, and Family First Prevention Service Act of 2018.

⁵¹ Congressional Research Service, “Child Welfare: An Overview of Federal Programs and Their Current Funding” (January 10, 2017), <https://fas.org/sgp/crs/misc/R43458.pdf>.

placement to maintain family connection.⁵² State statutes also have codified this relative preference.⁵³ If Noah had been assigned to an agency that would not approve same-sex couples, amidst all of his physical and emotional suffering, Noah would have suffered further loss by being denied placement with his remaining family. An agency that will not seek out and approve the home of a child's same-sex relative fails to do so in direct violation of federal and state law, and at the expense of the child's best interest.

Further, government-sanctioned discrimination would negatively impact established state standards that safeguard the well-being of LGBTQ children in care. In Illinois, DCFS implemented mandatory minimum standards to promote the safety, adjustment, and well-being of LGBTQ children.⁵⁴ These procedures arose from evidence-based research, comport with national social work standards on culturally competent practice, and apply to all public and private agency caseworkers, who have procedural and ethical duties to follow these standards.⁵⁵ These procedures provide

⁵² 42 U.S.C. § 671(a)(19).

⁵³ U.S. Department of Health and Human Services, Administration for Children & Families, Children's Bureau, *Placement of Children with Relatives* (2018) at <https://www.childwelfare.gov/pubPDFs/placement.pdf> (includes summaries of state laws through Jan. 2018).

⁵⁴ DCFS Procedures 302, Appendix K at https://www2.illinois.gov/dcfs/aboutus/notices/Documents/Procedures_302_Appendices.pdf.

⁵⁵ Children and Family Research Center, University of Illinois School of Social Work, 2017 Illinois Child Well-Being

education and guidance for caseworkers and supervisors to serve the best interest of this struggling population and help them achieve permanency and better outcomes. Government sanctioned discrimination against the LGBTQ community would undermine the purpose of these procedures and violate the bedrock principle that all staff, whether public or privately contracted, must refrain from discrimination against children and their families based on LGBTQ status.⁵⁶

If the government contracts with foster care agencies that discriminate, evidence-based interventions for the best interest and permanency of children will no longer be the paramount priority of the child welfare system. There is a clear consensus of best practice for ensuring safety and promoting permanency for all foster children.⁵⁷ Excluding a class of people from participating in a foster care agency stands in opposition to recognized child welfare standards and will cause harm to children.



Study Final Report (2019) at https://www.cfr.illinois.edu/pubs/rp_20190619_2017IllinoisChildWell-BeingStudy.pdf; NASW Standards for Social Work Practice in Child Welfare, 17 at https://www.socialworkers.org/LinkClick.aspx?fileicket=_FIu_UDcEac%3d&portalid=0.

⁵⁶ DCFS Procedures 302, Appendix K, 1 at https://www2.illinois.gov/dafs/aboutus/notices/Documents/Procedures_302_Appendices.pdf.

⁵⁷ NASW Standards for Social Work Practice in Child Welfare, 20, 22, https://www.socialworkers.org/LinkClick.aspx?fileicket=_FIu_UDcEac%3d&portalid=0.

CONCLUSION

Government-sanctioned discrimination against a class of viable and appropriate prospective foster parents limits opportunities for permanency for children in foster care, violating their constitutional rights, federal and state child welfare statutes, and the basic tenets of child welfare policy.

Respectfully submitted,

CHARLES P. GOLBERT

Counsel of Record

CHRISTINA SCHLEICH

DANIELLE GOMEZ

ALISON L. STANKUS

JILL RUNK

NICHOLAS YOUNGBLOOD

JEFFREY STERBENC

KASS A. PLAIN

ALPA JAYANTI PATEL

JANET L. BARNES

CAROL CASEY

SARAH DONOVAN

KEVIN JEREMIAH

ULYSSES ROSALES

JEAN AGATHEN

OFFICE OF THE COOK COUNTY

PUBLIC GUARDIAN

2245 West Ogden Avenue,

Fourth Floor

Chicago, Illinois 60612

(312) 433-4300

charles.golbert@cookcountyil.gov

Counsel for Amicus Curiae