

No. 18-2574

**UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT**

SHARONELL FULTON, ET AL.,

Plaintiffs-Appellants,

v.

CITY OF PHILADELPHIA, ET AL.,

Defendants-Appellees.

On Appeal from the United States District Court
for the Eastern District of Pennsylvania, No. 18-cv-02075-PBT
Before the Honorable Petrese B. Tucker

**BRIEF FOR VOICE FOR ADOPTION, THE NORTH AMERICAN
COUNCIL ON ADOPTABLE CHILDREN, THE NATIONAL
ASSOCIATION OF SOCIAL WORKERS, THE CHILD WELFARE
LEAGUE OF AMERICA, AS AMICI CURIAE SUPPORTING
AFFIRMANCE IN FAVOR OF DEFENDANTS-APPELLEES**

JUSTIN GOODYEAR
WILMER CUTLER PICKERING
HALE AND DORR LLP
7 World Trade Center
250 Greenwich Street
New York, NY 10007
(212) 230-8800

ELIZABETH L. MITCHELL
Counsel of Record
EMILY L. STARK
LAUREN J. SCHREUR
WILMER CUTLER PICKERING
HALE AND DORR LLP
1875 Pennsylvania Avenue NW
Washington, DC 20006
(202) 663-6000

October 4, 2018

CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1, amici curiae certify that each of them is a non-profit organization with no parent corporation. None of the amici curiae has issued stock, and consequently no publicly held corporation owns 10% or more of the stock of any of the amici curiae.

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§ 675	8
11 P.S. § 2633	3

OTHER AUTHORITIES

<i>AAFP Congress of Delegates Update</i> , 30 Wash. Fam. Physician 8 (2003), at http://wafp.net/wp-content/uploads/2015/07/WA_Jan03.pdf	7
American Academy of Child and Adolescent Psychiatry, <i>Gay, Lesbian, Bisexual, or Transgendered Parents</i> (2009), at https://www.aacap.org/AACAP/Policy_Statements/2008/Gay_Lesbian_Bisexual_or_Transgender_Parents.aspx	7
American Academy of Family Physicians, <i>Resolution No. 505</i> (2002).....	7
American Academy of Pediatrics, <i>Policy Statement, Promoting the Well-Being of Children Whose Parents Are Gay or Lesbian</i> (2013), at http://pediatrics.aappublications.org/content/pediatrics/131/4/827.full.pdf	7
American Medical Ass’n, <i>Partner Co-Adoption H-60.940</i> (2014), at https://policysearch.ama-assn.org/policyfinder/detail/H-60.940%20Partner%20Co-adoption?uri=%2FAMADoc%2FHOD.xml-0-5034.xml	7
American Psychiatric Ass’n, <i>Position Statement on Issues Related to Homosexuality</i> (2013), at https://www.psychiatry.org/file%20library/about-apa/organization-documents-policies/policies/position-2013-homosexuality.pdf	7

American Psychoanalytic Ass’n, *Position Statement on Parenting* (2012), at <http://www.apsa.org/sites/default/files/2012%20%20Position%20Statement%20on%20Parenting.pdf>7

American Psychol. Ass’n (APA), Resolution, *Sexual Orientation, Parents, & Children* (2004), at <https://www.apa.org/about/policy/parenting.aspx>.....6, 7

Annie E. Casey Foundation, *LGBTQ in Child Welfare: A Systematic Review of the Literature* (2016), at <https://www.aecf.org/m/resourcedoc/aecf-LGBTQ2inChildWelfare-2016.pdf>.....16, 17, 18

Brodzinsky, David M., *Expanding Resources for Children III: Research-Based Best Practices in Adoption by Gays and Lesbians* (2011), at www.adoptioninstitute.org/old/publications/2011_10_Expanding_Resources_BestPractices.pdf.....10, 13

Brown, Helen Cosis, et al., *The Recruitment, Assessment, Support and Supervision of Lesbian, Gay, Bisexual and Transgendered Foster Carers: An International Literature Review* (2015), at http://reescentre.education.ox.ac.uk/wordpress/wp-content/uploads/2015/02/ReesCentreReview_LGBTfostercarers.pdf.....5

Child Welfare League of America, *Position Statement on Parenting of Children by Lesbian, Gay, Bisexual, and Transgender Adults* (2015), at <https://www.cwla.org/wp-content/uploads/2016/01/PositionStatementOnParentingOfChildrenbyLGBT.pdf>.....8

Detlaff, Alan J. & Micki Washburn, *Outcomes of Sexual Minority Youth in Child Welfare: Prevalence, Risk, and Outcomes, a Guide for Child Welfare Professionals*, at https://www.cssp.org/reform/child-welfare/get-real/resources/body/Sexual-Minority-Youth-in-Child-Welfare_providers_final.pdf (visited Oct. 4, 2018)18

Downs, Chris A. & Steven E. James, *Gay, Lesbian, and Bisexual Foster Parents: Strengths and Challenges for the Child Welfare System*, 85 *Child Welfare* 281 (2006).....11, 12, 14

Erney, Rosalynd & Kristin Weber, *Not All Children are Straight and White: Strategies for Servicing Youth of Color in Out-of-Home Care who Identify as LGBTQ*, 96 *Child Welfare J.* 151 (2018).....16

Feild, Tracey, *It is Time to Start Counting Kids Who are LGBTQ in Child Welfare*, 96 *Child Welfare J.* xiii (2018)15

Feinstein, Randi, et al., *Justice for All? A Report on Lesbian, Gay, Bisexual and Transgendered Youth in the New York Juvenile Justice System* (2001), at <https://files.eric.ed.gov/fulltext/ED471676.pdf>.....15

Gates, Gary J., et al., *Adoption and Foster Care by Gay and Lesbian Parents in the United States* (2007), at <https://williamsinstitute.law.ucla.edu/wp-content/uploads/Gates-Badgett-Macomber-Chambers-Final-Adoption-Report-Mar-2007.pdf>.....3, 5, 14

Gates, Gary J., *LGBT Parenting in the United States* (Feb. 2013), at <https://williamsinstitute.law.ucla.edu/wp-content/uploads/LGBT-Parenting.pdf>;.....13

Gilliam, James W., *Toward Providing a Welcoming Home for All: Enacting a New Approach to Address the Longstanding Problems Lesbian, Gay, Bisexual and Transgender Youth Face in the Foster Care System*, 37 *Loy. L.A. L. Rev.* 1037 (2004).....17

Goldberg, Abbie E., et al., *Choices, Challenges, and Tensions*, 10 *Adoption Quarterly* 33 (2007)11

Harden, Brenda Jones, *Safety and Stability for Foster Children: A Developmental Perspective* 14 *Future of Children* 31 (2004), at <https://files.eric.ed.gov/fulltext/EJ796432.pdf>3, 4

Howard, Jeanne & Madelyn Freundlich, *Expanding Resources for Waiting Children II: Eliminating Legal & Practice Barriers to Gay & Lesbian Adoption from Foster Care* (2008), at https://www.adoptioninstitute.org/wp-content/uploads/2013/12/2008_09_Expanding_Resources_Legal.pdf.....6, 13

Improving Services for Gay and Lesbian Youth in NYC’s Child Welfare System: A Task Force Report (1994), Joint Task Force of New York City’s Child Welfare Administration and the Council of Family and Child Caring Agencies15

Jayaratne, Srinika, et al., *African American and White Child Welfare Workers' Attitudes Towards Policies Involving Race and Sexual Orientation*, 30 *Children & Youth Servs. Rev.* 955 (2008)11

Jennings, Sarah, et al., *Why Adoption? Gay, Lesbian, and Heterosexual Adoptive Parents' Reproductive Experiences and Reasons for Adoption*, 17 *Adoption Quarterly* 205 (2014)13

Kaiser Family Foundation, *Inside-OUT: A Report on the Experiences of Lesbians, Gays and Bisexuals in America and on the Public's Views on Issues and Policies Related to Sexual Orientation* (2001), at <https://kaiserfamilyfoundation.files.wordpress.com/2013/01/new-surveys-on-experiences-of-lesbians-gays-and-bisexuals-and-the-public-s-views-related-to-sexual-orientation-chart-pack.pdf>14

Kim, Hyoun K., et al., *The Placement History Chart: A Tool for Understanding the Longitudinal Pattern of Foster Children's Placements*, 34 *Child. & Youth Servs. Rev.* 1459 (2012).....4

Lorthridge, Jayme, et al., *Strengthening Family Connections and Support for Youth who Identify as LGBTQ: Findings from the PII-RISE Evaluation*, 96 *Child Welfare J.* 53 (2018).....17

Mallon, Gerald P., *We Don't Exactly Get the Welcome Wagon: The Experiences of Gay and Lesbian Adolescents in the Welfare Systems* (1998)17

Marcenko, Maureen, *Foster Parent Recruitment and Retention: Developing Resource Families for Washington State's Children in Care* (2009), at https://partnersforourchildren.org/sites/default/files/2009._foster_parent_recruitment_and_retention.pdf10

McRoy, Ruth G., *Barriers and Success Factors in Adoptions from Foster Care: Perspectives of Families & Staff* (2007), at http://www.adoptuskids.org/_assets/files/NRCRRFAP/resources/barriers-and-success-factors-family-and-staff-perspectives.pdf10

National Adoption Center, *Adoption by Members of the LGBT Community* (2008), at <http://www.adopt.org/our-policies/#LGBT>8

National Ass’n of Social Workers, *Foster Care and Adoption* (2002), at <https://www.socialworkers.org/assets/secured/documents/da/da2010/referred/Foster%20Care.pdf>8

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.....5

North American Council on Adoptable Children, *Gay and Lesbian Adoptions and Foster Care* (2002), at <https://www.nacac.org/advocate/nacacs-positions/#gay>; *Eliminating Categorical Restrictions in Foster Care and Adoption*, at <https://www.nacac.org/advocate/nacacs-positions/#eliminating> (visited Oct. 4, 2018)8

Philadelphia Department of Human Services, *Resource Parent Handbook*, at <https://www.phila.gov/media/20170926145732/DHS-Resource-Handbook-FINAL-VERSION-small.pdf> (visited Oct. 4, 2018)4, 8

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 (2000), at https://www.researchgate.net/publication/226831919_Predictors_of_Placement_Outcomes_in_Treatment_Foster_Care_Implications_for_Foster_Parent_Selection_and_Service_Delivery4, 5

Ryan, Scott D., et al., *Coming Out of the Closet: Opening Agencies to Gay and Lesbian Adoptive Parents* (2004), at https://www.researchgate.net/publication/8692256_Coming_Out_of_the_Closet_Opening_Agencies_to_Gay_and_Lesbian_Adoptive_Parents.....6

Salazar, Amy M., et al., *Developing Relationship-Building Tools for Foster Families Caring for Teens who are LGBTQ2S*, 96 Child Welfare J. 75 (2018)17

Tyebjee, Tyzoon, *Attitude, Interest, and Motivation for Adoption and Foster Care*, 82 Child Welfare J. 685 (2003).....13

U.S. Department of Health & Human Services, Administration for Children & Families, *Working with Lesbian, Gay, Bisexual, and Transgender (LGBT) Families in Adoption* (2011), at https://www.childwelfare.gov/pubPDFs/f_profbulletin.pdf.....10

U.S. Department of Health & Human Services, *The AFCARS Report #24* (Oct. 20, 2017), at <https://www.acf.hhs.gov/sites/default/files/cb/afcarsreport24.pdf>.....14

Wilson, Julie Boatright, et al., *Listening to Parents: Overcoming Barriers to the Adoption of Children from Foster Care* (2005), at <https://sites.hks.harvard.edu/ocpa/pdf/Listening%20to%20Parents.pdf>9, 11

Wilson, Bianca D.M., et al., *Sexual and Gender Minority Youth in Foster Care: Assessing Disproportionality and Disparities in Los Angeles* (Aug. 2014), at https://www.acf.hhs.gov/sites/default/files/cb/pii_rise_lafys_report.pdf15, 16

STATEMENT OF INTEREST¹

Amici curiae (“Amici”)—Voice for Adoption, The North American Council on Adoptable Children, The National Association of Social Workers, and The Child Welfare League of America—are non-profit organizations dedicated to improving child welfare and foster care and adoption policy across the United States through research, policy development, and advocacy. Collectively, Amici have worked with many LGBTQ adoptive and foster parents and a wide spectrum of adoption and foster care agencies, including faith-based agencies, and are nationally recognized standard-setters for child-welfare services. Dedicated to improving the lives of our nation’s most vulnerable youth, Amici have long been leading voices on family foster care and adoption policy and best practices. Based on their collective experience and expertise, Amici believe that a diversity of foster and adoptive families is needed to help ensure that all children find permanent, loving families, and further believe that gay and lesbian parents are essential partners in this effort. On the basis of our collective knowledge and experience, Amici submit this brief to urge this Court to affirm the district court’s denial of the motion for a temporary restraining order and preliminary injunction.

¹ All parties have consented to this filing. No party’s counsel authored this brief in whole or in part. No party or party’s counsel contributed money that was intended to fund preparing or submitting this brief. No person—other than Amici and its counsel—contributed money that was intended to fund preparing or submitting this brief.

INTRODUCTION

Amici seek to describe, based on their extensive experience helping children in the foster care system, the harm to foster children that would result from permitting agencies to refuse to certify same-sex couples as foster parents.

Section I below explains how allowing discrimination against same-sex couples—and by extension against LGBTQ individuals—would deprive the foster care system of a scarce and vital resource: qualified, loving potential parents willing to open their homes and their hearts to foster children. Indeed, LGBTQ parents enhance the foster care system and child welfare in important ways. Agency exclusion of same-sex couples from certification increases the risk that children will not find stable, supportive family placements that enhance their well-being and is therefore detrimental to the best interests of children. Section II details the specific harm to LGBTQ children from an agency exclusion of same-sex couples. LGBTQ foster children are already at elevated risk for negative outcomes.

LGBTQ foster parents—while able to provide loving care to any child who needs a family—are often well-situated to provide LGBTQ foster children the understanding and support they need. Thus, policies that categorically exclude same-sex couples from being certified as foster parents disproportionately impact the welfare of LGBTQ foster children. Moreover, these exclusionary policies

stigmatize LGBTQ individuals as a group and risk harming some of the very youths whom the system is trying to protect and nurture.

ARGUMENT

I. ALLOWING AGENCIES PROVIDING PUBLIC FOSTER CARE SERVICES TO REFUSE TO CERTIFY SAME-SEX COUPLES AS FOSTER PARENTS IS DETRIMENTAL TO THE BEST INTERESTS OF CHILDREN

A. To Meet The Needs Of Children In Foster Care, Well-Established Child Welfare Practice Rejects Excluding Prospective Foster Parents Based On Characteristics Unrelated To Child Welfare

Pennsylvania law is clear that “issues of custody and continuation of foster care are determined according to a [foster] child’s best interests.” *In Interest of Sweeney*, 574 A.2d 690, 691 (Pa. Super. Ct. 1990); *see also* 11 P.S. § 2633(18), (19). A good match between the foster parent(s) and foster child is a key component of ensuring that a foster care placement is in the child’s best interests. Good matches are likely to be more stable, and stable foster care placements are critical to promoting the well-being of foster children.² In contrast, instability

² *See* Harden, *Safety and Stability for Foster Children: A Developmental Perspective* 14 *Future of Children* 31, 38 (2004) (“The quality of the parent-child relationship ... influences placement stability.”), *at* <https://files.eric.ed.gov/fulltext/EJ796432.pdf>; *see also* Gates et al., *Adoption and Foster Care by Gay and Lesbian Parents in the United States* 17 (2007) (explaining that “stability of placements is associated with positive outcomes for children” and noting that a review of studies from 1960-90 showed that having fewer placements was associated with, among other things, “better school achievement, less criminal activity, more social support, [and] increased life satisfaction”), *at* <https://williamsinstitute.law.ucla.edu/wp-content/uploads/Gates-Badgett-Macomber-Chambers-Final-Adoption-Report-Mar-2007.pdf>.

“leads to negative outcomes for children” and “children’s perceptions of the impermanency of their placements have also been linked to behavioral difficulties.”³ Moreover, a poor match impacts not only the specific children placed with a succession of foster parents, but the *entire* population of children needing care. “Inappropriate placement and increased numbers of unsuccessful placements ... cause[] pervasive harm to the entire system by creating foster parent burnout, thus reducing the quality and quantity of available foster homes.”⁴

Finding a good match for a foster child requires an individualized assessment of the potential foster parent(s) and foster child. Under well-established child welfare norms, this assessment involves matching the needs of the child with the strengths and capabilities of available foster families.⁵ For

³ Harden, 14 *Future of Children* at 38-39 (noting studies concluding that the number of placements predicted behavioral problems and emotional problems, such as aggression, coping difficulties, poor home adjustment, and low self-concept); *see also* Kim et al., *The Placement History Chart: A Tool for Understanding the Longitudinal Pattern of Foster Children’s Placements*, 34 *Child. & Youth Servs. Rev.* 1459, 1459-1460 (2012) (noting that disruptions in care are “potentially detrimental,” with “multiple placement transitions negatively affect[ing] attachment to primary caregivers and significantly increas[ing] risk for psychopathology and other adjustment problems”).

⁴ Redding 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), at https://www.researchgate.net/publication/226831919_Predictors_of_Placement_Outcomes_in_Treatment_Foster_Care_Implications_for_Foster_Parent_Selection_and_Service_Delivery.

⁵ *See* Phila. Dep’t of Human Servs., *Resource Parent Handbook 7*, at <https://www.phila.gov/media/20170926145732/DHS-Resource-Handbook-FINAL->

example, a child with a health condition will require foster parents capable of facilitating the necessary medical treatment and dealing with the medical community. Also critical is “the similarity between the child’s temperament and home environment; when the child’s temperament matches the expected or valued temperament in a particular home environment, the child is likely to do better.”⁶ Simply put, the City’s Department of Human Services (“DHS”) serves a diverse population of foster children with varied levels and types of needs. Having the largest pool possible of qualified potential foster parents increases the likelihood that DHS will be able to match foster children with foster parents who best meet their specific needs.

In contrast, the best interests of children are not served when an agency excludes from certification potential foster parents based solely on criteria unrelated to child welfare (like LGBTQ identity).⁷ “The effect of excluding

VERSION-small.pdf (visited Oct. 4, 2018); Nat’l Ass’n of Social Workers, *NASW Standards for Social Work Practice in Child Welfare* 23 (2013) at https://www.socialworkers.org/LinkClick.aspx?fileticket=_Flu_UDcEac%3D&portalid=0.

⁶ Redding et al., 9 J. Child & Fam. Studies at 438.

⁷ Social science has shown over and over—and it is not disputed in this litigation—that LGBTQ parents are as qualified and caring parents as heterosexual parents and that children fare as well in their families as children in heterosexual homes. See Brown et al., *The Recruitment, Assessment, Support and Supervision of Lesbian, Gay, Bisexual and Transgendered Foster Carers: An International Literature Review* 7-9 (2015), at http://reescentre.education.ox.ac.uk/wordpress/wp-content/uploads/2015/02/ReesCentreReview_LGBTfostercarers.pdf; Gates et al., *Adoption and Foster Care*, *supra* n.2, at 4 (collecting research on the effects of

nontraditional placement resources through an overly narrow definition of family is that some children will languish longer in foster care without permanence.”⁸ For this reason, nearly every major professional organization with a commitment to promoting child welfare has adopted an official position stating that sexual orientation should not be used to categorically exclude individuals from raising children through adoption and/or foster care, including: the American Academy of

LGBTQ parenting and noting the “findings across these studies are remarkably consistent in showing no negative consequences for children of GLB parents with regard to standard child well-being measures”); Am. Psychol. Ass’n (APA), Resolution, *Sexual Orientation, Parents, & Children* (2004) (“[T]here is no scientific evidence that parenting effectiveness is related to parental sexual orientation: Lesbian and gay parents are as likely as heterosexual parents to provide supportive and healthy environments for their children.”), at <https://www.apa.org/about/policy/parenting.aspx>. In fact, some studies have found that children of LGBTQ “parents fare *better* on some measures [of child welfare] than their peers.” Howard & Freundlich, *Expanding Resources for Waiting Children II: Eliminating Legal & Practice Barriers to Gay & Lesbian Adoption from Foster Care* 14 (2008) (collecting research on the effects of LGBTQ parenting) (emphasis added), at https://www.adoptioninstitute.org/wp-content/uploads/2013/12/2008_09_Expanding_Resources_Legal.pdf.

⁸ Ryan et al., *Coming Out of the Closet: Opening Agencies to Gay and Lesbian Adoptive Parents* 85 (2004), at https://www.researchgate.net/publication/8692256_Coming_Out_of_the_Closet_Opening_Agencies_to_Gay_and_Lesbian_Adoptive_Parents.

Child and Adolescent Psychiatry,⁹ the American Academy of Pediatrics,¹⁰ the American Medical Association,¹¹ the American Academy of Family Physicians,¹² the American Psychiatric Association,¹³ the American Psychoanalytic Association,¹⁴ the American Psychological Association,¹⁵ the Child Welfare

⁹ Am. Acad. of Child and Adolescent Psychiatry, *Gay, Lesbian, Bisexual, or Transgendered Parents* (2009), at https://www.aacap.org/AACAP/Policy_Statements/2008/Gay_Lesbian_Bisexual_or_Transgender_Parents.aspx.

¹⁰ Am. Acad. of Pediatrics, Policy Statement, *Promoting the Well-Being of Children Whose Parents Are Gay or Lesbian* (2013), at <http://pediatrics.aappublications.org/content/pediatrics/131/4/827.full.pdf>.

¹¹ Am. Med. Ass'n, *Partner Co-Adoption H-60.940* (2014), at <https://policysearch.ama-assn.org/policyfinder/detail/H-60.940%20Partner%20Co-adoption?uri=%2FAMADoc%2FHOD.xml-0-5034.xml>.

¹² Am. Acad. of Fam. Physicians, *Resolution No. 505* (2002), *quoted in AAFP Congress of Delegates Update*, 30 Wash. Fam. Physician 8, 9 (2003), at http://wafp.net/wp-content/uploads/2015/07/WA_Jan03.pdf.

¹³ Am. Psychiatric Ass'n, *Position Statement on Issues Related to Homosexuality* (2013), at <https://www.psychiatry.org/file%20library/about-apa/organization-documents-policies/policies/position-2013-homosexuality.pdf>.

¹⁴ Am. Psychoanalytic Ass'n, *Position Statement on Parenting* (2012), at <http://www.apsa.org/sites/default/files/2012%20%20Position%20Statement%20on%20Parenting.pdf>.

¹⁵ APA Resolution, *supra* n.7.

League of America,¹⁶ the National Adoption Center,¹⁷ the National Association of Social Workers,¹⁸ and the North American Council on Adoptable Children.¹⁹

B. Allowing Discrimination Against Same-Sex Couples In The Foster Care System Will Likely Reduce The Number Of Available Foster Families And Thereby Harm The Best Interests Of Children

Allowing foster agencies to deny certification to same-sex couples on the basis of LGBTQ status shrinks the pool and hinders the primary goals of foster care placement: the child's safety and well-being, and stability that leads to the child's having a permanent family.²⁰ This is true even if agencies that refuse to

¹⁶ Child Welfare League of Am., *Position Statement on Parenting of Children by Lesbian, Gay, Bisexual, and Transgender Adults* (2015), at <https://www.cwla.org/wp-content/uploads/2016/01/PositionStatementOnParentingOfChildrenbyLGBT.pdf>.

¹⁷ Nat'l Adoption Ctr., *Adoption by Members of the LGBT Community* (2008), at <http://www.adopt.org/our-policies#LGBT>.

¹⁸ Nat'l Ass'n of Social Workers, *Foster Care and Adoption* (2002), at <https://www.socialworkers.org/assets/secured/documents/da/da2010/referred/Foster%20Care.pdf>.

¹⁹ N. Am. Council on Adoptable Children, *Gay and Lesbian Adoptions and Foster Care* (2002), at <https://www.nacac.org/advocate/nacacs-positions/#gay>; *Eliminating Categorical Restrictions in Foster Care and Adoption*, at <https://www.nacac.org/advocate/nacacs-positions/#eliminating> (visited Oct. 4, 2018).

²⁰ See 42 U.S.C. §§ 671(16), 675(1) (together, requiring development of a “[a] plan for assuring that the child receives safe and proper care and that services are provided to the parents, child, and foster parents in order to improve the conditions in the parents’ home, [and] facilitate return of the child to his own safe home or the permanent placement of the child”). Permanency, meaning growing up in a permanent, loving home, can be achieved by reunifying a child with their birth parents, placing the child with other relatives, adoption, or permanent legal guardianship. *Resource Parent Handbook*, *supra* n.5, at 4. The importance of this

certify same-sex couples inform those couples of other non-discriminatory agencies.

First, discriminatory agency policies will discourage some LGBTQ individuals from applying to be foster parents in the first place. Given that the discriminatory agency is hired by the government, those policies may give some the misimpression that LGBTQ individuals are not permitted to adopt or foster through any agency, or at a minimum create confusion. Even those prospective parents who do not conclude that an across-the-board prohibition is in effect may still be deterred because, in the absence of a clear, inclusive policy enforced by the government, they know they face possible rejection based on their LGBTQ orientation. The first call to an adoption or foster agency is “an intensely emotional experience,” one that people may not undertake if they believe they may be discriminated against or stigmatized by an agency.²¹

In other instances, this type of rejection—and the corresponding need to hunt for a welcoming agency—will likely frustrate or discourage those who have

goal cannot be overstated. Aging out of the foster-care system without finding a permanent, loving home can have a devastating impact on a child’s future.

²¹ Wilson et al., *Listening to Parents: Overcoming Barriers to the Adoption of Children from Foster Care 5-6* (2005) (reporting emotional experience of prospective parents who were considering adopting a foster child and desire to be treated well, and with sensitivity, by agency staff during this first outreach), *at* <https://sites.hks.harvard.edu/ocpa/pdf/Listening%20to%20Parents.pdf>.

come forward, causing them to drop out of the process. Red tape and lack of responsiveness are already among the biggest barriers to successful outcomes in the foster care and adoption system.²² More importantly, refusing to certify but offering a different agency as an option is more than an administrative inconvenience; it reflects a judgment about one's fitness to be a parent.²³ In a study of lesbian women seeking to adopt, respondents who encountered agencies that would not work with them based on their sexual orientation experienced this

²² See McRoy, *Barriers and Success Factors in Adoptions from Foster Care: Perspectives of Families & Staff* 107-108 (2007) (presenting data showing that, of 28 barriers to successful adoption outcomes cited by 200 families, the two most commonly cited were adoption process logistics—cited 93% of the time—and agency communication/responsiveness—cited 80% of the time), at http://www.adoptuskids.org/_assets/files/NRCRRFAP/resources/barriers-and-success-factors-family-and-staff-perspectives.pdf; see also Marcenko, *Foster Parent Recruitment and Retention: Developing Resource Families for Washington State's Children in Care* 4 (2009) (concluding that “burdensome application processes, and poor agency responsiveness contribute to recruitment challenges,” so that “[m]any foster parent applicants do not complete the process”), at https://partnersforourchildren.org/sites/default/files/2009._foster_parent_recruitment_and_retention.pdf.

²³ See U.S. Dep't of Health & Hum. Servs. (HHS), Admin. for Child. & Fams., *Working with Lesbian, Gay, Bisexual, and Transgender (LGBT) Families in Adoption* 5 (2011) (noting that when adoption agencies decline to recruit adoptive parents from the lesbian and gay community, “many LGBT adults feel that agencies will not welcome them or will treat them as second-class applicants”), at https://www.childwelfare.gov/pubPDFs/f_profbulletin.pdf; Brodzinsky, *Expanding Resources for Children III: Research-Based Best Practices in Adoption by Gays and Lesbians* 34 (2011) (prospective gay and lesbian adoptive parents look “[f]irst and foremost” for “an agency or professional known to be ‘gay friendly’” when choosing an adoption source), at www.adoptioninstitute.org/old/publications/2011_10_Expanding_Resources_BestPractices.pdf.

refusal as a reflection of “societal beliefs about their (un)fitness as parents.”²⁴

While some prospective LGBTQ foster parents will continue despite a negative first interaction in which they are told a given agency will not consider them as foster parents, the rejection will be part of the cumulative hardship that causes some prospective parents to abandon the process.²⁵

Additionally, government acquiescence to discrimination at a subset of agencies may legitimize biases held by individual workers at other agencies that impact the ability of LGBTQ individuals to become foster parents. Individual agency workers’ personal beliefs “play a significant role in how workers respond to issues of sexual orientation in foster/adoptive parents.”²⁶ Consistent with this finding, Downs and James (2006) reported that, of those individuals who reported

²⁴ Goldberg et al., *Choices, Challenges, and Tensions*, 10 *Adoption Quarterly* 33, 52 (2007). In another study, nearly two-thirds of LGBTQ foster parents reported experiencing challenges in the foster care system because of their sexual orientation. See Downs & James, *Gay, Lesbian, and Bisexual Foster Parents: Strengths and Challenges for the Child Welfare System*, 85 *Child Welfare* 281, 291 (2006). Over half of those who did not report experiencing challenges due to their LGBTQ identity had adopted a “don’t ask, don’t tell” approach to the child welfare system. *Id.* at 292.

²⁵ Dropping out of the process is common. See Wilson et al., *Listening to Parents*, *supra* n.21, at 5 (estimating only one in 28 people who contact a child welfare agency about adoption ends up adopting a child from foster care).

²⁶ Jayaratne et al., *African American and White Child Welfare Workers’ Attitudes Towards Policies Involving Race and Sexual Orientation*, 30 *Children & Youth Servs. Rev.* 955, 964 (2008) (reporting “[b]oth African American and White conservative leaning workers are more likely to disagree with the placement of children in gay/lesbian households”).

encountering challenges in the foster care system due to their sexual orientation, 31.6% of men and 10% of women cited as their chief challenge having to prove to their foster agency that they were *exceptional* parents because of their sexual orientation.²⁷ These negative experiences may result in fewer qualified LGBTQ individuals becoming foster parents through *any* agency. A government policy prohibiting exclusion strengthens the pool of parents by enhancing the likelihood these parents will apply and successfully complete the process.

In sum, even if a given agency is willing to provide same-sex couples seeking to become foster parents information about other agencies, its discriminatory policy of refusing to certify such individuals ultimately shrinks the pool of potential foster parents. The City's policy prohibiting such exclusions protects the pool and thereby promotes child welfare.

C. LGBTQ Foster Parents Enhance The Foster Care System

In a foster care system that discourages or excludes LGBTQ parents, children are harmed not only because of a reduced pool of potential parents, but also because the children do not benefit from the specific ways that LGBTQ individuals contribute to the foster system.

While LGBTQ foster parents may be the best match for any given child, as a demographic, they play a particularly important role in providing a pool of

²⁷ Downs & James, 85 Child Welfare J. at 291.

potential foster parents for children who may be harder to match with a family. Research suggests that LGBTQ parents may be more willing to foster children who are harder to match, such as older children and children with special needs.²⁸ And, as discussed below, they may be especially understanding of foster children identifying as LGBTQ, a demographic that can be hard to match and is disproportionately represented in the foster care system.²⁹

Additionally, as a demographic, LGBTQ parents may be more willing to foster and to provide a permanent, adoptive home for their foster children.³⁰ In contrast to most heterosexual parents, for many LGBTQ parents, fostering or adoption is their first choice for how to become a parent: A same-sex couple is six times more likely than an opposite-sex couple to be raising a foster child, and four times more likely to be raising an adopted child.³¹ Consistent with this preference,

²⁸ See Howard & Freundlich, *Expanding Resources for Waiting Children II*, *supra* n.7, at 12; Brodzinsky, *Expanding Resources for Children III*, *supra* n.23, at 33-34.

²⁹ See Section II, *infra*.

³⁰ See Tyebjee, *Attitude, Interest, and Motivation for Adoption and Foster Care*, 82 *Child Welfare J.* 685, 703-704 (2003) (reporting that respondents identifying as LGBTQ were significantly more likely to be interested in adopting or fostering a child).

³¹ See Gates, *LGBT Parenting in the United States* 3 (Feb. 2013), at <https://williamsinstitute.law.ucla.edu/wp-content/uploads/LGBT-Parenting.pdf>; see also Jennings et al., *Why Adoption? Gay, Lesbian, and Heterosexual Adoptive Parents' Reproductive Experiences and Reasons for Adoption*, 17 *Adoption Quarterly* 205, 213 (2014) (reporting “[t]he majority of same-sex parents selected adoption as their first route to parenthood in contrast to a tiny minority of heterosexual parents”); Brodzinsky, *Expanding Resources for Children III*, *supra* n.23, at 6

LGBTQ individuals appear to be more willing than their non-LGBTQ individuals to provide one of the prime goals of foster care for children who cannot return home or go to relatives: a permanent, adoptive home for their foster children.³² In one national survey, 46% of lesbian/bisexual women reported having considered adoption and 5.7% had taken steps toward adoption, compared to only 32% and 3.3%, respectively, of heterosexual women.³³

(among gay and lesbian parents, “[o]ver 50% ... adopted children from the child welfare system, and 60% adopted transracially”).

³² Foster parents are the most common source of adoptive homes to foster children. HHS, *The AFCARS Report #24*, at 6 (Oct. 20, 2017) (showing 52% of the children adopted out of foster care with public agency involvement in fiscal year 2016 were adopted by their foster parents), at <https://www.acf.hhs.gov/sites/default/files/cb/afcarsreport24.pdf>.

³³ Gates et al., *Adoption and Foster Care*, *supra* n.2, at 6. As Gates notes, the National Survey of Family Growth did not also ask men these questions, but a 2001 survey conducted by the Kaiser Family Foundation of LGBTQ individuals across 15 major metropolitan areas similarly found that 49% would like to adopt children. Kaiser Fam. Found., *Inside-OUT: A Report on the Experiences of Lesbians, Gays and Bisexuals in America and on the Public’s Views on Issues and Policies Related to Sexual Orientation*, Chart 8 (2001), at <https://kaiserfamilyfoundation.files.wordpress.com/2013/01/new-surveys-on-experiences-of-lesbians-gays-and-bisexuals-and-the-public-s-views-related-to-sexual-orientation-chart-pack.pdf>; *see also* Downs & James, 85 *Child Welfare J.* at 290 (reporting that though study participants were only asked to name one satisfying aspect of foster parenting, “50% of men and 33.3% of women made secondary comments about using foster parenting as a means to test out adoption in their future”).

II. PERMITTING EXCLUSION OF SAME-SEX COUPLES WILL EXACERBATE ALREADY DISPROPORTIONATE NEGATIVE OUTCOMES FOR LGBTQ YOUTH BY REMOVING INDIVIDUALS WHO MAY HAVE HAD SIMILAR LIFE EXPERIENCES AND STIGMATIZING LGBTQ IDENTITY

Not only are LGBTQ youth disproportionately represented in the foster care population,³⁴ but they are also at greater risk for negative experiences, including being more likely to be placed in group settings and/or experience multiple placements.³⁵ LGBTQ youth in the foster care system are less likely than their non-LGBTQ peers to achieve a permanent home and are overrepresented in populations of homeless youth.³⁶ Studies suggest that these alarming statistics are driven in part by the disapproval and rejection faced by LGBTQ youth after

³⁴ See Wilson 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.

³⁵ See Feinstein et al., *Justice for All? A Report on Lesbian, Gay, Bisexual and Transgendered Youth in the New York Juvenile Justice System* 16 (2001) (discussing joint task force finding that 78% of LGBTQ youth surveyed living in New York City Administration for Children's Services group homes had run away or were removed from their foster family placement because of hostility toward their sexual orientation or gender identity), at <https://files.eric.ed.gov/fulltext/ED471676.pdf> (citing *Improving Services for Gay and Lesbian Youth in NYC's Child Welfare System: A Task Force Report* (1994), Joint Task Force of New York City's Child Welfare Administration and the Council of Family and Child Caring Agencies).

³⁶ Feild, *It is Time to Start Counting Kids Who are LGBTQ in Child Welfare*, 96 *Child Welfare J.* xiii, xiv (2018).

making their sexual orientation or identity known—both to their biological family and within the foster care system.³⁷

It is thus unsurprising that identifying supportive, accepting, LGBTQ-affirming homes that permit LGBTQ youth to flourish has been identified as a best and promising practice to reverse these statistics and combat negative outcomes.³⁸ In light of previous disapproval or rejection, many youth may not feel safe identifying themselves to foster parents as LGBTQ unless they know that rejection is unlikely and feel a sense of shared experience with their foster parents.³⁹ For example, when LGBTQ youth were asked to define safety and affirmation, they consistently highlighted the need for foster parents to acknowledge the different dimensions of their identities and “encourage their development and exploration of these identities.”⁴⁰ LGBTQ youth have reported that having accepting foster

³⁷ Annie E. Casey Found., *LGBTQ in Child Welfare: A Systematic Review of the Literature* 3 (2016) (“Casey Foundation Review”), at <https://www.aecf.org/m/resourcedoc/aecf-LGBTQ2inChildWelfare-2016.pdf>.

³⁸ *Id.* at 35; see also Wilson et al., *Sexual and Gender Minority Youth in Foster Care*, *supra* n.34, at 40-41.

³⁹ See Wilson et al., *Sexual and Gender Minority Youth in Foster Care*, *supra* n.34, at 40.

⁴⁰ Erney & Weber, *Not All Children are Straight and White: Strategies for Servicing Youth of Color in Out-of-Home Care who Identify as LGBTQ*, 96 *Child Welfare J.* 151, 159 (2018).

families is one of the principal factors contributing to their feelings of empowerment and liberation.⁴¹

While individuals of any sexual identity can provide nurturing, supportive care to LGBTQ youths, many foster care programs have had success in identifying and promoting LGBTQ-affirming placements by tapping LGBTQ foster parents.⁴² As one recent study of relationship-building tools for families caring for LGBTQ teenagers concluded: “[i]t is important to consider the ways in which participants’ identities impact their understanding of these youths’ identities.”⁴³ Eliminating prospective foster parents on the basis of their sexual orientation may remove the very parents who could most benefit LGBTQ youths—parents who have lived, and perhaps struggled, with LGBTQ identities and who will be supportive of the youth’s journey.⁴⁴ Relatedly, as many LGBTQ adults have unfortunately

⁴¹ *Casey Foundation Review*, supra n.37, at 35.

⁴² See Gilliam, *Toward Providing a Welcoming Home for All: Enacting a New Approach to Address the Longstanding Problems Lesbian, Gay, Bisexual and Transgender Youth Face in the Foster Care System*, 37 *Loy. L.A. L. Rev.* 1037, 1041-1042 (2004) (citing Mallon, *We Don’t Exactly Get the Welcome Wagon: The Experiences of Gay and Lesbian Adolescents in the Welfare Systems* (1998) and referencing successful placement programs in Los Angeles, New York, Toronto, and Washington, D.C.).

⁴³ Salazar et al., *Developing Relationship-Building Tools for Foster Families Caring for Teens who are LGBTQ2S*, 96 *Child Welfare J.* 75, 94 (2018).

⁴⁴ Lorthridge et al., *Strengthening Family Connections and Support for Youth who Identify as LGBTQ: Findings from the PII-RISE Evaluation*, 96 *Child Welfare J.* 53, 55 (2018) (“Identifying as LGBTQ alone does not mean a young person will experience any negative outcomes; however, the higher proportion of youth who

experienced maltreatment or harassment in their own lives, they may be better able to recognize such harassment when it occurs, advocate for a remedy, and help their children learn how best to respond.

The categorial exclusion of prospective foster parents on the basis of sexual orientation also stigmatizes LGBTQ youth, who are already at increased risk of health and mental health challenges, including lower self-esteem, depression and suicide, and illegal drug abuse.⁴⁵ Excluding same-sex couples from foster parenting sends a demoralizing and harmful message to LGBTQ youth: that they are less good than other individuals and that they are not capable of having the same full family life that others can look forward to as adults, or can do so only if they mask certain elements of their identity. To wit, many LGBTQ teens in the Philadelphia foster care system may have knowledge of this very litigation. Exclusionary policies that, at best, encourage silence with respect to sexual orientation or gender identity and, at worst, promote messages of unfitness are

identify as LGBTQ and who have these experiences in comparison to youth who do not identify as LGBTQ demonstrates the importance of ensuring that youth who do identify as LGBTQ in vulnerable situations, such as foster care, have supports available to meet their needs.”)

⁴⁵ *Casey Foundation Review*, *supra* n.37, at 3; *see also* Detlaff & Washburn, *Outcomes of Sexual Minority Youth in Child Welfare: Prevalence, Risk, and Outcomes, a Guide for Child Welfare Professionals* 10, 12, at https://www.cssp.org/reform/child-welfare/get-real/resources/body/Sexual-Minority-Youth-in-Child-Welfare_providers_final.pdf (visited Oct. 4, 2018).

detrimental to the welfare of LGBTQ youth because they undermine self-esteem. Prohibiting the City from enforcing non-discrimination by agencies would also have an indirect negative impact, in that it would impair LGBTQ youths' trust in the City and in DHS employees, and thus frustrate efforts to provide the best possible care.⁴⁶ The City's foster and adoption policies should reinforce LGBTQ children's sense of self-worth and the City's efforts on their behalf, not undermine them.

CONCLUSION

Catholic Social Services ("CSS"), and its dedicated staff and volunteers, have spent countless hours improving outcomes for foster children through work that is separate from certification. CSS has promoted foster parenting, recruited individuals to apply, and supported a network of loving foster parents who have devoted themselves to caring for foster children at untold personal sacrifice.⁴⁷

Amici applaud this critical charitable work that CSS and its families have carried out for decades. Amici also hope that the many individuals in CSS's foster parent network will continue to nurture and care for foster children. Many avenues

⁴⁶ In testimony before the district court, DHS Commissioner Cynthia Figueroa expressed her concern that allowing discrimination would "send a very strong signal to [the LGBTQ] community that [its] rights were not protected," and that "while we support you now, we won't support your rights as an adult." JA 483-484.

⁴⁷ JA 827 (Amato Decl. ¶¶ 3, 5).

remain open to CSS and the parents in its network to continue supporting foster children and foster families, notwithstanding the district court's order.

Nonetheless, Amici oppose CSS's insistence on an approach to foster parent certification that is inconsistent with recognized child welfare standards and risks unique harm to LGBTQ youth. Amici thus join Respondents in respectfully urging the Court to affirm the district court's denial of the motion for a temporary restraining order and preliminary injunction.

Respectfully submitted.

/s/ Elizabeth L. Mitchell

ELIZABETH L. MITCHELL

Counsel of Record

EMILY L. STARK

LAUREN J. SCHREUR

WILMER CUTLER PICKERING

HALE AND DORR LLP

1875 Pennsylvania Avenue NW

Washington, DC 20006

(202) 663-6000

JUSTIN GOODYEAR
WILMER CUTLER PICKERING
HALE AND DORR LLP
7 World Trade Center
250 Greenwich Street
New York, NY 10007
(212) 230-8800

Counsel for Voice for Adoption, The North American Council on Adoptable Children, The National Association of Social Workers, and the Child Welfare League of America

October 4, 2018

CERTIFICATE OF COMPLIANCE

Pursuant to Fed. R. App. P. 32(g), the undersigned hereby certifies that this brief complies with the type-volume limitation of Fed. R. App. P. 29(a)(5) and 32(a)(7). Exclusive of the exempted portions of the brief, as provided in Fed. R. App. P. 32(f), the brief contains 4,809 words. The brief has been prepared in proportionally spaced typeface using Microsoft Word in 14-point Times New Roman font. As permitted by Fed. R. App. P. 32(g), the undersigned has relied on the word count feature of this word processing system in preparing this certificate.

This brief complies with 3d Cir. Local App. R. 31.1(c) because the PDF file has been scanned for viruses by Cylance PROTECT and is said to be virus-free by that program.

I further certify that, in accordance with 3d Cir. Local App. R. 31.1(c), the electronic version of this brief is identical to the text of the paper copies that will be filed with the Clerk's office.

I further certify that, in accordance with 3d Cir. Local App. R. 28.3(d), I am a member in good standing of the bar of the United States Court of Appeals for the Third Circuit.

/s/ Elizabeth L. Mitchell
ELIZABETH L. MITCHELL

October 4, 2018

CERTIFICATE OF SERVICE

I hereby certify that on this 4th day of October, 2018, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Third Circuit using the appellate CM/ECF system. Counsel for all parties to the case are registered CM/ECF users and will be served by the appellate CM/ECF system.

/s/ Elizabeth L. Mitchell
ELIZABETH L. MITCHELL