

18-2574

IN THE
United States Court of Appeals
FOR THE THIRD CIRCUIT



SHARONELL FULTON; CECELIA PAUL; TONI LYNN SIMMS-BUSCH;
CATHOLIC SOCIAL SERVICES,

Appellants,

against

CITY OF PHILADELPHIA; DEPARTMENT OF HUMAN SERVICES FOR
THE CITY OF PHILADELPHIA; PHILADELPHIA COMMISSION ON HUMAN RELATIONS,

Appellees.

*On Appeal from the United States District Court
for the Eastern District of Pennsylvania*

**BRIEF FOR *AMICI CURIAE*
FAMILY EQUALITY COUNCIL AND COLAGE
IN SUPPORT OF APPELLEES**

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**CORPORATE DISCLOSURE STATEMENT;
PARTIES' CONSENT TO FILE**

Amici curiae have no parent corporation nor does any publicly held corporation own 10% or more of their stock.

No counsel for a party authored this brief, in whole or in part, and no person other than *amici curiae*, their members, and their counsel made any monetary contribution to fund the preparation or submission of this *amicus* brief.

All parties have consented to the filing of this *amicus* brief.

TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	ii
INTEREST OF <i>AMICI CURIAE</i>	1
SUMMARY OF ARGUMENT	3
ARGUMENT	5
POINT I ALLOWING FOSTER CARE AGENCIES TO DISCRIMINATE AGAINST SAME-SEX COUPLES LIMITS THE NUMBER OF AVAILABLE HOMES	5
A) Discrimination Against Same-Sex Couples Deters and Prevents Them From Fostering.....	9
B) Discrimination Against Same-Sex Couples Delays Families From Fostering	12
POINT II SAME-SEX COUPLES PROVIDE POSITIVE FOSTER HOMES AND NONDISCRIMINATION POLICIES CULTIVATE AN INCLUSIVE AND WELCOMING ENVIRONMENT FOR THEM TO FOSTER	15
POINT III DISCRIMINATING AGAINST PROSPECTIVE FOSTER PARENTS BASED ON SEXUAL ORIENTATION DENIES FOSTER CHILDREN LOVING AND AFFIRMING HOMES	19
A) Children Who Cannot Remain with Their Families Need Supportive Family Foster Homes.....	20
B) Children Need a Diverse Pool of Foster Parents	23
CONCLUSION.....	27

TABLE OF AUTHORITIES

	Page(s)
Cases	
<i>Ark. Dep’t of Human Servs. v. Cole</i> , 380 S.W.3d 429 (Ark. 2011)	6
<i>Brown v. Bd. of Educ.</i> , 347 U.S. 483 (1954).....	7
<i>Campaign for S. Equal. v. Miss. Dep’t of Human Servs.</i> , 175 F. Supp. 3d 691 (S.D. Miss. 2016)	6
<i>Fla. Dep’t of Children & Families v. X.X.G.</i> , 45 So. 3d 79 (Fla. 3d Dist. Ct. App. 2010).....	6
<i>Fulton v. City of Philadelphia</i> , No. 18-2075, Mem. Op. (E.D. Pa. July 13, 2018).....	23
<i>Obergefell v. Hodges</i> , 135 S.Ct. 2584 (2015).....	15
<i>Roberts v. U.S. Jaycees</i> , 468 U.S. 609 (1984).....	7
<i>Stewart v. Heineman</i> , 296 Neb. 262 (Neb. S. Ct. 2017)	6
<i>United States v. Windsor</i> , 570 U.S. 744 (2013).....	7
<i>Utah Dep’t of Health v. Stone</i> , Case No. 20140872-SC (Sup. Ct. Oct 23, 2014).....	6
<i>Watkins v. U.S. Army</i> , 875 F.2d 699 (9th Cir. 1989) (Norris, J., concurring)	5
Statutes	
Ark. Code Ann. § 9-8-301	6

Fla. Stat. § 63.0426
 Miss. Code Ann. § 93-17-3(5)6
 Utah Code Ann. § 78-30-1(3)6

Other Authorities

2016 Saw More Children in Foster Care and More Adopted, NORTH AMERICAN COUNCIL ON ADOPTABLE CHILDREN, available at: <https://www.nacac.org/2018/01/08/2016-saw-more-children-in-foster-care-and-more-adopted/> (last visited Oct. 2, 2018).....21

51 Useful Aging Out of Foster Care Statistics | Social Race Media, NAT’L FOSTER YOUTH INST. (May 26, 2017), available at: <https://www.nfyi.org/51-useful-aging-out-of-foster-care-statistics-social-race-media/> (last visited Oct. 2, 2018)22

COMFORTCASES, <https://www.comfortcases.org/> (last visited Sept. 21, 2018)16

Expanding Resources For Waiting Children II: Eliminating Legal and Practice Barriers to Gay and Lesbian Adoption from Foster Care, EVAN B. DONALDSON ADOPTION INSTITUTE (Sept. 2008), available at: https://www.adoptioninstitute.org/wp-content/old/publications/2008_09_Expanding_Resources_Legal.pdf (last visited Oct. 3, 2018).....6, 8, 22

Extending Foster Care Beyond 18, NAT’L CONFERENCE OF STATE LEGIS. (Jul. 28, 2017), available at: <http://www.ncsl.org/research/human-services/extending-foster-care-to-18.aspx> (last visited Oct. 3, 2018) 21-22

Family Equality Council & Movement Advancement Project, *Ten States Have Passed Discriminatory Adoption and Foster Care Laws that Harm Children*, available at: <https://everychilddeservesafamily.com/state-bills/> (last visited Sept. 29, 2018)7

James Michael Nichols, *This Incredible Place Helps LGBT Foster Kids When There’s Nowhere Else To Turn*, HUFFPOST (Jan. 1, 2016), available at: https://www.huffingtonpost.com/entry/this-incredible-place-helps-lgbt-foster-kids-when-theres-nowhere-else-to-turn_us_56817433e4b0b958f659f7c5 (last visited Sept. 29, 2018)..... 25-26

Joslin, Minter & Sakimura, *Statutes and administrative regulations banning or restricting the ability of lesbian and gay people from becoming adoptive or foster parents*, *Lesbian, Gay, Bisexual & Transgender Family Law* § 2:9 (Aug. 2018)6

Julia Terroso, *City resumes foster-care work with Bethany Christian Services after it agrees to work with same-sex couples*, THE INQUIRER (June 28, 2018), available at: <http://www2.philly.com/philly/news/foster-care-lgbt-bethany-christian-services-same-sex-philly-lawsuit-catholic-social-services-20180628.html> (last visited Sept. 29, 2018) 3-4

LGBTQ Youth in the Foster System, HUMAN RIGHTS CAMPAIGN, available” at <https://www.hrc.org/resources/lgbt-youth-in-the-foster-care-system> (last visited Oct. 3, 2018)26

Michael E. Lamb, *Mothers, Fathers, Families, and Circumstances: Factors Affecting Children’s Adjustment*, 16 APPLIED DEV. SCI. 98 (2012)15

Michael Lambert, *Rob Chasteen-Scheer: From Homeless Teen To Tireless Advocate For Foster Kids*, GAY WITH KIDS (Dec. 28, 2016), available at: <https://www.gaywithkids.com/rob-chasteen-scheer-from-homeless-teen-to-tireless-advocate-for-foster-2465987441.html> (republished by HUFFPOST on Mar. 30, 2017)16

Nebraska Department of Social Services Administrative Memorandum (Memo 1-95).6

Number of Children in Foster Care Continues to Increase, U.S. DEPT. OF HEALTH & HUMAN SERVICES: ADMINISTRATION FOR CHILDREN & FAMILIES (Nov. 30, 2017), available at: <https://www.acf.hhs.gov/media/press/2017/number-of-children-in-foster-care-continues-to-increase> (last visited Oc. 3, 2018).....7

Peter Gallucci, *Thou Shall Not Adopt; Sexual Orientation Discrimination in the Adoption Process*,
23 CARDOZO J.L.& GENDER 465 (2016).....5

Sejal Singh & Laura E. Durso, *Widespread Discrimination Continues to Shape LGBT People’s Lives in Both Subtle and Significant Ways*,
CENTER FOR AMERICAN PROGRESS (May 2, 2017), available at:
<https://www.americanprogress.org/issues/lgbt/news/2017/05/02/429529/widespread-discrimination-continues-shape-lgbt-peoples-lives-subtle-significant-ways> (last visited Oct. 3, 2018)5

Shoshana K. Goldberg & Kerith J. Conron, *How Many Same-Sex Couples in the U.S. Are Raising Children?*,
THE WILLIAMS INSTITUTE: UCLA SCHOOL OF LAW (July 2018).....8

Statement of Alex Lane Igoudin & Jonathan Clark to Family Equality Council (March 21 & Aug. 22, 2018).....17

Statement of April & Ginger Aaron-Brush to Family Equality Council (Sept. 7, 8 & 9, 2018)..... 10-11

Statement of Courtney Sausville to Family Equality Council (Aug. 31 & Sept. 3, 2018).....25

Statement of Drew Pierson to Family Equality Council (Aug. 30 & Sept. 4, 2018)..... 12-13

Statement of Jamie & Bo Nabozny to Family Equality Council (Aug. 29 & 30, 2018)9

Statement of Joseph DeBiew to Family Equality Council (Aug. 23, 27 & Sep. 4, 2018).....20

Statement of Kristopher Sharpe to Family Equality Council (Aug. 28 & 29, 2018)..... 3, 21-22

Statement of Lara Mayhew & Jennifer Zilka to Family Equality Council (Sept. 10 & 13, 2018)..... 13-14

Statement of Matthew Ramsey to Family Equality Council (Aug. 20, 2018)..... 18-19

Statement of Paul Rummell & Ben West to Family Equality Council
(May 15 & Aug. 21, 2018)18

Statement of Richard & Aaron Hooks Wayman to Family Equality Council
(Aug. 30 & 31, 2018)..... 16-17

Statement of Rick Olson & Jay Timmons to Family Equality Council
(Aug. 18, 2018).....12

Statement of Samantha Hutcherson Bannon to Family Equality Council
(Aug. 28 & Sept. 4, 2018)..... 3, 9-10

Statement of Shane Read to Family Equality Council
(May 23, Aug. 22 & 28, 2018) 23-24

Statement of Steve Ledoux to Family Equality Council
(May 1 & Aug. 21, 2018) 17-18

Statement of Thomas Starling to Family Equality Council
(Aug. 30, 2018)..... 11-12

Statement of Tristan Torres to Family Equality Council
(Aug. 21 & 22, 2018).....24

Statement of Tim Dennis to Family Equality Council
(Aug. 22, 2018).....26

Statement of Weston Charles-Gallo to Family Equality Council
(Aug. 28 & Sept. 5, 2018)..... 24-25

Stephen T. Watson & Harold McNeil, *95 Catholic Charities Workers
Oppose Decision to End Adoption Program*, BUFFALO NEWS (Aug.
31, 2018), available at: <https://buffalonews.com/2018/08/31/some-catholic-charities-workers-oppose-bishops-decision-to-end-adoption-program/> (last visited Sept. 29, 2018)15

Stumbo-Leonardi Family, 2011 Portrait Project, “*Families at the
Forefront: Post-Adoption Services Support Forever Families*” at
44, Voice for Adoption (2011) (on file with Voice for Adoption).....18

The Adoption and Foster Care Analysis and Reporting System Report,
 U.S. DEPT. OF HEALTH & HUMAN SERVICES: CHILDREN’S BUREAU
 (Nov. 30, 2017), available at:
<https://www.acf.hhs.gov/cb/resource/afcars-report-24>
 (last visited September 29, 2018)7

INTEREST OF *AMICI CURIAE*

Amici curiae are not-for-profit organizations dedicated to promoting equality among our country's diverse families, in particular those comprised of lesbian, gay, bisexual, transgender, or queer (LGBTQ) parents, same-sex couples, and their children. This brief offers the stories of LGBTQ adults and same-sex couples with experience in seeking to foster as well as stories of former foster children to underscore the harm inflicted by sanctioning discrimination against same-sex couples seeking to become foster parents.

Family Equality Council (“Family Equality” or “FEC”) is a national organization that connects, supports, and represents LGBTQ parents and their children. The organization is committed to changing attitudes and policies to ensure that all families are respected, loved, and celebrated. For nearly 40 years, Family Equality has been a community of parents, children, grandparents and grandchildren, reaching across the country and raising voices toward fairness for all families. Family Equality spearheads the Every Child Deserves a Family Campaign, a national effort to end anti-LGBTQ discrimination in the child welfare system and promote the best interests of all children in the foster care and adoption system by increasing their access to loving, stable, forever homes. Family Equality submits this brief on behalf of all of the LGBTQ parents and same-sex couples as well as the young people with whom it has worked.

COLAGE is the only national organization for and led by people with an LGBTQ parent. COLAGE approaches its work with the understanding that living in a world that discriminates against and treats these families differently can be isolating and challenging for children. Based on its direct experience in working with thousands of youth over the past 28 years, COLAGE can attest to the critical importance of recognizing and respecting these families on every level – socially, institutionally, politically and legally.

SUMMARY OF ARGUMENT

Children need families, not facilities. At the heart of the foster care crisis in this country is the simple fact that there are not enough foster and adoptive homes. So, why would anyone think it is acceptable to turn away qualified, willing foster parents? At best, allowing child welfare agencies to discriminate based on their religious beliefs creates an atmosphere of confusion and discouragement for families who want to foster or adopt in a state that desperately needs more families to do so. At worst, it robs children of their livelihood by unduly denying LGBT, single, or non-Christian parents opportunities to save children from the cycle of abuse and neglect they will almost certainly encounter growing up in the foster care system. No child should have the childhood that I had – especially when there are people who are willing to provide a safe and loving home.

- Kristopher Sharpe, New York City (previously Texas)¹

Shortly after I arrived at [Bethany Christian Services], I shared with the staff that we are a two-mom family.... Two staff members immediately left the room without addressing me. The third individual ... stated that refugee children have “already been through enough” and wouldn't be the best fit for placement in our family.... [W]e decided not to pursue any further inquiries fearing we would face the same humiliating and discriminatory treatment.

- Samantha Hutcherson Bannon, Philadelphia²

¹ Kristopher Sharpe Statement to FEC (Aug. 28 & 29, 2018). All statements cited in this brief are on file with *amicus* FEC and the undersigned counsel.

² Samantha Hutcherson Bannon Statement to FEC (Aug. 28 & Sept. 4, 2018). The City also suspended BCS' contract to license foster parents, but BCS changed its policy to comply with the City's nondiscrimination policy and is partnering with the Mayor's Office of LGBT Affairs to train its staff on working with LGBTQ people and same-sex couples. The City has reinstated BCS' contract. See Julia Terroso, *City resumes foster-care work with Bethany Christian Services after it agrees to work with same-sex couples*, THE INQUIRER (June 28, 2018), available at <http://www2.philly.com/philly/news/foster-care-lgbt-bethany-christian->

Despite the enormous need for foster care families, Catholic Social Services (“CSS”) refuses to certify same-sex couples seeking to become foster parents, in violation of its contract with the City of Philadelphia (the “City”), which prohibits discrimination based on sexual orientation, among other characteristics. CSS argues that any harm from its admittedly discriminatory policy is hypothetical because same-sex couples may get certified to foster through other agencies. CSS is wrong: discrimination can discourage or delay a qualified same-sex parent family from fostering. That other agencies might behave differently does not cure the chilling effect of discrimination.

Amici offer the perspectives of the people directly affected by discriminatory policies like the one CSS seeks to justify: LGBTQ adults who have sought to foster and young people who were formerly in foster care. Through their experiences, these individuals are uniquely positioned to explain the harmful impact of discriminatory policies that ultimately result in fewer homes for children in foster care by preventing, deterring, and delaying would-be foster and adoptive parents from pursuing the care of children in need of families. Their stories make clear the need for nondiscrimination protections and the reality that, when they are in place, same-sex couples are more willing and able to foster and adopt. If this Court were

to accept CSS’s position that government-contracted foster care agencies may discriminate against prospective families based on an agency’s religious beliefs, children in the foster care system will be denied access to families who could provide them safe and loving homes.

ARGUMENT

POINT I

ALLOWING FOSTER CARE AGENCIES TO DISCRIMINATE AGAINST SAME-SEX COUPLES LIMITS THE NUMBER OF AVAILABLE HOMES

As the narratives below illustrate, discrimination prevents, deters, and delays same-sex couples from becoming foster parents. Historically, anti-LGBTQ discrimination has been pervasive in virtually all aspects of life, including in the child welfare system.³ Until recently, some states had laws or policies expressly prohibiting LGBTQ individuals and/or same-sex couples from fostering or

³ See Sejal Singh & Laura E. Durso, *Widespread Discrimination Continues to Shape LGBT People’s Lives in Both Subtle and Significant Ways*, CENTER FOR AMERICAN PROGRESS (May 2, 2017), available at <https://www.americanprogress.org/issues/lgbt/news/2017/05/02/429529/widespread-discrimination-continues-shape-lgbt-peoples-lives-subtle-significant-ways> (last visited Oct. 3, 2018); *Watkins v. U.S. Army*, 875 F.2d 699, 724 (9th Cir. 1989) (Norris, J., concurring) (“Discrimination against homosexuals has been pervasive in both the public and private sectors.”); Peter Gallucci, *Thou Shall Not Adopt; Sexual Orientation Discrimination in the Adoption Process*, 23 CARDOZO J.L. & GENDER 465, 468-71 (2016) (summarizing historical and ongoing discrimination in adoption against the LGBTQ community).

adopting.⁴ Other states enacted laws intended to have the same discriminatory impact.⁵ Although these laws and policies have been overturned or repealed,⁶ as discussed below, when same-sex couples face discrimination by foster or adoption agencies, the harm is exacerbated by this long history of discrimination.

Discrimination is harmful and, as the stories below demonstrate, it can have a chilling effect on same-sex couples' willingness and ability to move forward with plans to foster or adopt. As the United States Supreme Court has recognized, discrimination "generates a feeling of inferiority as to [individual's] status in the

⁴ Fla. Stat. § 63.042; Miss. Code Ann. § 93-17-3(5); Joslin, Minter & Sakimura, *Statutes and administrative regulations banning or restricting the ability of lesbian and gay people from becoming adoptive or foster parents*, Lesbian, Gay, Bisexual & Transgender Family Law § 2:9 (August 2018) ("Family Law") (describing Missouri's "long-standing unwritten policy of not licensing homosexuals"); Nebraska Department of Social Services Administrative Memorandum (Memo 1-95); *see also Expanding Resources For Waiting Children II: Eliminating Legal and Practice Barriers to Gay and Lesbian Adoption from Foster Care*, EVAN B. DONALDSON ADOPTION INSTITUTE at 17-20 (Sept. 2008) (the "Donaldson Report"), available at: https://www.adoptioninstitute.org/old/publications/2008_09_Expanding_Resources_Legal.pdf (last visited Oct. 3, 2018).

⁵ Ark. Code Ann. § 9-8-301 (preventing cohabiting couples from adopting pre-marriage equality); Utah Code Ann. § 78-30-1(3) (same).

⁶ *Campaign for S. Equal. v. Miss. Dep't of Human Servs.*, 175 F. Supp. 3d 691 (S.D. Miss. 2016); *Ark. Dep't of Human Servs. v. Cole*, 380 S.W.3d 429 (Ark. 2011); Family Law, *supra* n. 4 (describing how Missouri's policy was dropped); *Fla. Dep't of Children & Families v. X.X.G.*, 45 So. 3d 79 (Fla. 3d Dist. Ct. App. 2010); 2015 Fla. HB 7013; *Stewart v. Heineman*, 296 Neb. 262 (Neb. S. Ct. 2017); *Utah Dep't of Health v. Stone*, Case No. 20140872-SC (Sup. Ct. Oct 23, 2014); *see also* Donaldson Report, *supra* n. 4 at 17.

community that may affect their hearts and minds in a way unlikely ever to be undone.” *Brown v. Bd. of Educ.*, 347 U.S. 483, 494 (1954). It “deprives persons of their individual dignity,” *Roberts v. U.S. Jaycees*, 468 U.S. 609, 625 (1984), and can have a harmful impact on one’s family, *United States v. Windsor*, 570 U.S. 744, 772 (2013) (recognizing that discrimination against same-sex couples has a harmful impact on the couples and their children). Faced with discrimination, some same-sex couples seeking to be foster parents abandon their efforts. Even when couples ultimately persevere, they may delay moving forward for significant periods of time.

The harm of permitting discrimination against same-sex couples within the public child welfare system cannot be overstated.⁷ There are over 400,000 children in foster care across the country,⁸ and same-sex couples represent a large pool of

⁷ There is an increasing effort to undermine nondiscrimination protections by allowing taxpayer-funded faith-based agencies like CSS to discriminate. See Family Equality Council & Movement Advancement Project, *Ten States Have Passed Discriminatory Adoption and Foster Care Laws that Harm Children*, available at: <https://everychilddeservesafamily.com/state-bills/> (listing ten states with laws permitting discrimination by faith-based agencies) (last visited Sept. 29, 2018).

⁸ See *Number of Children in Foster Care Continues to Increase*, U.S. DEPT. OF HEALTH & HUMAN SERVICES: ADMINISTRATION FOR CHILDREN & FAMILIES (Oct. 3, 2017), available at: <https://www.acf.hhs.gov/media/press/2017/number-of-children-in-foster-care-continues-to-increase> (last visited Sept. 21, 2018); *The Adoption and Foster Care Analysis and Reporting System Report*, U.S. DEPT. OF HEALTH & HUMAN SERVICES: CHILDREN’S BUREAU (Nov. 30, 2017), available at:

interested and qualified foster families. In fact, same-sex couples are seven times more likely than different-sex couples to foster or adopt, making barriers to fostering by this community all the more harmful to children needing a family.⁹ Further, gay men and lesbians historically have been “very willing to adopt children with special needs and, as a demographic group, may be more willing to do so than heterosexual adults.”¹⁰

CSS argues that the City’s suspension of referrals to CSS is “over a purely hypothetical disagreement” because it “is unaware of even a single person who has been prevented – or even discouraged – from fostering because of” CSS’ discrimination against same-sex couples and asserts that if it is approached by a same-sex couple, it would simply refer them to another agency. CSS Br. at 1-2, 14. This argument ignores the chilling impact of discrimination.

Contrary to CSS’s assertions, same-sex couples can be – and, as shown below, have been – deterred from fostering after facing initial discriminatory treatment. This reaction to discriminatory treatment is not surprising given the

<https://www.acf.hhs.gov/cb/resource/afcars-report-24> (last visited September 29, 2018).

⁹ Shoshana K. Goldberg & Kerith J. Conron, *How Many Same-Sex Couples in the U.S. Are Raising Children?*, THE WILLIAMS INSTITUTE: UCLA SCHOOL OF LAW (July 2018) (finding that 2.9% of same-sex couples vs. 0.4% of different-sex couples raise foster children and that 21.4% of same-sex couples vs. 3.0% of different-sex couples have an adopted child).

¹⁰ Donaldson Report, *supra* n.4 at 5.

history of discrimination and the dignitary harm inflicted by such discrimination described above. Jamie and Bo Nabozny of Minnesota, who fostered-to-adopt four siblings, summarize the danger of allowing discriminatory policies like CSS’:

There are many LGBT couples like us who want to create their family through foster care and adoption. However, after facing discrimination in various forms through their lives, many may choose not to pursue adoption if they have doors slammed in their faces and obstacles put in their way.¹¹

A) Discrimination Against Same-Sex Couples Deters and Prevents Them From Fostering

If this Court holds that CSS as a government-contracted foster care agency is allowed to refuse to accept same-sex couples, prospective families in Philadelphia and throughout the Third Circuit will be dissuaded or prevented from becoming foster parents.

For example, Samantha Hutcherson Bannon and her wife, an emergency medicine doctor, were “interested in fostering a refugee child” but abandoned their efforts in the face of discrimination. They attended an event held by Bethany Christian Services (BCS) near Philadelphia. However, when Samantha “shared with the staff that we are two-mom family . . . the 3 staff members present were clearly uncomfortable with the information.” Two staff members “immediately left the room,” and the third advised that BCS had “never worked with a same-sex family before” and offered “information about organizations in the area that

¹¹ Jamie and Bo Nabozny Statement to FEC (Aug. 29 & 30, 2018).

worked with families like ours to become foster parents.” When Samantha explained that they were “specifically interested in fostering a refugee child and, as she knew, there were limited organizations that handled these placements,” the staff member responded “that refugee children ‘had already been through enough’ and wouldn’t be the best fit for placement in our family.” The impact of this discrimination and dignitary harm led Samantha and her wife to relinquish their attempt to foster.

In Samantha’s words:

Being a parent is a responsibility that both my wife and I do not take lightly. We do not think our family structure causes either of our daughters any harm or difficulty. To have it insinuated that our family would be an additional burden to bear for a refugee child is inaccurate, insulting and embarrassing.... [W]e decided not to pursue any further inquiries fearing we would face the same humiliating and discriminatory treatment.¹²

April and Ginger Aaron-Brush of Alabama, a state without any non-discrimination protections for LGBTQ people seeking to foster or adopt, also wished to become foster parents but were met with discrimination that effectively prevented them from proceeding. April and Ginger contacted the only three agencies in their area. Two were private faith-based agencies that turned them away “almost immediately.” The third – a local state agency – resulted in another “dead end with no path forward,” despite their best efforts and persistence. They

¹² Hutcherson Bannon, *supra* n.2.

“learned that many LGBT people who seek to foster or adopt have the same experience [with the state agency] and that there is only one person at the agency who will work with LGBT people and same-sex couples Apparently, we did not get that person.” With no path forward, and the emotional impact of the discrimination, April and Ginger made the difficult decision to abandon their efforts:

We felt scorned and deterred while attempting to work with our local [state] office and decided to give up on this process. We wanted to provide a safe and loving home to a child, and there was no foreseeable option for doing so in our area. So, we finally gave up. It is heartbreaking.¹³

Moreover, in the face of discrimination, some same-sex couples will choose other avenues to create their family, resulting in a loss of qualified, loving homes for youth in foster care. For example, when Thomas Starling and Jeff Littlefield, previously of South Carolina, encountered discrimination, they abandoned their hopes of adopting and instead turned to surrogacy. As Thomas relays, at the onset of exploring adoption options, including from the child welfare system, they scheduled meetings with “lawyers in South Carolina that specialize in family law” and “were met with resistance. The lawyers with which we spoke told us that there was no chance of a gay couple being able to adopt in South Carolina.” This left

¹³ April and Ginger Aaron-Brush Statement to FEC (Sept. 7, 8 & 9, 2018).

Thomas and Jeff “very discouraged” and as a result they “gave up [their] dream of helping a child in need.”¹⁴

The child welfare system similarly lost a potential family in the case of Rick Olson and Jay Timmons, a married couple from Virginia, who believed they could offer “a loving and nurturing environment for a child (or children) who need a permanent home.” They explored foster care and adoption. However, after facing barriers to adopting as a same-sex couple they chose to create their family through surrogacy and now have three children.¹⁵

B) Discrimination Against Same-Sex Couples Delays Families From Fostering

Even if a same-sex couple is not permanently deterred from trying to foster because of discriminatory treatment, they may still defer their efforts for some time. Additionally, the discrimination can delay a successful placement. This too harms foster children as those parents are lost as potential families in the meantime.

For example, Drew Pierson of Texas was deterred from his dream of fostering and adopting when the first agency he went to told him that they would never place a child with him because he was gay.

¹⁴ Thomas Starling Statement to FEC (Aug. 30, 2018).

¹⁵ Rick Olson and Jay Timmons Statement to FEC (Aug. 18, 2018).

Drew “had always wanted children” and considered adoption “because of the large number of children in the system who needed the kind of good, loving home that I knew I could provide.” Having grown up in a Christian home and wanting “to instill those values to my children,” he contacted a Christian agency in Texas. But after starting the training, he was told that, while “the agency would license me as a foster home. . . they would never place a child with me.” This devastated Drew, “so [he] shelved the idea and went about [his] life.” Drew tried again “[a] few years later” and was, ultimately, able to foster and has since adopted two children; in the meantime, the system lost Drew as a potential home for a child (or children) in need because of the discrimination he initially experienced.¹⁶

Lara Mayhew’s and Jennifer Zilka’s path to fostering was also delayed because of the discriminatory treatment they received. The state agency they first contacted was “over-taxed” so they contacted a faith-based state subcontracted agency but were ultimately “turned down because we were lesbians.” As Lara and Jennifer share:

The door was closed. Our journey continued with one hurdle after another, which contributed to a delay in our ability to provide a safe and loving home to a child in need. We sat for an adoption interview with a team comprised of caseworkers of another local agency We were specifically passed over for adoption and eliminated because we were not a “traditional family.”

¹⁶ Drew Pierson Statement to FEC (Aug. 30 & Sept. 4, 2018).

Afterwards we learned from [interviewer] that we were, by far, the best couple interviewed.... We knew we were an excellent placement and it felt to be such a disservice to the children and to us as human beings.

Ultimately, Laura and Jennifer found a LGBTQ friendly agency to work with and were able to foster a child, whom they adopted. In the meantime, however, the disparate treatment they had received “caused delays in one more child being placed in a healthy, loving home.”¹⁷

As these narratives demonstrate, the harm of allowing agencies to discriminate is tangible – families are deterred or delayed from fostering. When an agency turns away a same-sex couple, it causes a dignitary harm that is exacerbated by the history of discrimination against the LGBTQ community, leaving another child or children in care without a loving home, either permanently or longer than necessary. Applying nondiscrimination policies to all agencies that receive taxpayer dollars to find families for our Nation’s most vulnerable children is essential for these needed families to pursue foster parenting.

¹⁷ Lara Mayhew and Jennifer Zilka Statement to FEC (Sept. 10 & 13, 2018).

POINT II

SAME-SEX COUPLES PROVIDE POSITIVE FOSTER HOMES AND NONDISCRIMINATION POLICIES CULTIVATE AN INCLUSIVE AND WELCOMING ENVIRONMENT FOR THEM TO FOSTER

There is no doubt that same-sex couples can – and currently do – provide loving nurturing homes to foster children in need. Decades of social science research shows that LGBTQ parents do just as well as heterosexual parents at raising happy, healthy and well-adjusted children. *See, e.g.,* Michael E. Lamb, *Mothers, Fathers, Families, and Circumstances: Factors Affecting Children’s Adjustment*, 16 APPLIED DEV. SCI. 98, 104 (2012); *Obergefell v. Hodges*, 135 S.Ct. 2584, 2600 (2015) (“[A]ll parties agree, many same-sex couples provide loving and nurturing homes to their children, whether biological or adopted.”). Indeed, acknowledging “[t]he research is clear that gay parents are good parents,” dozens of Catholic Charity employees in Buffalo, N.Y. recently protested Catholic Charities’ direction to senior management to “end foster care and adoption services [in Buffalo] because of the state requirement that those services be non-discriminatory.”¹⁸

¹⁸ Stephen T. Watson & Harold McNeil, *95 Catholic Charities Workers Oppose Decision to End Adoption Program*, BUFFALO NEWS (Aug. 31, 2018), available at: <https://buffalonews.com/2018/08/31/some-catholic-charities-workers-oppose-bishops-decision-to-end-adoption-program/> (last visited Sept. 29, 2018).

A nondiscriminatory and inclusive environment encourages same-sex couples to foster. For example, Rob, a former foster youth himself, and Reese Sheer have adopted four children from foster care in Washington D.C., a locality with nondiscrimination protections in place. The first two children, siblings, arrived at ages 4 and 2 in 2009; tibia trauma had stunted the growth of the two year old's legs – who is now a runner and gymnast, while his sister is an honor student. A couple of months later, they took in two brothers as well, one of whom had faced significant physical abuse. One of the brothers became “a star football player and a very kind young man” while the other, the youngest child, “is the apple of Rob's eye.” After seeing the needs of children in foster care, which mirrored his own experience of being shuffled around with all of his belongings in a garbage bag, Rob founded a charity called Comfort Cases that has provided over 25,000 backpacks of comfort items to youth in care.¹⁹

Richard and Aaron Hooks Wayman, who fostered three children and fostered to adopt six more in Minnesota and Maine feel “very lucky to find welcoming, inclusive, and accommodating [child] welfare systems” in those states.

¹⁹ See Michael Lambert, *Rob Chasteen-Scheer: From Homeless Teen To Tireless Advocate For Foster Kids*, GAY WITH KIDS (Dec. 28, 2016), available at: <https://www.gaywithkids.com/rob-chasteen-scheer-from-homeless-teen-to-tireless-advocate-for-foster-2465987441.html> (republished by HUFFPOST on Mar. 30, 2017); see also COMFORTCASES, <https://www.comfortcases.org/> (last visited Sept. 21, 2018).

They found the approach of each of the foster care licensure training courses “to welcome us into their community, offer us specific and relevant training ... and encourage us in our journey to become foster parents was simply wonderful” and “went from hesitation and worry to being excited about our role as advocates and care takers for our children.”²⁰

Alex Lane Igoudin and Jonathan Clark of California, which has anti-discrimination laws in place, fostered to adopt biological sisters, raising them in a safe and loving home. They report that their daughters are “thriving today: healthy, social, and doing well in school: one is an athlete and the other wants to become a doctor.”²¹

Likewise, Steve Ledoux and his husband, also from California, successfully “[grew their] family through the foster-adopt system.” They fostered a 19-month-old toddler and were able, working with social workers, to reunite the toddler with his biological mother, who asked them “to remain a permanent part of [the child’s] life” and the child still “spends one weekend a month at [their] home.” They then fostered two brothers whom they later adopted. On top of that, they get together

²⁰ Richard and Aaron Hooks Wayman Statement to FEC (Aug. 30 & 31, 2018).

²¹ Alex Lane Igoudin and Jonathan Clark Statement to FEC (March 21 & Aug. 22, 2018).

with the boys' third brother – who was placed with a different couple due to his special needs – once a month. As they put it: “we’ve hit the jackpot.”²²

Scott Stumbo and Cliff Leonardi also found California’s foster and adoption system “extremely inspiring.” Their three children, who were placed in foster care with them at ages 2 and 3 but are now teenagers and adopted, have “thrived in [their] caring, attentive home.”²³

Similarly, Paul Rummell and Ben West of Oregon, also a state with affirming policies, have welcomed 13 foster children into their home over a three year period.²⁴

If this Court requires Philadelphia to allow government-contracted agencies to discriminate against same-sex couples, the City risks losing qualified same-sex couples to jurisdictions prohibiting such discrimination. For example, Matthew Ramsey and his husband knew they wanted to be parents and that they “had a lot of love to provide to a child or children.” This was a significant factor in their decision to move to a state with nondiscrimination protections. Matthew explains:

We moved to Seattle in part so we could build a family without the then-existing legal barriers in Ohio. We wanted to live in a more progressive area and knew the laws in Washington state

²² Steve Ledoux Statement to FEC (May 1 & Aug. 21, 2018).

²³ *Stumbo-Leonardi Family*, 2011 Portrait Project, theme “*Families at the Forefront: Post-Adoption Services Support Forever Families*” at 44, Voice for Adoption (2011) (on file with Voice for Adoption).

²⁴ Paul Rummell & Ben West Statement to FEC (May 15 & Aug. 21, 2018).

were supportive of prospective LGBTQ parents and their efforts to form families.

Having now adopted two brothers from foster care, Matthew feels, “The more people who love my boys, the better. To all those agencies who would discriminate: There’s no such thing as too much love. Stop getting in the way.”²⁵

POINT III

DISCRIMINATING AGAINST PROSPECTIVE FOSTER PARENTS BASED ON SEXUAL ORIENTATION DENIES FOSTER CHILDREN LOVING AND AFFIRMING HOMES

The harm caused by allowing barriers to same-sex couples fostering and adopting, like the one CSS’ policy represents, is particularly egregious when viewed in light of the great need for foster homes and the lack of sufficient qualified families. Children languish in the system without placements with a family and, as the stories below illustrate, are too often being shuffled around between multiple families or being placed in group homes, often leaving them worse off than when they entered the system. Without enough homes for the over 400,000 children in foster care, far too many young people “age out” of the system without a forever family. In contrast, same-sex couples represent a large pool of potential, interested and qualified foster families.

²⁵ Matthew Ramsey Statement to FEC (Aug. 20, 2018).

A) Children Who Cannot Remain with Their Families Need Supportive Family Foster Homes

Lacking sufficient foster homes, some children are placed in group homes or with families that are not well-matched to meet their needs

This was the experience of Joseph DeBiew, who grew up in New York, spent seven years “bouncing around between five different group homes[.]” “[T]he lack of available homes meant ... seven years in a jail-like setting.” Joseph explains:

When there are not enough foster families available, people like me who didn't need a higher level of care may end up stuck in a juvenile detention facility. Not because I did anything to get there; I stayed there because there weren't any other housing options available. Allowing more families who are willing to be foster parents the opportunity to step up could've helped me avoid 7 years in a facility. No child or youth should have to grow up in a facility. Placing youth in congregate care facilities normalizes the super-structured, non-family life for young people.

Joseph believes a foster home would have been better:

I didn't trust the adults around me because I knew they were there only because they were paid to be. I grew up feeling like there were no adults in my life who really cared about me. I think growing up in a foster home would have been a lot different. I would have had foster parents who chose to open their home to kids like me for a loving and supportive purpose. I could not have cared less about the sexual orientation or gender identity of

foster parents, I just wanted a family and a supportive place to call home.²⁶

Similarly, Kristopher Sharpe grew up in group homes. In the “more than eight years” Kristopher spent in Texas foster care, he “lived in upwards of 25 different placements, . . . For the most part, . . . in what is commonly referred to as ‘congregate care settings’” Kristopher further explains:

Some are the size of prisons. No matter their size, where they were located, or how many children are in care, abuse is pervasive in these facilities. I was molested for the first time at age 13 by one of my caregivers in a group home. By the time I turned 15, I had been beaten and raped more times than I care to remember – I was living in a state-sponsored hell, and there was nothing I could do about it.²⁷

As the stories here illustrate, for many children, foster placements are a pathway to adoption.²⁸ The great need for qualified families interested in fostering and adopting is highlighted by the fact that over 20,000 children “age out” of foster care each year.²⁹ For these young people, the consequences of aging out without a

²⁶ Joseph DeBiew Statement to FEC (Aug. 23, 27 & Sep. 4, 2018).

²⁷ Sharpe, *supra* n. 1.

²⁸ *See 2016 Saw More Children in Foster Care and More Adopted*, NORTH AMERICAN COUNCIL ON ADOPTABLE CHILDREN, available at <https://www.nacac.org/2018/01/08/2016-saw-more-children-in-foster-care-and-more-adopted/> (last visited Oct. 2, 2018) (52% of kids adopted out of foster care are adopted by foster parents).

²⁹ *See Extending Foster Care Beyond 18*, NAT’L CONFERENCE OF STATE LEGIS. (Jul. 28, 2017), available at: <http://www.ncsl.org/research/human-services/extending-foster-care-to-18.aspx> (last visited Oct. 3, 2018);

“forever family” can be dire; such children are at “high risk for a host of negative outcomes, including poverty, homelessness, incarceration, and early parenthood.”³⁰

Kristopher describes his experience of aging out after eight years in Texas foster care:

Like so many youth who age out of foster care, overnight, I was homeless, on the streets with no family, no support and nowhere to turn.... I spent the next six months on the streets, sleeping on the roof of a shopping strip in the north side of Houston at night and relying on the street economy to survive during the day. . . . Homelessness, unemployment, instability, and incarceration are the norm once foster children become adults. I have had to watch far too many of the young people I grew up with struggle, and in some cases even die an untimely death due to suicide, drug over dose, or other perils of life on the streets.³¹

In short, there is a great need for foster families and same-sex couples statistically offer a large pool of potentially qualified and willing families to help meet that need. Against this backdrop, the actual and potential risk of deterring and preventing same-sex couples from fostering is particularly serious. Discrimination by just one agency risks the loss of potential homes for children in

51 Useful Aging Out of Foster Care Statistics Social Race Media, NAT'L FOSTER YOUTH INST. (May 26, 2017), available at: <https://www.nfyi.org/51-useful-aging-out-of-foster-care-statistics-social-race-media/> (last visited Oct. 2, 2018).

³⁰ Donaldson Report, *supra* n.4, at 4 (citations omitted).

³¹ Sharpe, *supra* n.1.

need of placement in Philadelphia and beyond. *See supra* Point I. If the Court were to accept CSS’s argument and hold that faith-based agencies have a constitutional right to violate non-discrimination requirements in providing public foster care services, it is unclear how many other agencies would also discriminate against same-sex couples.

B) Children Need a Diverse Pool of Foster Parents

In addition to the need for as many qualified families as possible, the City has an interest in ensuring that the “the pool of foster parents and caregivers is as diverse and broad as the children in need.” *Fulton v. City of Philadelphia*, No. 18-2075, Mem. Op. at 30 (E.D. Pa. July 13, 2018). Allowing faith-based agencies to discriminate against families that do not meet their religious standards is antithetical to this goal. As the below stories from former LGBTQ foster children illustrate, some feel that placement with an LGBTQ family would have been best for them or is what led them to finally feel accepted and part of a family.

For example, after living in four homes in 10 years, Shane Read of Minnesota, an LGBTQ youth, “aged out” of foster care. Shane recounts, “I was not allowed to feel comfortable in my environment.... I was discriminated against and segregated from others.... I couldn’t sleep in my own room because I had a roommate.” Shane felt like “an animal at a shelter that was no longer wanted,” and believes he would have thrived with “foster parents who were LGBTQ.” Shane

explains, “I would have been in an environment where I knew I would be safe. I would have been able to explore who I was and maybe come to terms with myself sooner.”³²

Similarly, Tristan Torres of Nevada “had two sets of foster parents who had no idea what to do with me as a transgender foster kid.” One foster parent “locked me in her room, berated me for being transgender, and forbade me from speaking to her biological children.” He was placed in a new home, but, after revealing his gender identity to another family member, those foster parents “withheld food from me ... and . . . I ended up literally thrown out of my house with my belongings in trash bags.” After his experience, Tristan led a push for Nevada to require LGBTQ training for foster parents. As he explains, “There are a disproportionate number of LGBTQ+ youth in the system We need affirming placements with parents who can support our needs and who understand how to care for LGBTQ+ foster youth.”³³

Weston Charles-Gallo of Missouri says that his “social worker couldn’t find a home that was supportive of me because I was gay. It was hard for me to find a space where others were comfortable.” But “on the brink of living in the streets,”

³² Shane Read Statement to FEC (May 23, Aug. 22 & 28, 2018).

³³ Tristan Torres Statement to FEC (Aug. 21 & 22, 2018).

after being “bounced from home to home, many hospital visits, and living in a shelter,” he found a “forever family with two dads and six siblings.”

Weston explains:

I can’t imagine where I would be right now if I hadn’t found them. It is because of them that I can be the person that I have always wanted to be. . . . I know my parents [will] always be there when I make mistakes. My family loves me for who I am – everything I’ve been through and the experiences I’ve overcome. I’ve been able to grow, now that I have security and stability.³⁴

Courtney Sausville, who was in the Vermont’s foster care system for four years, believes that “[n]ot limiting who is able to foster or adopt children by sexual orientation is important.” She continues:

There are tons of LGBT+ families who would love a child with open arms as much as the child would love to be part of something – a family.... Children should be able to feel safe and comfortable in a home. Comfortability can be different for each child.³⁵

As a representative of the Children’s and Youth Welcome Center in Los Angeles County explains:

We understand that many foster youth who may self-identify as LGBT or questioning, feel that they aren’t accepted in some foster families and foster homes. That’s why we want to make sure we have a good representation from every community. Even if we have a good home for a foster youth, some of these teens are

³⁴ Weston Charles-Gallo Statement to FEC (Aug. 28 & Sept. 5, 2018).

³⁵ Courtney Sausville Statement to FEC (Aug. 31 & Sept. 3, 2018).

asking for a match with a parent or parents that mirrors their own demographic.³⁶

Tim Dennis of Tennessee echoes this sentiment:

When I was in care, I knew I couldn't reveal my identity to my foster parents; if I did, they would kick me out. Keeping my identity secret took a huge toll on me; I self-harmed and entertained thoughts of suicide. I moved several times because homophobic foster parents were unwilling to have me in their home. Having a family that supported me could have provided the stability I needed after entering care.

Now a case manager himself, Tim sees firsthand that when the LGBTQ youth he works with “find a foster parent who is willing to support and value their identity, whether that parent identifies as LGBTQ+ themselves or not, the young person can finally relax, grow, develop and heal.”³⁷

³⁶ James Michael Nichols, *This Incredible Place Helps LGBT Foster Kids When There's Nowhere Else To Turn*, HUFFPOST (Jan. 1, 2016), available at: https://www.huffingtonpost.com/entry/this-incredible-place-helps-lgbt-foster-kids-when-theres-nowhere-else-to-turn_us_56817433e4b0b958f659f7c5 (last visited Sept. 29, 2018); *LGBTQ Youth in the Foster System*, HUMAN RIGHTS CAMPAIGN, available at: <https://www.hrc.org/resources/lgbt-youth-in-the-foster-care-system> (last visited Oct. 3, 2018) (“Recognizing that LGBTQ adults are one potential group that could provide affirming foster homes for LGBTQ youth, agencies should engage LGBTQ adults who may be interested in becoming foster parents.”).

³⁷ Tim Dennis Statement to FEC (Aug. 22, 2018).

CONCLUSION

There is an enormous need for qualified families to foster children. Same-sex couples offer a large pool of potentially qualified families interested in meeting that need. Discriminatory policies like the one CSS seeks to defend can cause (and have caused) same-sex couples to abandon their hopes of fostering altogether. At a minimum, such policies can delay a same-sex couple's ability to foster a child. Children in need of loving families suffer because there are fewer available homes.

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Respectfully submitted,

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CERTIFICATION OF COMPLIANCE

Pursuant to Fed. R. App. P. 32(a)(7)(c)(i) and L.A.R. 31.1(c), I certify that:

1. This brief complies with the type-volume limitations of Fed. R. App. P. 32(a)(7) because the brief contains 6,303 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(f).
2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because the brief has been prepared in a proportionally spaced typeface using Microsoft Word in Times New Roman 14 point font.
3. Pursuant to the Third Circuit Local Appellate Rule 31.1(c), the text of the brief filed with the Court by electronic filing is identical to the text in the hard paper copies of the brief.
4. Pursuant to the Third Circuit Local Appellate Rule 31.1(c), a virus protection program was performed on this electronic brief using Trend Micro and no virus was detected.



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CERTIFICATE OF BAR MEMBERSHIP

I hereby certify that I am a member in good standing of the bar of the
United States Court of Appeals for the Third Circuit.

Dated: October 4, 2018

A handwritten signature in black ink, reading "Philip E. Karmel". The signature is written in a cursive style with a large, looping "P" and "K".

Philip E. Karmel

CERTIFICATE OF SERVICE

The undersigned does hereby certify that on October 4, 2018, a true and correct copy of the foregoing Brief of Amicus Curaei Family Equality Council and COLAGE using the Court's CM/ECF system, where it is available for printing and viewing.

s/ Philip E. Karmel
*Attorney for Amicus Curaie
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COLAGE*