

No. 19-123

IN THE
Supreme Court of the United States

SHARONELL FULTON, *et al.*,
Petitioners,

v.

CITY OF PHILADELPHIA, PENNSYLVANIA, *et al.*,
Respondents.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

**BRIEF FOR VOICE FOR ADOPTION, NORTH
AMERICAN COUNCIL ON ADOPTABLE CHILDREN,
NATIONAL ASSOCIATION OF SOCIAL WORKERS,
CHILD WELFARE LEAGUE OF AMERICA, AND
AMERICAN PROFESSIONAL SOCIETY ON THE
ABUSE OF CHILDREN AS AMICI CURIAE
IN SUPPORT OF RESPONDENTS**

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INTEREST OF AMICI CURIAE¹

Amici curiae—Voice for Adoption, North American Council on Adoptable Children, National Association of Social Workers, Child Welfare League of America, and American Professional Society on the Abuse of Children—are non-profit organizations dedicated to improving child welfare and foster care and adoption policy and practice across the United States through research, policy development, and advocacy. Amici 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. Amici have worked with a wide spectrum of adoption and foster care agencies, including, in the cases of some amici, faith-based organizations, to implement best practices. Based on well-established child welfare standards, amici believe that certifying *all* qualified foster families is necessary to address the shortage of available foster parents and to ensure that all children find permanent, loving families. Amici further believe that LGBTQ foster parents are essential partners in this effort. On the basis of their collective knowledge and experience, amici submit this brief to urge this Court to affirm the Third Circuit’s decision.

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 their counsel—contributed money intended to fund preparing or submitting this brief.

SUMMARY OF ARGUMENT

Policies that prohibit discrimination against prospective foster parents based on characteristics unrelated to child welfare promote the best interests of children in foster care. These policies ensure the broadest possible pool of potential parents, which maximizes the chances of a good match between children in the foster care system and foster parents. Additionally, policies that prohibit discrimination against prospective foster parents who are same-sex couples or LGBTQ reduce the disproportionate negative outcomes experienced by LGBTQ children in the foster care system, including by eliminating the traumatic effects of being entrusted to the care of an agency that is not LGBTQ-affirming.

Foster care programs are a fundamental aspect of every state's child welfare program. Although the federal government provides funds to states to administer child welfare programs and requires states receiving such funds to follow certain minimum standards, the states administer foster care programs, at either the state or local level.² Foster care programs are run largely according to state and local regulations, but in all instances, child placement decisions must generally be based on the "best interests" of the child.³ Pertinent here, Pennsylvania law is clear that "issues of custody and continuation of foster care are determined according to a 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).

² See Child Welfare Information Gateway, *State vs. County Administration of Child Welfare Services* (2018), <https://tinyurl.com/yynt6498>.

³ See Child Welfare Information Gateway, *Determining the Best Interests of the Child* (2016), <https://tinyurl.com/y5d37kt3>.

Many state and local governments contract with private agencies to provide certain foster care services.⁴ In administering such services through public-private partnerships, governments and governmental child welfare agencies, including Philadelphia's, are obligated to continue to adopt, follow, and enforce policies that are in the best interests of the children they serve. Because the private agencies are providing services in the government's name, the government must be free to decline to enter service partnerships with actors that do not follow their policies.

Private foster care agencies may contract with state and local governments to provide a variety of services, including foster parent recruitment, foster parent certification, foster child placement, and other support services for children in foster care and foster parents. Only one such service is at issue in this case: foster parent certification. To promote the best interests of children in the foster care system, governmental child welfare agencies that contract with private agencies for foster parent certification must be free to decline to contract with private agencies that discriminate against prospective parents based on characteristics unrelated to child welfare.

⁴ Child Welfare Information Gateway, *Privatization* (2020), <https://tinyurl.com/yyep3dz6>. Foster care services—which are a core part of every state's child welfare system—are separate from the private adoption system, whereby a pregnant woman can work with a private agency to seek adoptive parents for her child. In the private adoption context, the government does not take custody of the child and is not involved the child's placement. Although states require private adoption agencies to be licensed, these agencies are not contracting with the state to provide a governmental service. Private adoption services are thus not directly affected by this case.

Section I explains the important child welfare goals that are promoted by nondiscrimination policies like the city of Philadelphia’s and why 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. Section II details how discrimination against same-sex couples in foster care undermines the government’s interest in ensuring a diverse pool of potential foster parents. Section III discusses the unique harm that agency exclusion of same-sex couples causes to LGBTQ children in foster care—a demographic that is disproportionately represented in foster care and is at elevated risk for negative outcomes.

ARGUMENT

I. WELL-ESTABLISHED CHILD WELFARE PRACTICE REJECTS EXCLUDING PROSPECTIVE FOSTER PARENTS BASED ON CHARACTERISTICS UNRELATED TO CHILD WELFARE

As a general rule, children in foster care have been removed from their families by the government because of concerns about their safety and well-being. Governmental child welfare agencies follow well-established standards that have been developed over the years to promote the safety and well-being of children while they are in the government’s care. The Child Welfare League of America’s (CWLA) Standards of Excellence for Child Welfare Services (“Standards”) and related Best Practice Guidelines have been widely adopted by child welfare agencies (including private

agencies) across the country.⁵ These standards are based on social science research and CWLA’s 100 years of experience dedicated to improving the nation’s child welfare system.

A core premise of the Standards and Best Practice Guidelines is that agencies should not turn away qualified foster parents based on characteristics unrelated to child welfare, and should instead implement policies that promote a diverse pool of potential foster parents.⁶ A diverse pool of qualified foster parents is essential to making good matches between children in foster care and foster parents – a key component of ensuring that a given foster care placement is in a child’s best interests. Excluding qualified foster parents from the pool of available families based on characteristics unrelated to child welfare undermines an agency’s ability to make good matches. It deprives the pool of those potential foster parents and the distinctively valuable characteristics that might make them the best placement for a given child in foster care.⁷

⁵ Available at <https://tinyurl.com/y2pfryxa>.

⁶ See, e.g., CWLA, *Standards of Excellence for Family Foster Care Services* 97 (rev. ed. 1995) (agencies should “actively recruit and select foster families of diverse races and cultures” and “not reject foster parent applicants solely due to their age, income, marital status, race, religious preference, sexual orientation, physical or disabling condition, or location of the foster home”).

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 families headed by LGBTQ parents 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); Gates et al., *Adoption and Foster Care by Gay and*

Amici’s experience, as well as social science literature, make clear that a good match between the foster parent(s) and child is essential to promoting the best interests of the child in foster care. Good matches are likely to be more stable, and stable foster care placements are critical to promoting the well-being of children in foster care.⁸ Because children who may enter the foster care system cannot select the agency that will certify or choose their foster parents, their interests are best served when the parent pool is as broad as possible. In that way, the option best suited to their needs will be available if it becomes necessary to place them in foster care. Sometimes the best match for a given child would be with an LGBTQ relative, such as a grandparent, aunt, or uncle. Depending on the role agencies play in a state’s foster care system, agency

Lesbian Parents in the United States 4 (2007) (collecting research on the effects 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 on Sexual Orientation, Gender Identity (SOGI), Parents and Their Children* (2020) (“[T]here is no scientific evidence that parenting ineffectiveness is related to parental sexual orientation or gender identity: sexual and gender minority parents are as likely as cisgender heterosexual parents to provide supportive and healthy environments for their children.”).

⁸ 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.”); see also Gates et al., *Adoption and Foster Care*, *supra* n.7, at 17 (explaining that “stability of placements is associated with positive outcomes for children” and noting that a review of studies from 1960-1990 showed that having fewer placements was associated with, among other things, “better school achievement, less criminal activity, more social support, [and] increased life satisfaction”).

unwillingness to certify LGBTQ men and women as foster parents can prevent a child from being placed with his or her closest relatives.⁹

A poor match between a child and his or her foster parents may result in conflict in the foster home, leading to the child being uprooted once again and placed with a different foster family, or in congregate care if another suitable family is not available.¹⁰ The trauma that flows from a poor match and yet another transition increases the risk of negative outcomes for children.¹¹

⁹ See *Catholic Charities W. Mich. v. Michigan Dep't of Health and Human Servs.*, No. 19-cv-116611-DPH-DRG, ECF 23-4, at 2 (Mich. E.D. July 24, 2019) (May 2, 2018 Michigan Department of Health and Human Services report attached to brief in opposition to motion for preliminary injunction in case challenging Michigan policy prohibiting catholic charities from discriminating against same-sex couples). The report found a violation where Catholic Charities West Michigan “failed to place siblings together as they do not place any of their children in homes that do not follow the Catholic Teachings.”

¹⁰ As discussed in more detail in Section III, the need for a good match is particularly salient with respect to LGBTQ youth in foster care. One study found 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. 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) (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).

¹¹ Harden, 14 *Future of Children* at 38-39; 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

Specifically, studies have shown that the number of foster care placements predicted behavioral problems and emotional problems, such as aggression, coping difficulties, poor home adjustment, and low self-concept, and increased the risk of ADHD and substance abuse.¹² Research shows that these negative outcomes result not only from children’s perceptions of impermanency¹³ but also from the impact placement instability has on brain development.¹⁴ Congregate care has likewise been shown to produce more negative outcomes for children.¹⁵ In a study comparing young children reared in foster homes to those in group homes, children in group care exhibited “similar levels of behavioral problems” but “more compromised mental development and adaptive skills.”¹⁶

For the same reasons, a poor match diminishes the likelihood that children in foster care will achieve permanency, meaning growing up in a permanent, loving

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”).

¹² Harden, 14 *Future of Children* at 38-39; Fischer et al., *A Translational Neuroscience Perspective on the Importance of Reducing Placement Instability among Foster Children*, 92 *Child Welfare* 9 (2013).

¹³ Harden, 14 *Future of Children* at 39 (collecting research and explaining that “children’s perceptions of the impermanency of their placements have [] been linked to behavioral difficulties”).

¹⁴ Fischer et al., 92 *Child Welfare* 9.

¹⁵ Harden, 14 *Future of Children* at 38 (noting, “[o]verall, the evidence suggests that group home placement is deleterious to children”).

¹⁶ *Id.*

home. Permanency, which can be achieved by reuniting a child with birth parents, placing the child with other relatives, adoption, or permanent legal guardianship, is an essential—and federally mandated—goal of a sound foster care plan.¹⁷ For children who cannot return to their family, their foster parents are the most common source of adoptive homes. Of the over 63,000 children in foster care adopted in 2018 with public agency involvement, 52% were adopted by their foster parent(s).¹⁸ The importance of permanency 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.¹⁹ Allowing agencies to exclude otherwise qualified foster parents obstructs efforts to facilitate a good foster care match and to achieve permanency for children in foster care who cannot return to their families.

¹⁷ 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”); Phila. Dep’t of Human Servs., *Resource Parent Handbook* at 4.

¹⁸ U.S. Department of Health and Human Services, *The AFCARS Report #26*, at 6 (Aug. 22, 2019).

¹⁹ See Reilly, *Transition from Care: Status and Outcomes of Youth Who Age Out of Foster Care*, 82 *Child Welfare* 727, 740-741 (2003) (“The data clearly suggest that a significant proportion of youth exiting the foster care system face serious difficulty in transitioning to life on their own. Although most of the youth in this study are surviving (and some are doing exceedingly well), an unacceptable number ended up living on the streets, lacked a place to live, were incarcerated, lacked enough money to meet their basic living expenses, failed to maintain steady employment, or were physically or sexually victimized.”).

Moreover, a poor match adversely affects not only the specific children placed with a succession of foster parents or in congregate care but also 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.”²⁰

Finding a good match for a child in foster care requires an individualized assessment of the potential foster parent(s) and child. Under well-established child welfare standards, this assessment involves matching the characteristics and needs of the child with the strengths and capabilities of available foster parents.²¹ For example, a child with a health condition will require foster parents capable of facilitating the necessary medical treatment. 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.”²²

²⁰ 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).

²¹ See *Resource Parent Handbook*, *supra* n.17, at 7 (“If there is no appropriate kinship placement readily available for a child, DHS works to match the needs of the child with the strengths and capabilities of available foster families”); Nat’l Ass’n of Social Workers, *NASW Standards for Social Work Practice in Child Welfare* 23 (2013) (“Social workers shall consider the strengths and needs of the child and the caregiver when assessing the safety and appropriateness of placement options”).

²² Redding et al., 9 J. Child & Fam. Studies at 438.

Social science research indicates that, as a demographic, LGBTQ people provide distinctively valuable contributions as foster parents. Although LGBTQ foster parents may be the best match for any given child, they also play a particularly important role in providing a pool of 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 older children and children with special needs, who tend to be harder to match with suitable foster parents.²³ And, as discussed below, they may be more open to accepting, and especially understanding of, children in foster care identifying as LGBTQ, who can also be hard to match with parents and are disproportionately represented in the foster care system.²⁴

Additionally, LGBTQ parents may be more willing to foster and to provide a permanent, adoptive home for their foster children.²⁵ In contrast to most heterosexual parents, for many LGBTQ parents, fostering or adoption is their first choice for how to become a parent.²⁶ Same-sex couples are six times more likely than

²³ See 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); Brodzinsky, *Expanding Resources for Children III: Research-Based Best Practices in Adoption by Gays and Lesbians* 33-34 (2011).

²⁴ See Section III, *infra*.

²⁵ 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 exhibit significantly higher than average willingness to adopt or foster a child as compared to the general population).

²⁶ See Jennings et al., *Why Adoption? Gay, Lesbian, and Heterosexual Adoptive Parents' Reproductive Experiences and Rea-*

other couples to be raising a child in foster care.²⁷ Consistent with this preference, LGBTQ parents appear to be more willing than non-LGBTQ parents, on average, to adopt a child.²⁸ Same-sex couples are four times more likely than other couples to be raising an adopted child.²⁹ 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.³⁰

sons 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”).

²⁷ See Gates, *LGBT Parenting in the United States* 3 (Feb. 2013).

²⁸ See Brodzinsky, *Expanding Resources for Children III*, *supra* n.23, at 6 (among gay and lesbian parents, “[o]ver 50% ... adopted children from the child welfare system, and 60% adopted transracially”); see also Downs & James, *Gay, Lesbian, and Bisexual Foster Parents: Strengths and Challenges for the Child Welfare System*, 85 *Child Welfare J.* 281, 290 (2006) (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”).

²⁹ See Gates, *LGBT Parenting in the United States*, *supra* n.27, at 3.

³⁰ Gates et al., *Adoption and Foster Care*, *supra* n.7, 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 randomly selected self-identified gay, lesbian and bisexual adults across 15 major metropolitan areas similarly found that 49% would like to adopt children. Kaiser Family 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* 4 (2001).

LGBTQ foster parents' willingness to adopt is a distinctly valuable characteristic because, as discussed above, foster parents are the most common source of adoptive homes to their foster children.

Child welfare agencies serve a diverse population of children in foster care with varied levels and types of needs, so finding a good match for a child in foster care is not always easy. The best interests of children are not served when an agency refuses to certify potential foster parents based solely on criteria unrelated to child welfare (like LGBTQ identity) and deprives the pool of those parents and the qualifications and characteristics that they bring. "The effect of excluding non-traditional placement resources through an overly narrow definition of family is that some children will languish longer in foster care without permanence."³¹ 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 Child and Adolescent Psychiatry,³² American Academy of Pediatrics,³³ American Medical Association,³⁴ American

³¹ Ryan et al., *Coming Out of the Closet: Opening Agencies to Gay and Lesbian Adoptive Parents* 85 (2004).

³² Am. Acad. of Child and Adolescent Psychiatry, *Gay, Lesbian, Bisexual, or Transgendered Parents* (2009).

³³ American Acad. of Pediatrics, Policy Statement, *Promoting the Well-Being of Children Whose Parents Are Gay or Lesbian* (2013).

³⁴ Am. Med. Ass'n, *Partner Co-Adoption H-60.940* (2014).

Academy of Family Physicians,³⁵ American Psychiatric Association,³⁶ American Psychoanalytic Association,³⁷ American Psychological Association,³⁸ Child Welfare League of America,³⁹ National Adoption Center,⁴⁰ National Association of Social Workers,⁴¹ and North American Council on Adoptable Children.⁴²

II. ALLOWING ANY DISCRIMINATION AGAINST SAME-SEX COUPLES IN FOSTER PARENT CERTIFICATION UNDERMINES THE GOVERNMENT'S INTEREST IN GROWING A DIVERSE POOL OF FOSTER PARENTS

Petitioners and their amici contend that allowing organizations to discriminate against same-sex couples will not limit the pool of well qualified foster parents because those organizations have practices of referring such applicants to other providers or to the City's De-

³⁵ Human Rights Campaign, *Professional Organizations on LGBTQ Parenting* (2009).

³⁶ American Psychiatric Ass'n, *Position Statement on Issues Related to Homosexuality* (2013).

³⁷ American Psychoanalytic Ass'n, *Position Statement on Parenting* (2012).

³⁸ APA Resolution, *supra* n.7.

³⁹ Child Welfare League of Am., *Position Statement on Parenting of Children by Lesbian, Gay, Bisexual, and Transgender Adults* (2015).

⁴⁰ Nat'l Adoption Ctr., *Adoption by Members of the LGBT Community* (2008).

⁴¹ Nat'l Ass'n of Social Workers, *Foster Care and Adoption* (2002).

⁴² N. Am. Council on Adoptable Children, *Gay and Lesbian Foster Care and Adoption* (2020); *Eliminating Categorical Restrictions in Foster Care and Adoption*.

partment of Human Services.⁴³ That argument ignores the impact discrimination by agencies has on prospective families' willingness and ability to foster, which in turn adversely affects children in the foster care system.

Requiring states and cities to permit agencies to discriminate would create a significant barrier to fostering. Discriminatory policies will discourage some potential LGBTQ foster parents from ever contacting a foster care agency about the potential to foster children. Because private foster care agencies do the work of the government when they certify foster parents, discriminatory policies at one or more agencies may give prospective foster families the misimpression that LGBTQ people are not permitted to foster through *any* agency. At a minimum, discriminatory agency policies create confusion and a misperception that the state endorses the discriminatory policy.

Even those prospective foster parents who do not conclude that an across-the-board prohibition is in effect may still be deterred from trying because, in the absence of a clear, inclusive policy followed by all foster agencies in a jurisdiction, they will be unwilling to run the risk of denial.⁴⁴ The first call to a foster care or adoption agency is “an intensely emotional experience,” and is one that people may not undertake if they are concerned that they will be discriminated against or

⁴³ See 76 United States Senators and Members of the House of Representatives Amicus Brief 17; *see also* Pet. Br. 36.

⁴⁴ See Meyer, *Prejudice, Social Stress, and Mental Health in Lesbian, Gay, and Bisexual Populations: Conceptual Issues and Research Evidence* (2003) (“Like other minority group members, LGB people learn to anticipate—indeed, expect—negative regard from members of the dominant culture.”).

stigmatized by an agency.⁴⁵ Red tape and lack of responsiveness are already among the biggest barriers to successful outcomes in the foster care and adoption systems, impacting all potential parents.⁴⁶ Requiring prospective LGBTQ foster parents to figure out, in addition, which agencies will *not* discriminate against them creates an additional emotional barrier and is likely to deter qualified parents from fostering—and, as a result, to deprive children who desperately need those qualified parents of a supportive home.⁴⁷

Some prospective LGBTQ foster parents may continue despite a negative first interaction in which they

⁴⁵ 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).

⁴⁶ 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); 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”).

⁴⁷ See e.g. Dumont, *We Were Rejected From Adopting Foster Children Because We Are Gay*, VICE (2018) (“It was shocking and hurtful. How could an agency whose job it is to find homes for children justify keeping a child in state care simply because they wanted to turn away LGBT parents? We called another agency, only to be told once again that they would not work with us because we are both women.”).

are told a given agency will not consider them as foster parents, but the rejection will be part of the cumulative hardship that causes many prospective parents to abandon the process.⁴⁸ A 2018 study concerning LGBTQ access to medical services illustrates the point, showing that LGBTQ people who have experienced discrimination in health care settings avoid or postpone needed medical care even when a nondiscriminatory option is available.⁴⁹ That study concluded that “[d]iscrimination—and even the potential for discrimination—can deter LGBTQ people from seeking care in the first place.”⁵⁰ If the potential for discrimination deters individuals from tending to their own medical needs, it is even more likely to create a significant deterrent to completing the process required to become a foster parent.

Moreover, refusing to certify someone as a suitable foster parent because of their LGBTQ identity but suggesting that a different agency would be willing to consider them is more than an administrative inconven-

⁴⁸ Dropping out of the process is common. See Marcenko, *Foster Parent Recruitment and Retention: Developing Resource Families for Washington State’s Children in Care*, *supra* n.46, at 4 (“[M]ost foster parent applicants never complete training or quit fostering soon after training.”).

⁴⁹ Mirza & Rooney, *Discrimination Prevents LGBTQ People from Accessing Health Care* (2018) (“CAP survey data show that discrimination played a role in preventing a significant number of LGBTQ people from seeking health care. In the year prior to the survey, 8 percent of all LGBTQ people—and 14 percent of those who had experienced discrimination on the basis of their sexual orientation or gender identity in the past year—avoided or postponed needed medical care because of disrespect or discrimination from health care staff.”).

⁵⁰ *Id.*

ience; it reflects a negative, and in many circumstances devastating, judgment about one's fitness to be a parent.⁵¹ 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 refusal as a reflection of "societal beliefs about their (un)fitness as parents."⁵² Prospective parents are less likely to pursue fostering opportunities if they have reason to believe they will face this kind of stigma at foster care agencies.

In addition, government acquiescence in discrimination at a subset of agencies may legitimize biases held by individual workers at other agencies, which will adversely affect the ability of LGBTQ men and women 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."⁵³ Consistent with this finding,

⁵¹ 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"); Brodzinsky, *Expanding Resources for Children III*, *supra* n.23, at 34 (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).

⁵² Goldberg et al., *Choices, Challenges, and Tensions*, 10 *Adoption Quarterly* 33, 52 (2007).

⁵³ 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").

one study reported that, of those individuals who reported 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.⁵⁴ These negative experiences may result in fewer qualified LGBTQ men and women becoming foster parents through *any* agency.

Further, while petitioners have stated that CSS would suggest a different agency to a same-sex couple seeking to be certified as foster parents,⁵⁵ that will not necessarily be the case for all agencies that exercise discriminatory policies. Other amici in this case have argued that “[b]eing coerced to do something objectionable is one of the worst violations of conscience and thus a paradigmatic instance of abridging the free exercise of religion.”⁵⁶ Another agency may well claim that the mere act of referring same-sex couples to an agency that will certify them violates their religious freedom, *cf. Zubik v. Burwell*, 136 S. Ct. 1557 (2016)—a scenario even more likely to end a particular couple’s attempt to foster and to reduce their potential foster children’s chances at a supportive home.

⁵⁴ Downs & James, 85 Child Welfare J. at 291. In that study, nearly two-thirds of LGBTQ foster parents reported experiencing challenges in the foster care system because of their sexual orientation. *Id.* 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.

⁵⁵ *See* Br. for Pet. at 9.

⁵⁶ Life Legal Defense Found. et al. Amicus Brief 7.

Contrary to the suggestions of certain amici, enforcing nondiscrimination in foster parent certification neither prevents faith-based organizations from supporting foster families nor harms children by shrinking the overall pool of foster parents. Catholic Social Services (“CSS”) and its dedicated staff and volunteers have spent countless hours improving outcomes for children in foster care 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 children in foster care at untold personal sacrifice.⁵⁷ Amici applaud this critical charitable work that CSS and its families have carried out for decades.

Philadelphia’s requirement of nondiscrimination in foster parent certification does not thwart CSS’s ability to promote fostering and to support foster children and families in other ways. As the court of appeals noted, CSS continues to operate congregate care facilities for Philadelphia and acts as a Community Umbrella Agency helping Philadelphia children “address problems in their home environment that might prevent them from remaining at home.”⁵⁸ In addition, amici hope that the many individuals in CSS’s foster parent network will continue to nurture and care for children in foster care with CSS’s support.

Whatever changes CSS makes to the extent and type of foster care support it provides, Philadelphia, CSS, other foster care agencies, and parents can join

⁵⁷ JA 827 (Amato Decl. ¶¶ 3, 5).

⁵⁸ Apr. 22, 2019 Circ. Ct. Op. at 17. It does not impact CSS’s private adoption work, as the policy applies only to service of certification pursuant to a government contract.

forces to ensure that all children in the foster care system receive a good match and appropriate support. That has been the case here and in other contexts. When organizations such as CSS change the services they provide in response to nondiscrimination policies, all parties work together to protect children's interests.⁵⁹ Parents—and even agency staff—have often shifted to other agencies.⁶⁰ The state or city can contract with other agencies and recruit additional parents, as Philadelphia has.⁶¹ Indeed, Philadelphia DHS Commissioner Figueroa testified that the number of children in congregate care did not increase in the months after Philadelphia ceased contracting with CSS for foster parent certification.⁶² Thus, the claims of petitioners' amici that enforcing nondiscrimination policies will make it harder to find families to foster chil-

⁵⁹ The district court cited approvingly Philadelphia's willingness to provide temporary funding to foster care agencies in the process of closing "to ensure smooth transitions of their staff, foster parents, and the children." July 13, 2018 Dist Ct. Op. at 60; *see also* JA285-86. Since the district court hearing, Philadelphia has entered into a "maintenance contract" with CSS under which CSS continues to support parents who began fostering through CSS before the City enforced its nondiscrimination policy. Br. for City Resps. at 8; SA 6-19.

⁶⁰ *See* July 13, 2018 Dist. Ct. Op. at 16-17 (describing experiences in Illinois and Washington, D.C. that avoided disruption of care).

⁶¹ As Cynthia Figueroa, Commissioner of the Philadelphia Department of Human Services, testified, a 2018 recruitment drive led more than 200 additional families to sign up to be foster parents. *See* JA 268, 353.

⁶² JA356-57, 388.

dren because faith-based agencies will exit the field⁶³ are unsupported.

The factors that influence successful foster parent recruiting and retention and the size of the foster parent pool are complicated.⁶⁴ But critically, other jurisdictions that have enforced nondiscrimination provisions in their agency contracts have been able to ensure positive outcomes for children. In Illinois, the number of children in foster care in congregate care dropped by 16% from 2011 to 2017, following Illinois' enforcement of its nondiscrimination policy in 2011.⁶⁵ In 2013, only 10% of Illinois children in foster care were in congregate care, well below the national average of 14%.⁶⁶ During the same period from 2011 to 2017—which also followed Washington, D.C.'s insistence on nondiscrimination in its foster care services in 2010—the number of foster children living in congregate care in Washington,

⁶³ See, e.g., Br. of Neb., Ariz., and Ohio as Amici Curiae in Supp. of Pets. at 14-15.

⁶⁴ Amici Nebraska, Arizona, and Ohio present an incomplete picture when they suggest (at 17) that Illinois's policy caused the number of non-relative foster care families to fall “nearly in half.” As support, they point to the period from 2012 to 2019—but from 2012 to 2017, the decline in the number of non-relative homes in Illinois was a much more modest 14%. See Who Cares: A National Count of Foster Homes and Families, *Illinois: Foster Care Capacity*, <https://tinyurl.com/y2pl2l36> (visited Aug. 20, 2020). In any event, a crucial metric for measuring a foster care program's success is its effectiveness at limiting the number of children in congregate care. By this standard, Illinois has excelled.

⁶⁵ See Who Cares: A National Count of Foster Homes and Families, *Foster Youth Living in Congregate Care*, <https://tinyurl.com/yxfgyxnp>.

⁶⁶ Annie E. Casey Found., *Every Kid Needs a Family* 6 (2015).

D.C. fell by 62%.⁶⁷ As of 2013, only 9% of children in foster care in Washington, D.C. were in congregate care.⁶⁸

This record demonstrates that states and local governments can manage foster care programs in the best interests of children when they prohibit discrimination against same-sex couples by foster care agencies. Non-discrimination policies help establish broad and diverse pools of foster parents well suited to vulnerable children who can be difficult to match successfully. And they do so without materially shrinking the total pool of parents or causing more children to be placed in congregate care.

III. PERMITTING CERTIFYING AGENCIES TO EXCLUDE SAME-SEX COUPLES WILL EXACERBATE ALREADY DISPROPORTIONATE NEGATIVE OUTCOMES FOR LGBTQ YOUTH

Nondiscrimination policies like Philadelphia's play a critical role in addressing the needs of LGBTQ children in the foster care system. LGBTQ youth, who often experience rejection by their biological families, are disproportionately represented in the foster care population by a factor of at least two.⁶⁹ They are also at greater risk for negative experiences in the foster care system, including being more likely to be placed in

⁶⁷ See Foster Youth Living in Foster Care, *Who Cares: A National Count of Foster Homes and Families*, *supra* n.65.

⁶⁸ Annie E. Casey Found., *Every Kid Needs a Family* 6, *supra* note 66.

⁶⁹ See Wilson et al., *Sexual and Gender Minority Youth in Foster Care: Assessing Disproportionality and Disparities in Los Angeles* 6 (2014).

group settings and/or to experience multiple placements.⁷⁰ LGBTQ youth in the foster care system are less likely than their non-LGBTQ peers to achieve a permanent family and are overrepresented in populations of homeless youth.⁷¹ Some estimates suggest that the percentage of homeless youth who are LGBT is as high as 40%.⁷² These overrepresentations and negative outcomes are even more pronounced for LGBTQ youth of color.⁷³

⁷⁰ See Center for the Study of Social Policy, *Out of the Shadows: Supporting LGBT Youth in Child Welfare through Cross-System Collaboration* 8 (2016) (“19.6 percent of youth in out-of-home care identifying as LGB were moved from their first placement at the request of their caregiver or foster family, compared with only 8.6 percent of heterosexual youth being moved for this reason.”); see also Feinstein et al., *Justice for All?*, *supra* n.10, at 16 (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) (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)).

⁷¹ Feild, *It is Time to Start Counting Kids Who are LGBTQ in Child Welfare*, 96 *Child Welfare J.* xiii, xiv (2018).

⁷² See Feinstein, *Justice for All?*, *supra* n.10; see also Baams et al., *LGBTQ Youth in Unstable Housing and Foster Care*, 1 *Pediatrics* (2019) (“More youth living in foster care (30.4%) and unstable housing (25.3%) self-identified as LGBTQ than youth in a nationally representative sample (11.2%).”).

⁷³ Center for the Study of Social Policy, *Out of the Shadows: Supporting LGBT Youth in Child Welfare through Cross-System Collaboration* (2016).

Studies suggest that these alarming statistics are driven in large part by the disapproval and rejection faced by LGBTQ youth after making their sexual orientation or gender identity known—both to their biological families and within the foster care system.⁷⁴ In one study, 13% of LGBTQ youth reported being treated poorly by the foster care system compared with 6% of non-LGBTQ youth.⁷⁵ And an estimated 43% of LGBTQ youth experiencing homelessness are forced from their homes because of family conflicts regarding their sexual identity.⁷⁶ Moreover, LGBTQ youth facing LGBTQ stigma experience not only depression, suicidality, and drug abuse,⁷⁷ but also exacerbation of the post-traumatic stress not uncommon to children in foster care.⁷⁸

It is unsurprising that identifying supportive, accepting, LGBTQ-affirming homes that permit LGBTQ

⁷⁴ Annie E. Casey Found., *LGBTQ in Child Welfare: A Systematic Review of the Literature* 3 (2016) (“Casey Foundation Review”).

⁷⁵ Wilson et al., *Sexual and Gender Minority Youth in Foster Care*, *supra* n.69, at 5.

⁷⁶ See Durso & Gates, *Serving Our Youth: Findings from a National Survey of Service Providers Working with Lesbian, Gay, Bisexual, and Transgender Youth Who Are Homeless or at Risk of Becoming Homeless* (2012).

⁷⁷ 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, 1040 (2004).

⁷⁸ See Valdez et al., *Trajectories of Depressive Symptoms in Foster Youth Transitioning Into Adulthood Child Maltreatment* 1, 1 (2014) (noting that “trauma exposure rates for foster youth approach 90%).

youth to flourish has been identified as an important practice to reverse these statistics and combat negative outcomes.⁷⁹ 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.⁸⁰ 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.”⁸¹ LGBTQ youth have reported that having accepting foster families is one of the principal factors contributing to their feelings of empowerment and liberation.⁸² These needs explain why the Commissioner of Philadelphia’s DHS testified that her agency “wanted to ensure that we had homes that were affirming to” a “large number of older youth that identified as LGBTQ.”⁸³

⁷⁹ *Id.* at 35; see also Wilson, *Sexual and Gender Minority Youth in Foster Care*, *supra* n.69, at 40-41.

⁸⁰ See Wilson et al., *Sexual and Gender Minority Youth in Foster Care*, *supra* n.69, at 40.

⁸¹ 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).

⁸² *Casey Foundation Review 3*, *supra* note 74, at 35.

⁸³ JA268. A child advocacy expert explained that LGBTQ youths in foster care “come to a system for refuge from what is essentially oppression, from abuse and neglect, often, as I said, typically targeted on their identity and it is absolutely essential that they find in all of us, in the child welfare system and all of its practitioners a place of justice, a place of healing and a place of

While there are certainly non-LGBTQ foster parents who are willing and able to provide nurturing, supportive care to LGBTQ youths, it can be hard to find families who are open to welcoming these youths. Many foster care programs have had success in identifying and promoting LGBTQ-affirming placements by tapping LGBTQ foster parents.⁸⁴ 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.”⁸⁵ Eliminating prospective foster parents on the basis of their sexual orientation may remove the very parents who could most benefit LGBTQ children in foster care—parents who have lived, and perhaps struggled, with LGBTQ identities and who will be supportive of the youth’s journey.⁸⁶ Relatedly, as many LGBTQ

safety. And in no uncertain terms that means that homes must be welcoming to them.” JA424.

⁸⁴ See Gilliam, *supra* n.77 at 1041-1042 (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.).

⁸⁵ Salazar et al., *Developing Relationship-Building Tools for Foster Families Caring for Teens who are LGBTQ2S*, 96 *Child Welfare J.* 75, 94 (2018).

⁸⁶ 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 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

adults have unfortunately 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 children in their care learn how best to respond.

Allowing foster care agencies to discriminate on the basis of LGBTQ status 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.⁸⁷ If the government permits such discrimination, it sends a demoralizing and harmful message to LGBTQ youth: that they are somehow less worthy 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. As the DHS Commissioner testified, “[Y]ou think about youth that are being served who might identify as LGBTQ, they will become adults at some time. So you are sending a signal to those youth that while we might support you now, we won’t support your rights as an adult.”⁸⁸

Exclusionary policies that, at best, encourage silence with respect to sexual orientation and gender identity and, at worst, promote messages of unfitness are detrimental to the welfare of LGBTQ youth be-

vulnerable situations, such as foster care, have supports available to meet their needs.”)

⁸⁷ *Casey Foundation Review 3*, *supra* note 74, 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.

⁸⁸ JA281.

cause they undermine self-esteem. Notably, the argument that an agency's refusal to certify prospective foster parents on the basis of their LGBTQ identity is not harmful to children in foster care because those adults can be referred to another agency—an argument with which amici strongly disagree—overlooks the fact that LGBTQ youth in the foster care system may not be able to avoid receiving care facilitated by a discriminatory agency. As LGBTQ youth in foster care report mistreatment and discrimination at twice the rate of their non-LGBTQ peers,⁸⁹ it is imperative to their best interests to be paired with a nondiscriminatory agency.

Prohibiting the City from requiring nondiscrimination by agencies with which it contracts for foster parent certification 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. The City's foster and adoption policies should reinforce LGBTQ children's sense of self-worth, not undermine it.

CONCLUSION

The judgment of the court of appeals should be affirmed.

⁸⁹ See Wilson et al., *Sexual and Gender Minority Youth in Foster Care*, *supra* n.69.

Respectfully submitted.

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