

No. 18-2574

**United States Court of Appeals
for the Third Circuit**

SHARONELL FULTON, ET AL.,
Plaintiffs-Appellants,

v.

CITY OF PHILADELPHIA, ET AL.,
Defendants-Appellees.

On Appeal from the United States District Court for
the Eastern District of Pennsylvania,
No. 2:18-cv-02075-PBT (Hon. Petrese B. Tucker)

BRIEF OF AMICI CURIAE

CHILDREN'S RIGHTS; BARTON CHILD LAW & POLICY CENTER, EMORY LAW SCHOOL; CENTER FOR CHILDREN & YOUTH JUSTICE; CENTER FOR CHILDREN'S ADVOCACY; CENTER FOR THE STUDY OF SOCIAL POLICY; CENTER ON CHILDREN AND FAMILIES; CHILDREN AND FAMILY JUSTICE CENTER; CHILDREN'S ACTION ALLIANCE; CHILDREN'S ADVOCACY INSTITUTE; CHILDREN'S DEFENSE FUND-NEW YORK; CHILDREN'S LAW CENTER OF CALIFORNIA; CHILDREN'S LAW CENTER OF KENTUCKY; CHILDREN'S LAW CENTER OF MINNESOTA; COALITION FOR JUVENILE JUSTICE; COLUMBIA LEGAL SERVICES; FIRST STAR, INC.; FLORIDA'S CHILDREN FIRST, INC.; HARVARD LAW SCHOOL CHILD ADVOCACY PROGRAM; JUVENILE LAW CENTER; LAWYERS FOR CHILDREN; LEGAL COUNSEL FOR YOUTH AND CHILDREN; LEGAL SERVICES FOR CHILDREN; PROFESSOR BRUCE A. BOYER; PROFESSOR MICHAEL J. DALE; NATIONAL ASSOCIATION OF COUNSEL FOR CHILDREN; NATIONAL CENTER FOR YOUTH LAW; NEBRASKA APPLESEED; NEW MEXICO CHILD ADVOCACY NETWORK; PARTNERS FOR OUR CHILDREN; PEGASUS LEGAL SERVICES FOR CHILDREN; RUTGERS SCHOOL OF LAW CHILDREN'S JUSTICE CLINIC; UNIVERSITY OF MIAMI CHILDREN & YOUTH LAW CLINIC; YOUTH LAW CENTER

**IN SUPPORT OF DEFENDANTS-APPELLEES AND IN
SUPPORT OF AFFIRMANCE**

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rules of Appellate Procedure 26.1 and 29(a)(4)(A) and Third Circuit LAR 26.1.1, *Amici Curiae* Children's Rights; Barton Child Law & Policy Center, Emory Law School; Center for Children & Youth Justice; Center for Children's Advocacy; Center for the Study of Social Policy; Center on Children and Families; The Children and Family Justice Center; Children's Action Alliance; Children's Advocacy Institute; Children's Defense Fund-New York; Children's Law Center of California; Children's Law Center of Kentucky; Children's Law Center of Minnesota; Coalition for Juvenile Justice; Columbia Legal Services; First Star, Inc.; Florida's Children First, Inc.; Harvard Law School Child Advocacy Program; Juvenile Law Center; Lawyers For Children; Legal Counsel for Youth and Children; Legal Services For Children; Professor Bruce A. Boyer; Professor Michael J. Dale; National Association of Counsel for Children; National Center for Youth Law; Nebraska Appleseed; New Mexico Child Advocacy Network; Partners for Our Children; Pegasus Legal Services for Children; Rutgers School of Law Children's Justice Clinic; University of Miami Children & Youth Law Clinic; Youth Law Center

(hereinafter collectively “*Amici Curiae*”) state, to the extent disclosure is required, they have no parent corporation and there is no publicly held corporation that holds 10 percent or more of their stock.

October 4, 2018



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45 C.F.R. § 87.3 24

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Allison S. Bohm, et al., *Challenges Facing LGBT Youth*, 17
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Gary J. Gates & Taylor N. T. Brown, *Marriage and Same-sex
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Gary J. Gates, *Demographics of Married and Unmarried
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STATEMENTS OF INTEREST OF *AMICI CURIAE*

Amici Curiae provide these Statements of Interest pursuant to Federal Rules of Appellate Procedure 29(a)(4)(D), (E) and Third Circuit LAR 29.1(b). *Amici Curiae* hereby certify that no party's counsel authored this brief in whole or in part, no party or party's counsel contributed money intended to fund preparation or submission of this brief, and no person other than *Amici Curiae* and their counsel contributed money intended to fund preparation or submission of the brief. The parties have consented to the filing of this brief.

Amici Curiae represent and advocate for the interests of children in foster care in Philadelphia and around the country.¹ *Amici Curiae* individually and collectively have a substantial interest in protecting the constitutional and statutory rights of children in foster care to safety, permanency and well-being, and in protecting them from discrimination on account of religion, sexual orientation, and gender identity.

¹ "Some friends of the court are entities with particular expertise not possessed by any party to the case. . . . Still others explain the impact a potential holding might have on an industry or other group." *Neonatology Assocs., P.A. v. Comm'r*, 293 F.3d 128, 132 (3d Cir. 2002) (Alito, J.) (quoting Luther T. Munford, *When Does the Curiae Need an Amicus?*, 1 J. APP. PRAC. & PROCESS 279, 281 (1999)).

Children's Rights is a national advocacy non-profit dedicated to improving the lives of vulnerable children in government systems. Children's Rights has a 20-year track record of using civil rights litigation, policy expertise, and public education to create positive systemic change. Children's Rights has successfully challenged unnecessary and harmful practices in the over-institutionalization of children in state custody, especially children who already have been traumatized as a result of separation from their homes and families. Children's Rights has long advocated for the equitable treatment of LGBTQ children in child welfare systems, recognizing that they are often subjected to discriminatory treatment and abuse. Children's Rights affirms the importance of actively recruiting LGBTQ foster parents, not only to protect them from discrimination, but also because they are an excellent resource for loving homes for all children

Barton Child Law & Policy Center, Emory Law School is a clinical program of Emory Law School dedicated to promoting and protecting the legal rights and interests of children involved with the juvenile court, child welfare and juvenile justice systems in Georgia. The Center achieves its reform objectives through research-based policy

development, legislative advocacy, and holistic legal representation for individual clients. The Barton Center adopts a multidisciplinary, collaborative approach to achieving justice for youth through which children are viewed in their social and familial contexts and provided with individualized services to protect their legal rights, respond to their human needs, and ameliorate the social conditions that create risk of system involvement.

Center for Children & Youth Justice (“CCYJ”) is a 501(c)(3) non-profit organization with a mission to improve—through systems reform—the outcomes of children and youth who enter the juvenile justice, child welfare, and related systems. CCYJ works to ensure that such systems are integrated, unbiased, fueled with innovative ideas, and backed by rules and programs to achieve the best outcomes for children, youth, and young adults. CCYJ has previously sought and received leave to file amicus briefing on issues related to the treatment of youth and young adults. Through its eQuality Project, CCYJ has brought together juvenile courts, child welfare agencies, and social service providers to implement recommendations aimed to reduce homelessness and create safe and affirming experiences for LGBTQ

youth in child welfare or juvenile justice. CCYJ affirms the importance of recruiting, supporting, and protecting LGBTQ foster parents from discrimination as part of this work.

The Center for Children’s Advocacy (“CCA”) is a non-profit organization affiliated with the University of Connecticut Law School and is dedicated to the promotion and protection of the legal rights of poor children. The children represented by CCA are dependent on a variety of Connecticut state systems, including judicial, health, child welfare, mental health, education and juvenile justice. CCA engages in systemic advocacy focusing on important legal issues that affect a large number of children, helping to improve conditions for abused and neglected children in the state’s welfare system as well as in the juvenile justice system. CCA works to ensure that children’s voices are heard and that children are afforded legal protections everywhere—community, foster placements, educational institutions, justice system, and child welfare.

The Center for the Study of Social Policy (“CSSP”) is a national non-profit organization dedicated to building a racially, socially, and economically just society. CSSP advocates with and for

children, youth, and families marginalized by public policies and institutional practices, and is recognized for its work in reforming public systems to better serve families. CSSP's work includes a focus on transforming child welfare systems to effectively serve children and youth who identify as lesbian, gay, bisexual, transgender and questioning (LGBTQ) and gender non-conforming (GNC) through its getREAL initiative and our institutional policy work.

The Center on Children and Families (CCF) at the University of Florida Fredric G. Levin College of Law in Gainesville, Florida is an organization whose mission is to promote the highest quality teaching, research, and advocacy for children and their families. CCF's directors and associate directors are experts in children's law, constitutional law, criminal law, family law, and juvenile justice, as well as related areas such as psychology and psychiatry. CCF supports interdisciplinary research in areas of importance to children, youth, and families, and promotes child-centered, evidence-based policies and practices in dependency and juvenile justice systems. Its faculty has many decades of experience in advocacy for children and youth in a variety of settings,

including the Virgil Hawkins Civil Clinics and Gator TeamChild juvenile law clinic.

The Children and Family Justice Center (CFJC), part of Northwestern Pritzker School of Law's Bluhm Legal Clinic, was established in 1992 as a legal service provider for children, youth, and families, as well as a research and policy center. Currently, clinical staff at the CFJC provide advocacy on policy issues affecting children in the legal system, and legal representation for children, including in the areas of delinquency and crime, immigration/asylum, and fair sentencing practices. In its more than 25-year history, the CFJC has filed numerous briefs as an amicus curiae in federal and in state supreme courts based on its expertise in the representation of children in the legal system. *See, e.g.*, Amicus Br., *Montgomery v. Louisiana*, 135 S. Ct. 1546 (2015) (No. 14-280), 2015 WL 4624620; Amicus Br., *Watson v. Illinois*, 136 S. Ct. 399 (2015) (No. 14-9504), 2015 WL 3452842.

Children's Action Alliance ("CAA") is an independent voice for Arizona children at the state capitol and in the community. CAA works to improve children's health, education and security through information and action. Through research, publications, media

campaigns, and advocacy, CAA seeks to influence policies and decisions affecting the lives of Arizona children and their families on issues related to health, child abuse and neglect, early care and education, budget and taxes, juvenile justice, children and immigration, and working families. CAA works toward a future in which all children have health insurance, no child is raised in poverty and hunger, every child enters school ready to learn and succeed, no child endures the ravages of abuse and neglect, every child has a place to call home, and struggling teens have the support they need to become responsible adults.

Children's Advocacy Institute ("CAI") is an academic center at the University of San Diego School of Law. It has educated law students in child rights and remedies since 1989, including classes and clinics representing abused children in dependency and delinquency court. It is also a center for child advocacy, with offices in Sacramento and D.C., active in studies and national publications on the status of children, particularly in the child protection area of law. CAI is interested in protecting the rights of all suspect classifications, including children who suffer discrimination based on sex/gender related factors.

Children’s Defense Fund-New York is dedicated to improving conditions for children, combining research, public education, policy development, community organizing and advocacy. A recognized authority in the endeavor to protect children and strengthen families, CDF-NY serves as a resource and partner for children, families and organizations throughout New York City and State.

Children’s Law Center of California (“CLCCAL”) is a non-profit, public interest law firm that serves as appointed counsel for children under the jurisdiction of the juvenile dependency courts in Los Angeles, Placer, and Sacramento Counties. Children’s Law Center of California is the largest children’s legal services organization in the nation, representing over 33,000 abused and neglected children at any given time. Our attorneys provide an unparalleled level of child advocacy expertise in dependency proceedings and in a host of related hearings that seek to ensure the wellbeing and future success of each child. Children’s Law Center of California is a driving force in local, state and national policy change and child welfare system reform.

Children’s Law Center of Kentucky has worked on behalf of adolescents in a variety of settings, including adolescents involved in

the juvenile justice and child welfare systems. The Children’s Law Center, Inc. (“CLC”) is a non-profit organization committed to the protection and enhancement of the legal rights of children. CLC strives to accomplish this mission through various means, including providing legal representation for youth and advocating for systemic and societal change. For nearly 30 years, CLC has worked in many settings, including the fields of special education, child custody, child welfare, and juvenile justice, to ensure that youth are treated humanely, free from harm, can access services, and are represented by counsel. CLC supports recruitment of LGBTQ foster parents as a means to ensure that children are free from harm and provided with loving homes.

Children’s Law Center of Minnesota (“CLC”) is a 501c(3) organization whose mission is to promote the rights and interests of Minnesota’s children, especially children of color and children with disabilities, in the judicial, child welfare, health care and education systems. CLC carries out its mission in three ways: (1) by providing direct legal representation for children in child protection (dependency) matters in Minnesota juvenile courts; (2) by advocating and participating in state-wide efforts to improve and reform the child

protection and juvenile justice systems; and (3) by training volunteer lawyers and other child advocates to represent children. CLC affirms the importance of actively requiring LGBTQ foster parents, not only to protect them from discrimination, but also because they are an excellent resource for loving homes for all children.

Coalition for Juvenile Justice (“CJJ”) is a non-profit, non-partisan, nationwide coalition of State Advisory Groups (SAGs), allied staff, individuals, and organizations. CJJ is funded by our member organizations and through grants secured from various agencies. CJJ envisions a nation where fewer children are at risk of delinquency; and if they are at risk or involved with the justice system, they and their families receive every possible opportunity to live safe, healthy, and fulfilling lives. CJJ serves and supports SAGs that are principally responsible for monitoring and supporting their state’s progress in addressing the four core requirements of the Juvenile Justice and Delinquency Prevention Act (JJDP Act) and administering federal juvenile justice grants in their states. CJJ is dedicated to preventing children and youth from becoming involved in the courts and upholding

the highest standards of care when youth are charged with wrongdoing and enter the justice system.

Columbia Legal Services (“CLS”) is a nonprofit legal services organization based in Washington State that advocates for people who face injustice and poverty and seeks to achieve social and economic justice for all. CLS uses policy reform, litigation, and innovative partnerships to reveal and end actions that harm the communities we serve. For decades, CLS has pursued litigation to improve opportunities for children and youth, including a class action challenging Washington’s foster care system, *Braam v. State of Washington and Dep’t of Soc. Health Serv.*, 81 P.3d 851 (Wash. 2003). CLS has sought and received leave to file amicus briefing on issues that challenge systems that discriminate against vulnerable people and deprive them of constitutional and statutory rights. Thus, CLS has a great interest in the outcome of this case as it impacts the breadth of protections afforded to children in foster care and foster families.

First Star, Inc. is a national 501(c)(3) public charity dedicated to improving life for child victims of abuse and neglect. First Star partners with child welfare agencies, universities, and school districts to ensure

foster youth have the academic, life skills, and adult support needed to successfully transition to higher education and adulthood. Over the last three years nationally, 91% of First Star Academy graduates were admitted to colleges and universities. First Star has extensive experience in each of our twelve Academies in working successfully with LGBT foster youth, and in addressing their special challenges where necessary.

Florida's Children First, Inc. ("FCF") is Florida's preeminent legal advocacy organization dedicated to the legal rights of children in the state's care and custody. Its mission is to advance children's legal rights consistent with their medical, educational, and social needs. FCF seeks to achieve significant improvements in all systems affecting children's lives, with a special emphasis on the child welfare system.

Harvard Law School Child Advocacy Program ("CAP") is a premier academic program focused on children's rights, primarily in the areas child welfare (abuse and neglect, foster care, and adoption), education, and juvenile justice. CAP trains students to contribute in their future careers to a better understanding of the rights of children, and to law and policy reform promoting children's rights in the United

States and around the world. CAP's Faculty director, Elizabeth Bartholet, is the Morris Wasserstein Public Interest Professor of Law, and is a leading national authority on child protection, foster care, and adoption law.

Juvenile Law Center advocates for rights, dignity, equity and opportunity for youth in the child welfare and justice systems through litigation, appellate advocacy and submission of amicus briefs, policy reform, public education, training, consulting, and strategic communications. Founded in 1975, Juvenile Law Center is the first non-profit public interest law firm for children in the country. Juvenile Law Center strives to ensure that laws, policies, and practices affecting youth advance racial and economic equity and are rooted in research, consistent with children's unique developmental characteristics, and reflective of international human rights values.

Lawyers For Children ("LFC") is a not-for-profit legal corporation dedicated to protecting the legal rights of individual children in New York City and compelling system-wide child welfare reform. Since 1984, LFC has provided free legal and social work services to children in more than 30,000 court proceedings involving

foster care, abuse, neglect, termination of parental rights, adoption, guardianship, custody and visitation. This year, our attorney-social worker teams will represent children and youth in close to 3,000 court cases in New York City Family Courts. Through our LGBTQ Rights Project, two attorneys collaborate with LFC's social workers to address the needs of LGBTQ youth and families involved in the child welfare system. In addition to representing individual children, the project conducts trainings and workshops regarding the rights of LGBTQ and gender nonconforming youth in foster care, distributes our You Are Not Alone handbook for LGBTQ and gender nonconforming youth in foster care, coordinates resource and service referrals for LGBTQ youth, and works with City agencies to develop policies, procedures and practices designed to best meet the needs of LGBTQ youth and families in the child welfare system. LFC's insight into the issues raised in the instant case is borne of more than thirty years experience representing LGBTQ youth in foster care in New York.

Legal Counsel for Youth and Children ("LCYC") was founded in 2010 to focus exclusively on children's rights and legal interests, providing holistic, child-centered legal advocacy, in collaboration with

other experts and natural supports. LCYC's low caseloads and strong community partnerships have been instrumental in achieving positive outcomes for youth. LCYC has a team of eleven legal advocates serving over 400 youth annually in King County through four main programs: child welfare, juvenile justice, immigrant youth and families, and homelessness. The majority of youth served are youth of color. Roughly one-fifth of youth served through our homeless advocacy program self-identify as LGBTQ. We also serve LGBTQ youth with open child welfare and juvenile offender matters. We take lessons learned from direct service work, youth, and community partners, to impact local and state policies supporting youth and families in Washington. It is imperative that youth in foster care feel comfortable sharing with their caregivers that they identify as LGBTQ. Based on our advocacy experiences, the lack of supportive and appropriate placements for LGBTQ youth in foster care has a direct, negative impact on youth safety, mental health, and well-being; it also impacts the number of LGBTQ youth experiencing homelessness.

Legal Services for Children ("LSC"), founded in 1975 as a nonprofit organization, is one of the first non-profit law firms in the

country dedicated to advancing the rights of youth. LSC's mission is to ensure that all children and youth in the San Francisco Bay Area have an opportunity to be raised in a safe environment with equal access to the services and support they need to become healthy and productive young adults. This mission is rooted in the belief that young people need strong families and deserve positive alternatives to unnecessary placement in foster care, juvenile justice facilities, and immigration detention. We provide free legal and social work services to children and youth in abuse and neglect, guardianship, school discipline, immigration, and emancipation proceedings. LSC regularly represents abused and neglected children in child protection proceedings and believes children in the child welfare system have a fundamental right to be free from discrimination on any basis.

Professor Bruce A. Boyer is the Curt and Linda Rodin Professor of Law and Social Justice at Loyola University of Chicago School of Law, where he serves as Director of the Civitas Child Law Clinic. He has more than thirty years of experience teaching, writing, and litigating in the areas of foster care and adoption, and he has trained hundreds of law students and lawyers in every aspect of child

maltreatment, focusing on constitutional law, civil rights, and trial practice skills. His publications include both scholarly and practice-oriented articles, and his service includes appointments to the American Bar Association's Special Committee on the Unmet Legal Needs of Children, as Program Chair of the Board of Directors of the Evan B. Donaldson Adoption Institute, and to the Illinois Supreme Court Commission on Professionalism. He is admitted to practice in Illinois and in federal courts including the United States Supreme Court. His interest in this litigation derives from his longstanding work aimed at improving the effectiveness of child protection courts in achieving just and durable permanency outcomes for at-risk children and their families.

Professor Michael J. Dale is a member of the faculty at Nova Southeastern University College of Law in Fort Lauderdale, Florida, where he teaches courses in family law, juvenile law, and in the family and juvenile clinic. Professor Dale was the Executive Director of the Youth Law Center in San Francisco after serving as Attorney in Charge of the Special Litigation Unit of the Juvenile Rights Division of the Legal Aid Society of the City of New York. He has been a practicing

lawyer specializing in significant civil rights litigation for 40 years focusing on issues related to children and their families. He is admitted to practice in the states of Arizona, Florida, New Mexico and New York as well as before the United States Supreme Court and numerous federal appellate and district courts. Professor Dale is the author of over seventy-five articles focusing primarily on juvenile and children's law topics.

The National Association of Counsel for Children ("NACC"), founded in 1977, is a 501(c)(3) non-profit child advocacy and professional membership association dedicated to enhancing the well being of America's children. The NACC works to strengthen legal advocacy for children and families by promoting well-resourced, high quality legal advocacy; implementing best practices; advancing systemic improvement in child serving agencies, institutions and court systems; and promoting a safe and nurturing childhood through legal and policy advocacy. NACC programs that serve these goals include training and technical assistance, the national children's law resource center, the attorney specialty certification program, policy advocacy, and the amicus curiae program. Through the amicus curiae program, the NACC

has filed numerous briefs involving the legal interests of children and families in state and federal appellate courts and the Supreme Court of the United States.

National Center for Youth Law (“NCYL”) is a private, non-profit organization devoted to impact litigation and advocacy that serve the needs of children living in poverty. For more than 35 years, NCYL has worked to improve the federal, state and local systems responsible for protecting children, including the child welfare, juvenile justice, health and mental health, and public benefits systems. As part of the organization’s child welfare advocacy, NCYL works to ensure the safety, stability and wellbeing of abused and neglected children. Denying children in foster care access to LGBTQ foster and adoptive families—who can and do provide healthy and stable foster and adoptive homes—undermines these efforts.

Nebraska Appleseed is a nonprofit organization based in Lincoln, Nebraska that fights for justice and opportunity for all Nebraskans, with over twenty years of experience in litigation and advocacy regarding issues affecting underrepresented groups, including

addressing the systemic issues affecting children and families in Nebraska's foster care system.

New Mexico Child Advocacy Network (“NMCAN”) partners with young people to build community, promote equity, and lead change. Since 1990, we have been leveraging community partnerships and volunteerism to improve children and youth's experiences in foster care. Today, we have grown to authentically engage young people impacted by the foster care and/or juvenile justice systems to improve their transition to adulthood. Together, we work to: 1. Reduce systemic barriers that negatively impact their lives; 2. Help them learn how to build positive community networks and strengthen their sense of belonging; 3. Access tools to achieve goals related to education, employment, health, housing, and personal finance. NMCAN believes that LGBTQ children and youth in foster care, as well as LGBTQ foster parents, should be treated equitably and protected from discrimination.

Partners for Our Children works to improve the lives of vulnerable children and families in Washington state, especially those touched by the child welfare system. Founded in 2007 to focus new thinking, resources, and expertise on the state's child welfare system,

we have since expanded our focus to include all vulnerable children and families, with a clear emphasis on child well-being. At Partners for Our Children, we hold the value of equity in all programs and policies, including for those who identify as LGBTQ. Especially in our advocacy efforts, we champion the equitable treatment of children who identify as LGBTQ and the importance of LGBTQ foster parents who provide loving homes for children.

Pegasus Legal Services for Children is a New Mexico nonprofit corporation established in 2002 to promote and defend the rights of children and youth to safe and stable homes, quality education and healthcare, and a voice in decisions that impact their lives. Pegasus provides legal services to hundreds of children living apart from their parents, often as wards of the State. Pegasus attorneys witness first-hand the adverse effects both on the physical and mental health and on the long-term well-being and future prospects of children who have been removed from their families. Pegasus joins this brief as an advocate for ensuring that there is equitable treatment of LGBTQ children in children welfare system and that these children are not discriminated against. Pegasus supports the importance of actively

recruiting LGBTQ foster homes so these children have an opportunity to be in a safe home while in the State's care.

The Rutgers School of Law Children's Justice Clinic is part of the clinical program of Rutgers Law School which is dedicated to representing youth in New Jersey's delinquency system. The Children's Justice Clinic originated in 2007 and has a successful track record of representing youth throughout southern New Jersey as well as being a catalyst for systemic reform throughout the region. In particular, the Children's Justice Clinic has been instrumental in addressing juvenile conditions of confinement issues including solitary confinement.

The University of Miami Children & Youth Law Clinic ("CYLC") is a legal clinic staffed by faculty and students of the University of Miami School of Law. For the past 22 years, the CYLC has engaged in individual and law reform advocacy to serve the legal needs of vulnerable children, with an emphasis on children in the child welfare system. Many CYLC clients are LGBTQ children who experience serious difficulties in foster care, and a significant focus of our policy advocacy is improving outcomes for these children while they are in foster care and after their exit from care. CYLC has appeared as

amicus curiae in many federal and state cases implicating the constitutional interests of children, including a Florida appellate case striking down the statutory ban on gays and lesbians adopting children out of foster care.

The Youth Law Center (“YLC”) is a national organization that advocates to transform the foster care and juvenile justice systems so that all children and youth can thrive. Over the past four decades, YLC has worked to advance the rights of children and youth in foster care and to ensure that all children in the system are provided with high-quality care that meets their developmental needs. YLC has sought to strengthen protections and supports for LGBTQ youth in the system through legislative, policy, and amicus efforts. Because quality parenting is the most important intervention that the child welfare system provides to children in its care, YLC strongly backs efforts to recruit and support foster families able to provide such parenting, including LGBTQ families.

SUMMARY OF THE ARGUMENT

“[W]hatever may be their precise impact, neither the Fourteenth Amendment nor the Bill of Rights is for adults alone.” *In re Gault*, 387 U.S. 1, 13 (1967). The underlying litigation presents as a battle between Appellants’ refusal to certify same-sex couples as foster parents based on Appellants’ religious objections, and Appellees’ obligation to adhere to laws that prohibit discrimination against qualified couples. *Amici Curiae* speak on behalf of the children who will be profoundly affected by the outcome of this case, and focus this submission to the Court on the implicated rights of these children. *Amici Curiae* support Appellees because in this case they seek to protect the constitutional rights and best interests of children in the foster care system seeking placement with safe and loving families.

Appellants argue that, due to their religious faith, they should be permitted to discriminate against same-sex couples in foster family certification solely on the basis of prospective parents’ sexual orientation. Appellants seek to circumvent Philadelphia’s statutory and contractual requirements prohibiting discrimination, while at the same time continuing to accept substantial taxpayer funds for providing those

discriminatory services. This is not in the public interest, and if Appellants' position were to prevail, it would cause substantial harm to children in Philadelphia's foster care system.

Perhaps the most unfortunate consequence of this case is that, in an attempt to show harm to themselves "and the children they serve" and obtain injunctive relief, Appellants wrongly claim that the City of Philadelphia "is shutting down Catholic Social Services' century-old foster care program." Br. Appellants 1. To the contrary: the City has proposed continuing CSS's contract to provide in-home foster care services—so long as CSS complies with the City's anti-discrimination requirements. CSS refuses to do so, instead apparently preferring to cease providing in-home foster care services.²

As described below, CSS's insistence on the right to discriminate on the basis of sexual orientation violates not only the City's contractual and regulatory requirements, but also the constitutional and statutory rights of children in the foster care system. CSS's insistence on the right

² The district court explained that CSS's cessation would have little or no effect on the foster care system. *Fulton v. City of Philadelphia*, 320 F.Supp.3d 661, 674, 702 (2018).

to discriminate conflicts with federal and state law protecting child welfare.

The Court should affirm the district court's order denying Appellants' demand for immediate injunctive relief compelling the City to place foster children with CSS.

ARGUMENT

I. THE APPELLEES' PROHIBITION AGAINST DISCRIMINATION ON THE BASIS OF SEXUAL ORIENTATION SERVES THE BEST INTERESTS OF VULNERABLE CHILDREN IN THE FOSTER CARE SYSTEM.

Amici Curiae respect and value the role that faith-based providers play in providing both placement and services for children in foster care across the country. Our concern is with state-sanctioned discrimination of any kind, and the harm it can do to children in care. A parent's ability to nurture a child's best interests is informed by a wide variety of factors, including financial stability, emotional and physical health, quality of family relationships, motives for adoption, total personality, emotional maturity, and feelings about children.³

Sexual orientation has no bearing on a parent's ability to care for a foster or adopted child—gay and straight people make equally good

³ See Joseph Evall, *Sexual Orientation and Adoptive Matching*, 25 FAM. L.Q. 347, 350–51 (1991).

parents.⁴ As Justice Kennedy described in *Obergefell v. Hodges*, “many same-sex couples provide loving and nurturing homes to their children, whether biological or adopted. . . . Most States have allowed gays and lesbians to adopt, either as individuals or as couples, and many adopted and foster children have same-sex parents.” 135 S.Ct. 2584, 2600 (2015) (citations omitted). Justice Kennedy cited this as “powerful confirmation from the law itself that gays and lesbians can create loving, supportive families.” *Id.*

The medical community takes the same position. According to the American Academy of Pediatrics, “children and adolescents who grow up with gay and/or lesbian parents fare as well in emotional, cognitive, social, and sexual functioning as do children whose parents are heterosexual” and “there is no evidence that the development of children with lesbian and gay parents is compromised in any significant

⁴ Rachel H. Farr et al., *Parenting and Child Development in Adoptive Families: Does Parental Sexual Orientation Matter?*, 14 APPLIED DEVELOPMENTAL SCI. 164, 175 (2010); Nanette Gartrell & Henny Bos, *US National Longitudinal Lesbian Family Study: Psychological Adjustment of 17-Year-Old Adolescents*, PEDIATRICS, Jul. 2010, at 1, 7, <http://pediatrics.aappublications.org/content/pediatrics/early/2010/06/07/peds.2009-3153.full.pdf>.

respect relative to that among children of heterosexual parents in otherwise comparable circumstances.”⁵

Many states fail to maintain a sufficient array of foster families to meet the needs of children. Indeed, the parties agree that thousands of children need placement in stable homes—CSS disagrees regarding who should be permitted to care for them.

But “categorical restrictions on the pool of adoptive parents significantly interfere with the attainment of a permanent family relationship for parentless children in the state’s care. By disqualifying a group of adults from adopting regardless of their ability to parent, the system limits children’s opportunity to become part of a stable family.”⁶ As the district court held in this case, “DHS and Philadelphia have a legitimate interest in ensuring that the pool of foster parents and resource caregivers is as diverse and broad as the children in need of

⁵ Ellen C. Perrin & Benjamin S. Siegel, *Promoting the Well-Being of Children Whose Parents Are Gay or Lesbian*, PEDIATRICS, Apr. 2013, at e1374, e1377–78, <http://pediatrics.aappublications.org/content/pediatrics/131/4/e1374.full.pdf>.

⁶ Joseph S. Jackson & Lauren G. Fasig, *The Parentless Child’s Right to a Permanent Family*, 46 WAKE FOREST L. REV. 1, 36–37 (2011).

foster parents and resource caregivers.” *Fulton*, 320 F. Supp. 3d at 685, 703.

CSS’s refusal to place children with same-sex couples therefore hurts *all* children because it unnecessarily narrows the pool of prospective parents. There are 22,340 same-sex couples in the state of Pennsylvania⁷ and 4,784 in Philadelphia County alone.⁸ Same-sex couples are nearly three times as likely as straight couples to be raising an adopted or foster child.⁹ Even before the Supreme Court’s landmark decision in *Obergefell*, married same-sex couples were more than five times as likely as opposite-sex married couples to have adopted or

⁷ Angeliki Kastanis et al., *Same-sex Couple and LGBT Demographic Data Interactive*, THE WILLIAMS INST.: UCLA SCH. OF L. (2016), <https://williamsinstitute.law.ucla.edu/visualization/lgbtstats/?topic=SS&area=42#density> (follow “LGBTStat: A Data Interactive Tool” hyperlink; choose “same-sex couples” option, then click on Pennsylvania in map).

⁸ *Id.* (follow “LGBTStat: A Data Interactive Tool” hyperlink; choose “same-sex couples” option, then click on Pennsylvania in map, then click “by county,” then click on Philadelphia County).

⁹ Gary J. Gates, *Demographics of Married and Unmarried Same-sex Couples: Analyses of the 2013 American Community Survey*, THE WILLIAMS INST.: UCLA SCH. OF L. 1 (2015), <http://williamsinstitute.law.ucla.edu/wp-content/uploads/Demographics-Same-Sex-Couples-ACS2013-March-2015.pdf>.

fostered children.¹⁰ In short, this is a tremendous resource of potential loving homes for children and one that should not be alienated by discrimination against same-sex couples in Philadelphia’s public child welfare system.

As covered in depth by the amicus brief submitted by Lambda Legal et al., Appellants’ challenge particularly undermines the interests of LGBTQ foster children, who suffer higher rates of discrimination and emotional, physical, and sexual abuse while in foster care, and who face worse life outcomes than their non-LGBTQ peers.¹¹

Despite LGBTQ youth’s comprising a disproportionate segment of foster care youth, “[o]nly 9 percent of foster families surveyed said they

¹⁰ *Id.*; see also Gary J. Gates & Taylor N. T. Brown, *Marriage and Same-sex Couples After Obergefell*, THE WILLIAMS INST.: UCLA SCH. OF L. 1 (2015), <http://williamsinstitute.law.ucla.edu/wp-content/uploads/Marriage-and-Same-sex-Couples-after-Obergefell-November-2015.pdf> (detailing substantial increase in marriages among same-sex couples after *Obergefell*).

¹¹ CHILDREN’S RIGHTS, LAMBDA LEGAL, AND CTR. FOR THE STUDY OF SOC. POLICY, *SAFE HAVENS: CLOSING THE GAP BETWEEN RECOMMENDED PRACTICE AND REALITY FOR TRANSGENDER AND GENDER-EXPANSIVE YOUTH IN OUT-OF-HOME CARE 3* (2017) [hereinafter *SAFE HAVENS*]; Allison S. Bohm, et al., *Challenges Facing LGBT Youth*, 17 *GEO. J. GENDER & L.* 125, 163 (2016) (“Familial rejection is cited as the primary cause of homelessness among LGBT youth.”).

would accept LGBT youth.”¹² Permitting Appellants to thwart the Appellees’ legitimate goal of recruiting as many loving families as possible is harmful to the children the system is created to protect, and serves no legitimate public interest—particularly where CSS receives nearly \$20 million in taxpayer funds each year. *See Fulton*, 320 F. Supp. 3d at 685 (citing the “legitimate interest in ensuring that individuals who pay taxes to fund government contractors are not denied access to those services”). Discrimination against same-sex couples does not serve the best interests of children.

II. IF THE APPELLEES PERMITTED DISCRIMINATION AGAINST PROSPECTIVE FOSTER FAMILIES, IT WOULD VIOLATE CHILDREN’S CONSTITUTIONAL RIGHTS.

A. Discrimination in the Public Foster Care System Would Violate Foster Children’s Fourteenth Amendment Substantive Due Process Rights.

Custody of children in state-regulated foster care creates a “special relationship” that triggers substantive due process rights, including children’s right to constitutionally adequate care, the right to

¹² SAFE HAVENS, *supra* note 11, at 3 (“[W]hile LGBTQ+ comprise about 5-7% of the overall youth population, they make up almost one-fourth of those in the foster care system”); Sarah Warbelow, *LGBT Youth Legal Landscape*, 23 TEMP. POL. & C.R. L. REV., 413, 427 (2014) (citation omitted); *see also* Bohm et. al, *supra* note 11, at 162 (2016) (“Familial rejection is cited as the primary cause of homelessness among LGBT youth.”).

personal security and reasonably safe living conditions, and the right to be free from physical and psychological harm. *Nicini v. Morra*, 212 F.3d 798, 808 (3d Cir. 2000) (en banc) (“[W]hen the state places a child in state-regulated foster care, the state has entered into a special relationship with that child which imposes upon it certain affirmative duties.”); *see also Lintz v. Skipski*, 25 F.3d 304, 305 (6th Cir. 1994) (“[D]ue process extends the right to be free from the infliction of unnecessary harm to children in state-regulated foster homes.”); *K.H. ex rel. Murphy v. Morgan*, 914 F.2d 846, 848–49 (7th Cir. 1990) (“The extension to the case in which the plaintiff’s mental health is seriously impaired by deliberate and unjustified state action is straightforward.”); *M.D. v. Abbott*, 152 F. Supp. 3d 684, 696 (S.D. Tex. 2015) (foster children have the right to “personal security and reasonably safe living conditions” and to protection from psychological abuse) (citation omitted); *Marisol A. ex rel. Forbes v. Giuliani*, 929 F. Supp. 662, 675 (S.D.N.Y. 1996) (children in foster care “have a substantive due process right to be free from unreasonable and unnecessary intrusions into

their emotional well-being”), *aff’d sub nom. Marisol A. v. Giuliani*, 126 F.3d 372 (2d Cir. 1997).¹³

Permitting contract agencies to use non-merit factors to exclude same-sex couples from the pool of prospective foster parents would violate the due process rights of children in foster care. Appellants’ discriminatory practices undermine the availability of suitable family-based settings for children in foster care, and put youth at risk of being placed in institutional settings. These settings not only are the least preferred under federal child welfare law, but also often are unable to meet children’s needs. By restricting available foster family homes, Appellants would impede children’s ability to access constitutionally adequate care.

¹³ See also *Doe ex rel. Magee v. Covington Cty. Sch. Dist. ex rel. Keys*, 675 F.3d 849, 859 (5th Cir. 2012); *Tamas v. Dep’t of Soc. & Health Servs.*, 630 F.3d 833, 846–47 (9th Cir. 2010); *Norfleet v. Ark. Dep’t of Human Servs.*, 989 F.2d 289, 293 (8th Cir. 1993); *Yvonne L. v. N.M. Dep’t of Human Servs.*, 959 F.2d 883, 891–93 (10th Cir. 1992); *Meador v. Cabinet for Human Res.*, 902 F.2d 474, 476 (6th Cir. 1990); *Taylor ex rel. Walker v. Ledbetter*, 818 F.2d 791, 797 (11th Cir. 1987); *Andrea L. ex rel. Judith B. v. Children & Youth Servs.*, 987 F. Supp. 418, 422 (W.D. Pa. 1997); *cf. R.G. v. Koller*, 415 F. Supp. 2d 1129, 1156 (D. Haw. 2006).

B. Appellants’ Discrimination Would Violate Foster Children’s Fourteenth Amendment Right to Equal Protection.

The Fourteenth Amendment also prohibits states from depriving any person of “the equal protection of the laws.” U.S. Const. amend. XIV, § 1. Appellants’ attempts to interfere with children’s right to a safe and loving family on the basis of sexual orientation would violate not only the rights of prospective parents, but also the constitutional right to equal protection for LGBTQ youths seeking placement.

The Supreme Court has invalidated laws that discriminate based on sexual orientation as a violation of the Equal Protection Clause. *Romer v. Evans*, 517 U.S. 620, 635–36 (1996).

All LGBTQ youth—particularly those in child welfare custody who face the heightened vulnerabilities described above—have the right to the same treatment under the law as their non-LGBTQ peers. *See Swidriski v. City of Houston*, 31 F. App’x 154, at *2 (5th Cir. 2001) (“Plaintiff alleges that it was the police department’s policy to afford less protection to a victim of domestic violence in a homosexual relationship; that animus was at least a motivating factor for the department’s disparate treatment; and that [the plaintiff] was injured

by this conduct. That is sufficient to state an equal protection claim.”); *Nabozny v. Polesny*, 92 F.3d 446, 457 (7th Cir. 1996) (evidence indicated that Nabozny was treated differently and that administrators’ statements regarding his sexual orientation (*i.e.*, that he should expect such harassment) were sufficient to allow a jury to find that “discriminatory treatment was motivated by the defendants’ disapproval of Nabozny’s sexual orientation”); *Flores v. Morgan Hill Unified Sch. Dist.*, 324 F.3d 1130, 1136 (9th Cir. 2003) (holding that plaintiffs had proffered sufficient evidence to show that “defendants failed to adequately train teachers, students and campus monitors about the District’s policies prohibiting harassment on the basis of sexual orientation,” that trainings that did occur did not focus on issues concerning sexual orientation, and that “discrimination the plaintiffs faced was a highly predictable consequence of the defendants not providing that training”); *Gill v. Devlin*, 867 F. Supp. 2d 849, 856 (N.D. Tex. 2012) (citing Supreme Court precedent in *Romer* and *Lawrence v. Texas*, 539 U.S. 558 (2003) for the proposition that “arbitrary discrimination on the basis of sexual orientation violates the Equal Protection Clause”).

Heightened scrutiny should apply to government classifications on the basis of sexual orientation in an equal protection analysis. *See Windsor v. United States*, 699 F.3d 169, 185 (2d Cir. 2012), *aff'd*, 570 U.S. 1066 (2013) (striking down a law that brings harm to children of same-sex couples); *see also Baskin v. Bogan*, 766 F.3d 648, 654 (7th Cir. 2014) (holding heightened scrutiny should apply to government classifications on the basis of sexual orientation); *SmithKline Beecham Corp. v. Abbott Labs.*, 740 F.3d 471, 481 (9th Cir. 2014) (holding that the Supreme Court's decision in *Windsor* "requires that heightened scrutiny be applied to equal protection claims involving sexual orientation").

A ruling prioritizing religious rights of government-funded providers over the equal protection of children would have serious implications for a local regulatory system designed to protect them.

CSS's treatment of same-sex parents harms LGBTQ youth in its care by sending a message that LGBTQ people are considered unsuitable to provide loving homes. The rejection LGBTQ prospective parents suffer when being turned away from foster care agencies trickles down to LGBTQ youth and perpetuates a cycle of stigmatic

harm. It sends the message that LGBTQ people are not valued, which can make LGBTQ youth fearful of coming out, of realizing their identity, and of being rejected by the very providers they depend on. This constitutes a violation of LGBTQ youth's right to equal treatment under the law as compared to their non-LGBTQ peers. As numerous courts, including the district court in the *Dumont* case, have recently recognized, stigmatic harm "constitutes an injury in fact." *Dumont v. Lyon*, No. 17-CV-13080, 2018 WL 4385667, at *6–7 (E.D. Mich. Sept. 14, 2018).

C. Permitting Appellants—Government Contractors Using Taxpayer Dollars—to Elevate Religious Viewpoint Over Children's Interests Would Violate the Establishment Clause.

The Establishment Clause forbids the government from delegating a government function to a religious organization and allowing that organization to perform the function pursuant to religious criteria. U.S. Const. amend. I. The district court concluded that Appellants "have an interest in avoiding likely . . . Establishment Clause claims that would result if it allowed its government contractors to avoid compliance with [the City's anti-discrimination regulations]." *Fulton*, 320 F. Supp. 3d. at 685 & n. 24. Appellants' intended practice

would privilege religion to the detriment of third parties—not only prospective families, but also the very children the foster care system was created to serve. *See Estate of Thornton v. Caldor, Inc.*, 472 U.S. 703 (1985). The district court properly concluded that granting Appellants the relief they seek would present a potential Establishment Clause violation.

Just as the government may not impose a religious test for its services, any organization contracting with the government may not do so either. *See, e.g., Larkin v. Grendel's Den*, 459 U.S. 116, 127 (1982) (holding that an ordinance permitting churches to veto applications for liquor licenses for any premises within 500 feet of a church violated “the core rationale underlying the Establishment Clause [of] preventing ‘a fusion of governmental and religious functions’”) (quoting *Sch. Dist. v. Schempp*, 374 U.S. 203, 222 (1963)).

In the *Teen Ranch* case, for example, the Sixth Circuit affirmed a district court finding that state placement of children in a residential facility that incorporated religious beliefs into its treatment program raised Establishment Clause concerns. *Teen Ranch, Inc. v. Udow*, 479 F.3d 403, 409–10 (6th Cir. 2006); *see also, e.g., Koller*, 415 F. Supp. 2d

at 1159 (noting that youth have the right to be free from state-imposed religion and recognizing “they are particularly susceptible to religious coercion”). Based on the studies described in the amicus brief submitted by Lambda legal et al., there is no question LGBTQ young are disproportionately represented in the foster system. Permitting Appellants to impose a state-funded religious viewpoint that does not accept same-sex couples as full members of that community—and in fact discriminates openly against them—is a plain First Amendment violation.

In short, CSS is demanding the right to use taxpayer funds to categorically exclude married same-sex couples and others from government-funded child welfare services based solely on religious criteria. Disbursement of public funds to organizations that use those funds in a non-secular manner is an Establishment Clause violation. If the City and DHS were to make such disbursement, that would violate the First Amendment.

D. Discrimination in the Public Foster Care System Could Violate Foster Children’s Freedom of Expression.

Allowing any provider to discriminate against same-sex prospective foster parents could create an environment in which LGBTQ youth fear reprisals or rejection from the very provider on which they depend for their care. To avoid that, they may feel pressured to hide who they are.

The right to express one’s identity is “speech” protected by the First Amendment. The Supreme Court has held, for example, that a group’s participation in a parade “to celebrate its members’ identity as openly gay, lesbian, and bisexual descendants of the Irish immigrants” was protected speech. *See Hurley v. Irish-American Gay, Lesbian & Bisexual Grp. of Boston*, 515 U.S. 557, 570 (1995); *see also McMillen v. Itawamba Cty. Sch. Dist.*, 702 F. Supp. 2d 699, 703 (N.D. Miss. 2010) (“[E]xpression of one’s identity and affiliation to unique social groups’ may constitute ‘speech’ as envisioned by the First Amendment.” (citation omitted)).

The Fifth Circuit Court of Appeals has also signaled that wearing clothing, even clothing not tied to a particular political message, may

constitute protected speech. *Canady v. Bossier Parish Sch. Bd.*, 240 F.3d 437, 441 (5th Cir. 2001) (“While the message students intend to communicate about their identity and interests may be of little value to some adults, it has a considerable effect, whether positive or negative, on a young person’s social development. . . . [W]e cannot declare that expression of one’s identity and affiliation to unique social groups through choice of clothing will never amount to protected speech.”). If providers are authorized by government to eliminate same-sex couples from consideration as foster parents, LGBTQ youth may reasonably conclude that expressing their own identity may be too costly. LGBTQ youth may avoid choosing clothing that corresponds with their gender identity or expression, building friendships with other LGBTQ individuals or groups, or pursuing gay or lesbian romantic connections. Thus, allowing discrimination of same-sex prospective foster parents could chill LGBTQ youths’ constitutionally protected freedom of expression.

III. APPELLANTS’ DISCRIMINATION VIOLATES FEDERAL CHILD WELFARE LAW.

Policies and actions that reduce the chances that youth will achieve permanency are inconsistent with obligations under federal law

to prioritize the best interests of children and provide permanency to youth in the child welfare system. By prioritizing discrimination, CSS upends these obligations.

A. Providers of foster care services are the gatekeepers for children to find loving families.

As a provider of foster care services, CSS is a gatekeeper in the child welfare system between at-risk children and safe, loving families. CSS recruits, screens, trains, and certifies prospective foster parents. When CSS performs its responsibilities to serve a religious objective rather than the best interests of children, it violates federal statutes. *See* 42 U.S.C. §§ 675(1)(B), (1)(F), (1)(G), (5)(A), (5)(C), (5)(E), (10)(A) (using the best interests of children as the guiding standard for the child welfare system); 42 USCA § 673b(i)(2) (prioritizing the best interests of children for adoptions out of the foster care system).

The goal of the child welfare system is to keep families together and help children find permanency when they cannot be reunified with their birth families. This core goal must be achieved while ensuring a child's safety and well-being. When provider agencies use non-objective criteria to discriminate against same-sex couples as foster parents, they are improperly minding the gate. By reducing the pool of individuals

who can provide permanency to all youth in foster care, Appellants put the safety and well-being of children at risk.

B. Appellants’ refusal to certify same-sex couples undermines the priorities set by federal child welfare law.

Federal law establishes specific priorities for child welfare systems to ensure they serve children’s best interests.

One priority is to increase the number of available foster and adoptive homes to reduce reliance on group care. Federal law requires the selection of the least restrictive, most family-like setting for a child. 42 U.S.C. § 675(5)(A). The Family First Prevention and Services Act limits federal funding for placements that are not in foster families,¹⁴ prioritizes foster families and family members over other settings,¹⁵ and requires states to develop plans to ensure that inappropriate diagnoses do not result in children’s being “placed in settings that are not foster family homes.”¹⁶ The Strengthening Families Act limits the capacity of

¹⁴ Family First Prevention Services Act, Pub. L. No. 115-123 § 50722, _ Stat. __, _ (2018); *id.* §§ 50731, 50741.

¹⁵ *Id.* § 50742.

¹⁶ *Id.* § 50743.

a child welfare agency to place youth in settings where they are not connected to family. 42 U.S.C. § 675a.

CSS's refusal to certify same-sex couples flouts this priority by reducing the number of available foster family homes. Given the acknowledged shortage of foster families, *see* Br. Appellants 19, this harms all foster children who so desperately need safe and loving families.

The other priorities established by federal law are permanency, health, safety, and placement with siblings. *See, e.g.*, 42 U.S.C. §§ 671(a)(15)(A) (demanding that “the child’s health and safety shall be the paramount concern”); 671(a)(15)(B–C) (reasonable efforts must be made to finalize the permanency plan until such time as the youth leaves the system); 671(a)(31) (emphasizing joint placement of siblings when not contrary to safety or well-being). CSS’s discrimination against same-sex couples does not further these priorities. For example, in restricting the number of potential foster families, CSS impedes youths’ progress towards finding permanent loving homes.

CSS's prioritization of discrimination in the interests of religious objection over the interest of achieving permanency, safety, and well-being for children violates federal law.

IV. APPELLANTS' DISCRIMINATION VIOLATES RULES AND REGULATIONS OF THE U.S. DEPARTMENT OF HEALTH AND HUMAN SERVICES.

The U.S. Department of Health and Human Services (HHS) sets forth explicit anti-discrimination provisions as a condition of receiving federal funding. CSS runs afoul of several of these provisions, and also creates a risk of harm to Philadelphia's children.

First, by denying publicly-funded services to married same-sex couples, CSS violates the HHS Grants Rule,¹⁷ which states:

It is a public policy requirement of HHS that no person otherwise eligible will be excluded from participation in, denied the benefits of, or subjected to discrimination in the administration of HHS programs and services based on non-merit factors such as age, disability, sex, race, color, national origin, religion, gender identity, or sexual orientation. **Recipients must comply with this public policy requirement in the administration of programs supported by HHS awards.**

¹⁷ 45 C.F.R. § 75.300 (2016). This rule, formally titled *Statutory and national policy requirements*, is commonly referred to as the "HHS Grants Rule."

Title 45 C.F.R. § 75.300(c) (emphasis added). This section of the Grants Rule is binding on state child welfare agencies and their agents because they receive federal funds through awards from the Administration for Children and Families, a division of HHS.

The Grants Rule continues: “In accordance with the Supreme Court decisions in *United States v. Windsor* and in *Obergefell v. Hodges*, all recipients must treat as valid the marriages of same-sex couples.” *Id.* at § 75.300(d). When the rule was proposed in July 2016, HHS noted that codifying the implementation of these decisions “ensures that same-sex spouses, marriages, and households are treated the same as opposite-sex spouses, marriages, and households in terms of determining beneficiary eligibility or participation in grant-related activities.” Health and Human Services Grants Regulation, 81 Fed. Reg. 45270 (proposed Jul. 13, 2016). CSS violates both the plain language and the intent of this section of the Grants Rule.

Second, violating the Grants Rule harms children in state custody who are beneficiaries of HHS programs. By using non-merit factors to turn away same-sex couples, CSS limits the pool of prospective foster and adoptive parents who can offer these children safe and loving

homes. CSS denies these children the full benefits of HHS programs and services.

Third, by imposing a religious litmus test on prospective foster and adoptive parents, CSS also violates the federal prohibition on the use of HHS funding to proselytize:

Organizations that apply for or receive direct financial assistance from an HHS awarding agency may not support or engage in any explicitly religious activities (including activities that involve overt religious content such as worship, religious instruction, or proselytization), as part of the programs or services funded with direct financial assistance from the HHS awarding agency, or in any other manner prohibited by law. . . . An organization that participates in any programs funded by financial assistance from an HHS awarding agency shall not, in providing services or in outreach activities related to such services, discriminate against a program beneficiary or prospective program beneficiary on the basis of religion, a religious belief, a refusal to hold a religious belief, or a refusal to attend or participate in a religious practice.

45 C.F.R. §§ 87.3(b), (d). CSS refuses to provide services to intended beneficiaries of HHS programs—potential foster and adoptive parents—if those parents do not share CSS’s particular religious objection regarding same-sex marriage.

CONCLUSION

For the foregoing reasons, *Amici Curiae* respectfully request the Court affirm the district court's decision.

Respectfully submitted this 4th day of October, 2018,

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CERTIFICATE OF COMPLIANCE

I certify this brief complies with the type-volume limitations set forth in Federal Rules Appellate Procedure 29(a)(4)(g) and 32(g)(1) because this brief contains 4,585 words, exclusive of the corporate disclosure statement table of contents, table of authorities, statement of interest, certificates of counsel, and other items exempted by Federal Rule of Appellate Procedure 32(f) and Third Circuit LAR 29.1(b).

This brief complies with the typeface requirements of Federal Rule of Appellate Procedure 32(a)(5) and the type style requirements of Federal Rule of Appellate Procedure 32(a)(6) because this brief has been prepared in Microsoft Word in a proportionally spaced typeface using a plain, roman-style, 14-point font.

October 4, 2018



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CERTIFICATE OF COMPLIANCE WITH E-BRIEF

I certify that the text of the electronic brief is identical to the text in the paper copies. I also certify that a virus check was performed by McAfee version 5.5.1.342, and that no virus was detected.

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CERTIFICATE OF BAR MEMBERSHIP

Pursuant to Third Circuit Local Appellate Rule 28.3(d), I certify that the undersigned counsel is a member of the Bar of the United States Court of Appeals for the Third Circuit.

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CERTIFICATE OF SERVICE

I hereby certify that on October 4, 2018, I caused the foregoing to be filed electronically with the Clerk of the Court for the United States Court of Appeals for the Third Circuit via the appellate CM/ECF system. I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

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