

No. 19-123

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

SHARONELL FULTON, ET AL.,
Petitioners,

v.

CITY OF PHILADELPHIA, ET AL.,
Respondents.

*On Writ of Certiorari to the
United States Court of Appeals for the Third Circuit*

**BRIEF OF AMICI CURIAE SCHOLARS WHO
STUDY THE LGB POPULATION IN SUPPORT
OF RESPONDENTS**

James E. Tysse
Counsel of Record
Pratik A. Shah
Margaret O. Rusconi*
AKIN GUMP STRAUSS
HAUER & FELD LLP
2001 K Street, NW
Washington, DC 20036
(202) 887-4000
jtysse@akingump.com

** Licensed to practice in Virginia only and under the direct supervision of a partner of Akin Gump Strauss Hauer & Feld who is an enrolled, active member of the D.C. Bar; application for admission to the D.C. Bar pending.*

Counsel for Amici Curiae

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INTEREST OF *AMICI CURIAE* ¹

Amici are scholars in law, public health, and social sciences. Many *amici* are affiliated with the Williams Institute, an academic research center at UCLA School of Law dedicated to the study of sexual orientation and gender identity law and public policy. *Amici* scholars have conducted extensive research and authored many studies about lesbians, gay men, and bisexuals (“LGB”), including the demographics and characteristics of LGB families as well as the effect of discrimination on LGB people.² The names of the *amici* scholars are identified in the list appended to this brief.

Amici and their colleagues from the Williams Institute have submitted many briefs to this Court and others, and this Court and others have relied on the research of many of the *amici*. *See, e.g., Obergefell*

¹ As required by Rule 37 of this Court, *amici curiae* obtained consent of counsel of record for all parties to file this brief. Respondents filed with the Court a letter providing blanket consent. Petitioners and Intervenors provided written consent. No counsel for any party authored this brief in whole or in part, and no person or entity other than *amici curiae*’s pro bono counsel made a monetary contribution intended to fund the brief’s preparation or submission.

² Transgender people suffer similar negative effects of discrimination. *See, e.g.,* Walter Bockting et al., *Adult Development and Quality of Life of Transgender and Gender Nonconformity People*, 23 CURRENT OP. ENDOCRINOLOGY, DIABETES & OBESITY 188 (Apr. 2016). But because this case concerns sexual orientation discrimination, *amici* do not address the transgender population. That said, if this Court rules that Philadelphia must permit its contractors to discriminate against LGB people, that ruling would likely lead to increased discrimination against transgender people as well.

v. Hodges, 576 U.S. 644, 667 (2015) (citing Brief for Gary J. Gates as *Amicus Curiae*); *Edmo v. Corizon, Inc.*, 935 F.3d 757, 768 (9th Cir. 2019); *Baskin v. Bogan*, 766 F.3d 648, 663, 668 (7th Cir. 2014); *Bostic v. Shaefer*, 760 F.3d 352, 382 (4th Cir. 2014).

Amici believe that their expertise and perspectives as academic scholars specializing in issues related to LGB people will help the Court better understand the population of foster parents and children protected by the City of Philadelphia's requirements, as well as appreciate the detrimental consequences of a ruling that would force states and localities to allow discrimination against same-sex individuals in government programs and beyond.

INTRODUCTION AND SUMMARY OF ARGUMENT

Amici agree with Respondents that *Employment Division v. Smith*, 494 U.S. 872 (1990), outlines the correct standard for the review of a First Amendment challenge to a neutral, generally applicable nondiscrimination requirement, and that the City of Philadelphia's requirement meets that standard. *Amici* submit this brief to explain that, regardless of the level of scrutiny used to evaluate Philadelphia's actions, the City's prohibition on sexual-orientation discrimination by the agencies with which it contracts to provide foster care services serves a compelling state interest.

I. Same-sex parents play an essential role in state and local foster care systems. Over one million Americans are in same-sex relationships, and those couples are raising hundreds of thousands of children—many of whom are adopted or in the foster

care system. In fact, same-sex couples raise adopted and foster children at a much greater rate than their different-sex counterparts. Same-sex couples raising children are seven times more likely to be raising adopted children or to be fostering children than their different-sex counterparts.

For hundreds of thousands of children in need, same-sex parents can offer a loving and welcoming home where children can grow and develop. The children raised by these parents have outcomes across a broad range of measures that are equivalent to those of children raised by different-sex parents. In homes led by same-sex parents, children report similar levels of self-esteem and overall psychological development as children of different-sex parents. Children of same-sex parents also perform similarly in school and show no impairments in social functioning. In the end, research shows that, in a variety of areas, children of same-sex parents achieve outcomes similar to those of children of different-sex parents.

II. By prohibiting the foster care agencies it contracts with from discriminating against same-sex parents, Philadelphia ensures that these loving and welcoming homes are available to children who need them. Forcing states and localities to allow—and in effect, to subsidize—agencies’ discrimination against same-sex parents will cause significant and long-lasting harms both to LGB people and children in foster care.

For one, it will likely reduce the number of homes available for children in need. Despite Petitioners’ and their *amici*’s arguments to the contrary, when a foster care agency discriminates against a same-sex couple, there is no guarantee that the couple can or

will be able to find another agency to work with. Some parents who are subject to discrimination by foster care agencies might simply choose to forgo fostering. Research shows that LGB people commonly constrain their behavior due to a fear of discrimination, especially if they have been subject to recent discrimination. Other same-sex parents might have no alternative agency to turn to. Although parents have a range of foster care agencies to work with in Philadelphia, that is not necessarily true throughout the country.

What is more, such a rule would stigmatize LGB people, which would in turn have serious ramifications for their health and well-being. Although everyone experiences their own general stressors throughout life, research shows that LGB people suffer additional, unique stressors related to anti-LGB stigma and prejudice. This excess stress is known as “minority stress,” and it causes significant and lasting damage to LGB people’s mental and physical health. Excluding same-sex couples alone from consideration for fostering is a unique stress-causing experience that, by definition, heterosexual couples would never face. And even if same-sex parents subjected to discrimination choose to foster again, they face additional burdens—such as an increased fear of rejection—stemming from the initial incident. For Philadelphia’s LGB residents, these burdens will exist only if the City is compelled to allow foster agencies to discriminate.

Even beyond the discrete acts of discrimination that would follow, forcing states and localities to allow the agencies they contract with to discriminate would effectively mean that those governments are

subsidizing discrimination with taxpayer dollars. This would send a message that the state or locality sanctions and approves of LGB discrimination, not only making LGB people feel less protected by their governments, but also potentially emboldening additional forms of discrimination against LGB people.

ARGUMENT

I. SAME-SEX COUPLES PLAY AN ESSENTIAL ROLE IN PUBLIC FOSTER CARE SYSTEMS AND FOR THE CHILDREN IN PUBLIC CARE

A. Same-Sex Couples Are Much More Likely To Foster And Adopt Than Their Heterosexual Counterparts.

1. *A sizeable proportion of same-sex couples are raising children under the age of 18.*

According to data from 2019, there are about 646,500 married and unmarried same-sex couples residing in the United States.³ Put differently, there are nearly 1.3 million Americans in a same-sex relationship. Between 2014 and 2016, 16.2 percent of all same-sex couples were raising children—8.1 percent of male same-sex couples were raising children, and more than 20 percent of female same-sex

³ LGBT Demographic Data Interactive, THE WILLIAMS INST. (last updated Jan. 2019), <https://williamsinstitute.law.ucla.edu/visualization/lgbt-stats/?topic=SS#about-the-data>.

couples.⁴ In 2016, that meant that about 114,000 same-sex couples were raising children—about 28,000 male same-sex couples and 86,000 female same-sex couples.⁵

Approximately half of all same-sex couples are married, and married same-sex couples are more likely than unmarried same-sex couples to raise children.⁶ The U.S. Census Bureau’s 2013 American Community Survey shows that 27 percent of married same-sex couples have children under the age of 18, compared to 15 percent of their unmarried counterparts.⁷ Of the children raised by same-sex couples, more than one-third had married parents.⁸ In states where same-sex couples could legally marry in 2013, that percentage jumped to over 50 percent.⁹

⁴ Shoshana K. Goldberg & Kerith J. Conron, *How Many Same-Sex Couples in the U.S. are Raising Children*, THE WILLIAMS INSTIT. 1 (July 2018), <https://williamsinstitute.law.ucla.edu/wp-content/uploads/Same-Sex-Parents-Jul-2018.pdf>. This number includes biological children, adopted children, and foster children. *Id.*

⁵ *Id.*

⁶ *Id.*

⁷ Gary J. Gates, *Demographics of Married and Unmarried Same-sex Couples: Analyses of the 2013 American Community Survey*, THE WILLIAMS INST. 2 (Mar. 2015), <https://williamsinstitute.law.ucla.edu/wp-content/uploads/Demo-SS-Couples-US-Mar-2015.pdf>.

⁸ *Id.*

⁹ *Id.* In 2013—*i.e.*, two years before this Court’s decision establishing the constitutional right to marry in *Obergefell v. Hodges*, 576 U.S. 644 (2015)—same-sex couples could legally marry only in Connecticut, Delaware, Iowa, Maine, Maryland,

In addition, it is more common for parents in same-sex relationships to be racial and ethnic minorities than parents in different-sex relationships.¹⁰ Same-sex couples also raise a higher percentage of non-White children—50 percent of children living with same-sex couples are non-White compared to 41 percent of children living in different-sex partner households.¹¹

All in all, as of 2013, “[a]mong same-sex couples with children, there was an average of 1.5 children in the home, suggesting that nearly 200,000 children under the age of 18 are being raised by same-sex couples.”¹²

2. Same-sex couples are raising an outsized share of foster and adopted children.

Like their different-sex counterparts, most same-sex couples with children are raising their biological

Massachusetts, Minnesota, New Hampshire, New Jersey, New York, Rhode Island, Vermont, and Washington. Hawaii is not included because same-sex marriage was only available starting in December of that year.

¹⁰ Gary J. Gates, *LGBT Parenting in the United States*, THE WILLIAMS INST. 4 (Feb. 2013), <https://williamsinstitute.law.ucla.edu/wp-content/uploads/LGBT-Parenting-US-Feb-2013.pdf>.

¹¹ *Id.*

¹² Gary J. Gates, *LGB Families and Relationships: Analyses of the 2013 National Health Interview Survey*, THE WILLIAMS INST. 5 (Oct. 2014), <https://williamsinstitute.law.ucla.edu/wp-content/uploads/LGB-Families-Relationships-Oct-2014.pdf>.

children.¹³ But compared to different-sex couples with children, same-sex couples with children are much more likely to be raising an adopted or foster child. In fact, from 2014 to 2016, same-sex couples raising children were approximately seven times more likely than different-sex couples raising children to have an adopted child (21.4 percent versus 3 percent).¹⁴ Same-sex couples with children were also approximately seven times more likely than different-sex couples with children to be raising a foster child (2.9 percent versus 0.4 percent).¹⁵ The following chart demonstrates these stark differences:¹⁶

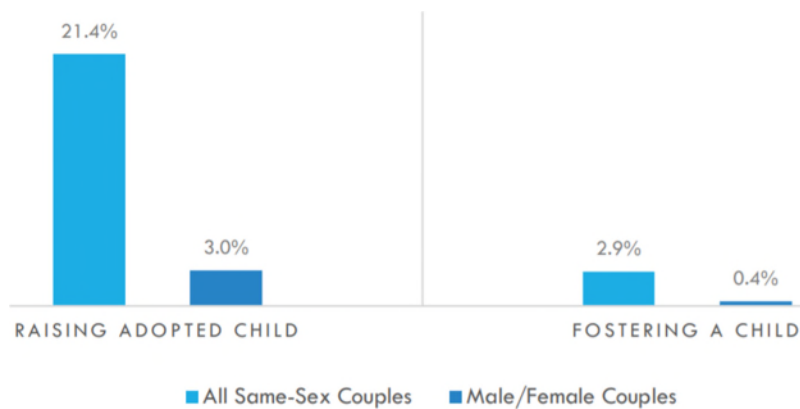
¹³ Goldberg & Conron, *supra* note 4, at 1.

¹⁴ *Id.*

¹⁵ *Id.*

¹⁶ *Id.* at 2.

Fig. 1. Percentage of Coupled Households Raising an Adopted or Foster Child Among Couples Raising Children, By Couple Type, American Community Survey (2014-2016)



Altogether, as of 2013, almost 27,000 same-sex couples were raising around 58,000 adopted and foster children.¹⁷ It is possible that those numbers would be higher if states and localities throughout the country imposed anti-discrimination requirements like Philadelphia's.

In addition, although the data do not indicate precisely how many same-sex parents are raising lesbian, gay, bisexual, transgender, or queer ("LGBTQ") foster children, research shows that those children make up an outsized share of the foster care

¹⁷ Gates, *Demographics of Married and Unmarried Same-sex Couples*, *supra* note 7, at 1.

system.¹⁸ Based on a recent study, “the proportion of LGBTQ youth in foster care and unstable housing is 2.3 to 2.7 times larger than would be expected from estimates of LGBTQ youth in nationally representative adolescent samples.”¹⁹ As of 2014 in Los Angeles, about one in five (19.1 percent) foster children ages 12-21 identified as LGBTQ.²⁰ Because of the frequent abuse and discrimination these youth face, as well as the difficulty agencies have in placing them long term, scholars have observed that LGB “foster parents might constitute an important pool of parents for these children, in particular.”²¹

¹⁸ Bianca D.M. Wilson, et al., *Sexual and Gender Minority Youth in Foster Care: Assessing Disproportionality and Disparities in Los Angeles*, THE WILLIAMS INSTIT. 6 (Aug. 2014), <https://williamsinstitute.law.ucla.edu/wp-content/uploads/SGM-Youth-in-Foster-Care-Aug-2014.pdf>.

¹⁹ Laura Baams, et al., *LGBTQ Youth in Unstable Housing and Foster Care* 4, PEDIATRICS (Mar. 2019), <https://pediatrics.aappublications.org/content/143/3/e20174211>.

²⁰ Wilson, *supra* note 18, at 6.

²¹ Gary J. Gates, et al., *Adoption and Foster Care by Gay and Lesbian Parents in the United States*, URBAN INSTITUTE 17 (Mar. 2007), <https://www.urban.org/sites/default/files/publication/46401/411437-Adoption-and-Foster-Care-by-Lesbian-and-Gay-Parents-in-the-United-States.PDF>; *see also Working With Lesbian, Gay, Bisexual, Transgender, and Questioning (LGBTQ) Families in Foster Care and Adoption*, CHILDREN’S BUREAU 4 (Sept. 2016), https://www.childwelfare.gov/pubPDFs/f_profbulletin.pdf (“LGBTQ parents may be considered for LGBTQ youth, who are often overrepresented in the foster care population compared to their peers in the general population.”); *LGBTQ Youth in the Foster Care System*, HUMAN RIGHTS CAMPAIGN 4, <https://assets2.hrc.org/files/assets/resources/HRC-YouthFosterCare-IssueBrief-FINAL.pdf> (last

B. Children Raised By Same-Sex Parents Enjoy Outcomes Similar To Those Of Children Raised By Different-Sex Parents.

Over the years, some—including one of Petitioners’ *amici* here, Amicus Br. of Concerned Women for America, et al. 18-19 n.46—have raised “concerns that the sexual orientation of LGB parents will negatively affect children in both indirect and direct ways.”²² But decades of research have shown that these concerns are wholly unwarranted.²³

accessed July 30, 2020) (“LGBTQ adults are one potential group that could provide affirming foster homes for LGBTQ youth.”); Katherine Kovalanka, *The “Second Generation”: LGBTQ Youth with LGBTQ Parents*, in *LGBT-PARENT FAMILIES: INNOVATIONS IN RESEARCH AND IMPLICATIONS FOR PRACTICE* 163, 168 (Abbie E. Goldberg & Katherine R. Allen, eds. 2013) (noting studies finding “that having nonheterosexual parents when one identifies as LGBTQ may be potentially beneficial”).

²² Abbie E. Goldberg & Nanette K. Gartrell, *LGB-Parent Families: The Current State of Research and Directions for the Future*, 46 *ADVANCES CHILD DEV. BEHAV.* 57, 69 (2014), <https://wordpress.clarku.edu/agoldberg/files/2012/03/Goldberg-Gartrell-2014.pdf> (noting that such concerns have been raised in child custody cases); see, e.g., Rachel H. Farr, *Does Parental Sexual Orientation Matter? A Longitudinal Follow-Up of Adoptive Families With School-Age Children*, 53 *DEVELOPMENTAL PSYCH.* 252, 252 (Feb. 2017) (“Outcomes for children with [lesbian and gay] parents have been featured in legal and policy debates about same-sex marriage and the adoption of children.”).

²³ For example, Cornell University’s “What We Know” Project identified 79 studies that addressed “the well-being of children with gay or lesbian parents,” and 75 of those studies “concluded that children of gay or lesbian parents fare no worse

Studies that have compared the children of same-sex and different-sex parents show few differences when it comes to the children's well-being.²⁴ Whether considering "self-esteem, quality of

than other children." What We Know, *What Does the Scholarly Research Say About the Well-being of Children With Gay or Lesbian Parents?* CORNELL U. (June 2016), <https://whatwewknow.inequality.cornell.edu/topics/lgbt-equality/what-does-the-scholarly-research-say-about-the-wellbeing-of-children-with-gay-or-lesbian-parents/>. In the four "outlier" studies, most of the children studied "came from families in which opposite-sex parents raised the[] children for a period of time, but in which, often, one or more parent(s) subsequently came out as gay or lesbian and left the family or had a same-sex relationship." *Id.* Because those families "endured added stress and often disruption or family breakup," "[i]ncluding such children among those labeled as having been 'raised by same-sex parents' is so misleading as to be inaccurate[.]" *Id.*

²⁴ See, e.g., Gary J. Gates & Adam P. Romero, *Parenting Gay Men and Lesbians: Beyond the Current Research*, in MARRIAGE AND FAMILY: PERSPECTIVES AND COMPLEXITIES 227 (H. Elizabeth Peters & Claire M. Kamp Dush, eds. 2009); Rachel H. Farr, et al., *Parenting and Child Development in Adoptive Families: Does Parental Sexual Orientation Matter?*, 14 APPLIED DEV. SCI. 164, 165 (July 2010) ("The healthy development of children born to lesbian and gay parents has been documented by numerous studies, demonstrating that children of lesbian and gay parents have scored similarly to children born to heterosexual parents on a variety of psychological measures."); Fiona Tasker, *Developmental Outcomes for Children Raised by Lesbian and Gay Parents*, in WHAT IS PARENTHOOD?: CONTEMPORARY DEBATES ABOUT THE FAMILY 171, 178 (Linda C. McClain & Daniel Cere, eds. 2013) ("[F]amily type did not seem to be associated with developmental outcomes, but the quality of parenting did."); cf. Jerel P. Calzo, et al., *Parental Orientation and Children's Psychological Well-being: 2013-2015 National Health Interview Survey*, 90 CHILD DEV. 1097, 1103-1104 (2019) (noting that "[b]isexual parents were more likely than

life, internalizing problems (e.g., depression), externalizing problems (e.g., aggression, behavioral problems), or social functioning,” children raised by same-sex parents and children raised by different-sex parents turn out largely the same.²⁵ In fact, some studies show “potential strengths associated with growing up” with LGB parents from birth.²⁶ For example, some research shows that young adults and adults raised by same-sex parents experience psychological strengths due to their upbringing, such as “resilience and empathy toward diverse and marginalized groups.”²⁷

Research similarly shows “no evidence that children with same-sex parents demonstrate problems with respect to their academic progress.”²⁸ Studies

heterosexual parents to report that their children had emotional and mental health difficulties,” but explaining that the survey “provides insufficient data to contextualize this finding” and that the survey’s “results provide further reassurance that *** concerns about children raised in same-gender partnered households appear unwarranted”).

²⁵ Goldberg & Gartrell, *supra* note 22, at 70. This study, like most research in this area, focused on the development of children raised by lesbian mothers. See, e.g., Farr, *Parenting and Child Development in Adoptive Families*, *supra* note 24, at 165-166.

²⁶ Goldberg & Gartrell, *supra* note 22, at 70.

²⁷ *Id.* (citing Abbie E. Goldberg, *(How) Does It Make a Difference? Perspectives of Adults With Lesbian, Gay, and Bisexual Parents*, 77 AM. J. ORTHOPSYCHIATRY 550 (Oct. 2007) and Lisa Saffron, *Raising Children in an Age of Diversity-Advantages of Having a Lesbian Mother*, 2 J. LESBIAN STUDIES 35 (Oct. 2008)).

²⁸ Goldberg & Gartrell, *supra* note 22, at 71.

have found no connection between growing up with same-sex parents and “disrupted or delayed progression through elementary school,” or issues associated “with children’s academic achievement (i.e., grades).”²⁹ Indeed, studies “provide no evidence that children with same-sex parents demonstrate problems with respect to their academic and educational outcomes.”³⁰ On the contrary, some data show higher than average grade point averages and high educational aspirations for children of same-sex parents.³¹

Studies of children’s social competence tell the same story: There is little to no difference between children with same-sex parents and those with different-sex parents.³² Rather than turning on the

²⁹ *Id.* (citing Michael J. Rosenfeld, *Nontraditional Families and Childhood Progress Through School*, 47 *DEMOGRAPHY* 755 (Aug. 2010); Nanette Gartrell & Henny Bos, *US National Longitudinal Lesbian Family Study: Psychological Adjustment of 17-year-old Adolescents*, 126 *PEDIATRICS* 28 (2010); Jennifer L. Wainright, et al., *Psychosocial Adjustment, School Outcomes, and Romantic Relationships of Adolescents With Same-Sex Parents*, 75 *CHILD DEV.* 1886 (Dec. 2004)).

³⁰ Goldberg & Gartrell, *supra* note 22, at 71.

³¹ *Id.*; see also Nanette Gartrell, et al., *Adolescents with Lesbian Mothers Describe Their Own Lives*, 59 *J. HOMOSEXUALITY* 1211 (Oct. 2012), <https://www.nllfs.org/images/uploads/pdf/nllfs-adolescents-with-lesbian-mothers-2012.pdf>.

³² Goldberg & Gartrell, *supra* note 22, at 71 (“That is, according to self-, peer-, and parent-report, [children with same-sex parents and children with different-sex parents] *** do not appear to differ in their social competence or relationships with peers.”) (citing Nanette Gartrell, et al., *The National Lesbian Family Study: 4. Interviews With the 10-Year-Old Children*, 75

parents' sexual orientation, research shows that social competence is tied to the relationship between parents and children.³³ The closer children are with their parents, the better their social functioning, with "more friends and higher quality relationships with their peers."³⁴ This holds true regardless of whether the parents are two men, two women, or one of each.³⁵

At the end of the day, "on nearly all of a large array of variables related to *** personal adjustment, adolescents with same-sex parents did not differ significantly from" children with different-sex parents.³⁶

II. PHILADELPHIA HAS A COMPELLING INTEREST IN PREVENTING HARM TO CHILDREN IN THE FOSTER CARE SYSTEM AND TO LGB PEOPLE

Philadelphia prohibits the foster care agencies with which it contracts from discriminating against prospective foster parents on the basis of those parents' sexual orientation. The research supports at least two compelling interests in such a prohibition. First, the prohibition ensures that LGB-parent households are available for the children who need them. Second, it prevents LGB adults and children

Am. J. Orthopsychiatry 518 (Oct. 2005)).

³³ *Id.* (citing Abbie E. Goldberg, *Lesbian and Gay Parents and Their Children: Research on the Family Life Cycle*, AM. PSYCH. ASSOC. (2010)).

³⁴ *Id.* at 72 (citing Wainright, *supra* note 29).

³⁵ Wainright, *supra* note 29, at 1893-1895.

³⁶ *Id.* at 1895.

from experiencing state-subsidized stigma and discrimination and its consequent harms.

A. Discriminating Against Same-Sex Parents Could Reduce The Number Of Loving And Welcoming Homes Available For Children In Need.

The United States faces a foster care crisis.³⁷ More than 400,000 American children are living in foster care.³⁸ Of those children, over 47,000 are in a group home or institution.³⁹ By prohibiting its foster care agencies from discriminating against same-sex parents, the City of Philadelphia serves a compelling interest in ensuring that the thousands of LGB-parent homes described above are an option for those children. Forcing Philadelphia—and potentially other states and localities—to permit discrimination against same-sex parents risks taking those homes out of the equation. When foster care agencies discriminate against same-sex parents, that reduces the pool of eligible parents—which means fewer available homes for placement and more children stuck in group care

³⁷ John Kelly, et al., *The Foster Care Housing Crisis*, 1 THE CHRON. OF SOC. CHANGE (2017), <https://chronicleofsocialchange.org/wp-content/uploads/2017/10/The-Foster-Care-Housing-Crisis-10-31.pdf> (detailing a “continued increase in the number of children in foster care, as well as a concurrent shortfall in the number of foster homes to accommodate them”).

³⁸ U.S. DEPT OF HEALTH AND HUMAN SERVICES, ADMINISTRATION FOR CHILDREN AND FAMILIES, THE AFCARS REPORT 1 (Aug. 2019), <https://www.acf.hhs.gov/sites/default/files/cb/afcarsreport26.pdf>.

³⁹ *Id.* at 1.

settings.

Contrary to the claims of Petitioners and their *amici*, it is not a solution to say that same-sex parents can just go to another agency. See Pet’rs Br. 36; Amicus Br. of Generation Justice Amicus 9; Amicus Br. of 76 U.S. Senators & Members of the House of Representatives 17-18. For one, if same-sex parents are turned away from an agency, they may decide not to continue their efforts to serve as foster parents, even if other agencies exist that *would* serve them. Stigmatized groups like LGB people already constantly fear the possibility of discrimination.⁴⁰ For reasons laid out more fully below, to cope, members of those groups will often take steps to “avoid[] negative consequences of stigma.”⁴¹ One way to cope is to avoid potentially discriminatory encounters.⁴² Indeed, one study shows that many LGB people “chang[e] their lives in a variety of ways in order to avoid discrimination.”⁴³ The likelihood of avoiding certain

⁴⁰ Ilan H. Meyer, *Prejudice, Social Stress, and Mental Health in Lesbian, Gay, and Bisexual Populations: Conceptual Issues and Research Evidence*, 129 PSYCH. BULL. 674, 680 (Sept. 2003); see also Sejal Singh & Laura E. Durso, *Widespread Discrimination Continues to Shape LGBT People’s Lives in Both Subtle and Significant Ways*, CTR. FOR AM. PROGRESS (May 2017), <https://www.americanprogress.org/issues/lgbtq-rights/news/2017/05/02/429529/widespread-discrimination-continues-shape-lgbt-peoples-lives-subtle-significant-ways/>.

⁴¹ Meyer, *Prejudice, Social Stress, and Mental Health*, *supra* note 40, at 681.

⁴² Singh & Durso, *supra* note 40; see also, *infra* Part II.B (discussing effects of discrimination and stigmatization on LGB people).

⁴³ Singh & Durso, *supra* note 40. Transgender people alter

activities, moreover, increases “significantly” for those who have experienced discrimination in the past year.⁴⁴ Thus, a same-sex couple denied the opportunity to foster based on their sexual orientation might decide to avoid fostering altogether rather than face the risk of experiencing discrimination again.

In addition, some same-sex parents may be dissuaded from applying in the first place. Studies show that even LGB people who have not experienced recent discrimination avoid certain activities and change their behavior to avoid the possibility of being subject to discrimination.⁴⁵ If states and localities are told that they must permit the foster care agencies with which they contract to discriminate against the LGB community, it stands to reason that some portion of that community will decide to avoid the system entirely.

Even beyond those harms, it is possible that, in some areas of the country, even motivated same-sex parents might not have a foster care agency to turn to. Unlike Philadelphia, which has 29 other foster care agencies besides Catholic Social Services,⁴⁶ other areas have far fewer. The entire state of Kansas, for example, has only four.⁴⁷ It is thus easy to imagine a scenario in which, if this Court were to conclude that

their behavior as well.

⁴⁴ *Id.*

⁴⁵ *Id.*

⁴⁶ J.A. 291.

⁴⁷ Foster Care Providers, Kansas Dep’t for Children & Families, <http://www.dcf.ks.gov/services/Pages/MapFosterCare.aspx> (last visited Aug. 19, 2020).

states and localities cannot mandate that contractors work with same-sex parents, some of those parents will be excluded from eligibility.

The upshot is that, regardless whether same-sex parents are deterred from fostering or simply have nowhere else to go, a rule compelling states and localities like Philadelphia to allow contracting agencies to discriminate on the basis of sexual orientation risks lowering the number of loving homes available to the thousands of children across the country who need them.

B. Forcing States And Localities To Allow Their Foster Care Agencies To Discriminate Against Same-Sex Parents Would Stigmatize And Harm LGB People.

Requiring states and localities to allow discrimination against same-sex parents, particularly in a government program, would exacerbate the stigma and corresponding stress LGB people have long suffered and continue to suffer.

1. “Our society has come to the recognition that gay persons and gay couples cannot be treated as social outcasts or as inferior in dignity and worth.” *Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Comm’n*, 138 S. Ct. 1719, 1727 (2018). But that was not always the case; nor is that a universal view even today.⁴⁸ “For decades, homosexuality has been

⁴⁸ LGBT people still face discrimination in states across the country. See, e.g., Christy Mallory, et al., *The Impact of Stigma and Discrimination Against LGBT People in Virginia*, THE

portrayed, wrongly and stereotypically, as degenerate, criminal, and a mental and physical illness.”⁴⁹ As this Court detailed in *Obergefell*, LGB people have been “prohibited from most government employment, barred from military services, excluded under immigration laws, targeted by police, and burdened in their rights to associate.” 576 U.S. at 661.

A “central aspect” of this long history of LGB stigma “concerns family relations and intimacy. Lesbians and gay men have long been portrayed as incapable of—and even uninterested in—sustained intimate relationships.”⁵⁰

WILLIAMS INST. (Jan. 2020), <https://williamsinstitute.law.ucla.edu/wp-content/uploads/Impact-LGBT-Discrimination-VA-Jan-2020.pdf>; Christy Mallory, et al., *The Impact of Stigma and Discrimination Against LGBT People in Ohio*, THE WILLIAMS INST. (Oct. 2019), <https://williamsinstitute.law.ucla.edu/wp-content/uploads/Impact-LGBT-Discrimination-OH-Nov-2019.pdf>; Christy Mallory, et al., *The Impact of Stigma and Discrimination Against LGBT People in Michigan*, THE WILLIAMS INST. (Apr. 2019), <https://williamsinstitute.law.ucla.edu/wp-content/uploads/Impact-LGBT-Discrimination-MI-Apr-2019.pdf>; Christy Mallory, et al., *The Impact of Stigma and Discrimination Against LGBT People in Texas*, THE WILLIAMS INST. (Apr. 2017), <https://williamsinstitute.law.ucla.edu/wp-content/uploads/Impact-LGBT-Discrimination-TX-Apr-2017.pdf>.

⁴⁹ Decl. of Ilan H. Meyer ¶26, *De Leon v. Perry*, 975 F. Supp. 2d 632 (W.D. Tex. 2013) (No. 5:13-cv-982-OLG), ECF No. 25-28.

⁵⁰ Decl. Ilan H. Meyer ¶27, *supra* note 49 (citing Ilan H. Meyer & Laura Dean, *Internalized homophobia, intimacy, and sexual behavior among gay and bisexual men*, in *STIGMA AND SEXUAL ORIENTATION: UNDERSTANDING PREJUDICE AGAINST LESBIANS, GAY MEN, AND BISEXUALS*, VOL. 4 *PSYCH. PERSPECTIVES ON LESBIAN AND GAY ISSUES*, SERIES (G.M. Herek

2. As a result of their enduring stigmatization, LGB people experience “minority stress,” *i.e.*, “excess stress to which individuals from stigmatized social [groups] are exposed as a result of their social, often a minority, position.”⁵¹

Generally, stress is thought of as a “condition having the potential to arouse” one’s “adaptive machinery,”⁵²—*i.e.*, “physical, mental, or emotional pressure, strain or tension.”⁵³ One way to think of it is as a load relative to a supportive surface.⁵⁴ Like a bridge that one day collapses when the weight becomes too much, our bodies can break down due to stress.⁵⁵ Indeed, data from over four decades of

ed. 1998)).

⁵¹ Mark L. Hatzenbuehler & John E. Pachankis, *Stigma and Mental Stress as Social Determinants of Health Among Lesbian, Gay, Bisexual, and Transgender Youth*, 63 PEDIATRIC CLINICS N. AM. 985, 986 (Dec. 2016) (quoting Meyer, *Prejudice, Social Stress, and Mental Health*, *supra* note 40); *see also* David M. Frost, et al., *Minority Stress and Physical Health Among Sexual Minority Individuals*, 39 J. BEHAV. MED. 1, 1 (2013) (“Minority stress theory suggests that sexual minority individuals (*i.e.*, lesbian, gay, and bisexual men and women, or LGBs) are at greater risk for health problems than heterosexuals, because LGBs face greater exposure to social stress related to prejudice and stigma.”).

⁵² Meyer, *Prejudice, Social Stress, and Mental Health*, *supra* note 40, at 675.

⁵³ *Id.*

⁵⁴ Blair Wheaton & Shirin Montazer, *Stressors, Stress, and Distress*, in A HANDBOOK FOR THE STUDY OF MENTAL HEALTH: SOCIAL CONTEXTS, THEORIES, AND SYSTEMS 176-178 (Teresa Scheid & Tony N. Brown, eds. 1999).

⁵⁵ *Id.* at 176.

research prove it: stress damages mental and physical health.⁵⁶

Certain stressors are equally likely to affect anyone, such as the loss of a loved one, being fired, or getting stuck in traffic.⁵⁷ Others are not. Minority stress is additional “stress related to a variety of stigma-related experiences that stem from” minority status, ranging from “prejudice-related stressful life events such as being attacked or fired” to “expectations of rejection regardless of actual discriminatory circumstances[.]”⁵⁸ By definition, such stress is unique to minorities. And research shows that it creates a heightened risk for diseases caused by stress.⁵⁹

3. When LGB people face discrimination solely due to their sexual orientation—such as when a foster

⁵⁶ Peggy A. Thoits, *Stress and Health: Major Findings and Policy Implications*, 51 J. HEALTH & SOC. BEHAV. 541, 549 (Oct. 2010).

⁵⁷ Meyer, *Prejudice, Social Stress, and Mental Health*, *supra* note 40, at 675.

⁵⁸ Frost, *supra* note 51, at 1; *see also* Kimberly F. Balsam & Dawn M. Szymanski, *Relationship Quality and Domestic Violence in Women’s Same-Sex Relationships: The Role of Minority Stress*, 29 PSYCH. OF WOMEN Q. 258, 259 (Sept. 2005) (describing minority stress as “psychosocial stress derived from being a member of a minority group that is stigmatized and marginalized”).

⁵⁹ Meyer, *Prejudice, Social Stress, and Mental Health*, *supra* note 40, at 676; *see also* Pamela J. Sawyer, et al., *Discrimination and the Stress Response: Psychological and Physiological Consequences of Anticipating Prejudice in Interethnic Interactions*, 102 AM. J. PUBLIC HEALTH 1020, 1020 (May 2012), <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC3483920/pdf/AJPH.2011.300620.pdf>

care agency refuses to work with them on that basis alone—they experience an increase in stress.

Irrespective of Petitioners' motivation, refusing to consider a same-sex couple for eligibility as prospective foster parents based solely on the fact that they are a same-sex couple is discrimination. *Cf. Bostock v. Clayton Cnty., Georgia*, 140 S. Ct. 1731, 1745 (2020) (“An employer that announces it will not employ anyone who is homosexual, for example, intends to penalize male employees for being attracted to men and female employees for being attracted to women.”). It is a type of minority stressor, and it will have real and lasting effects on the couple. Practically speaking, the couple will face a choice: continue trying to work with other foster care agencies (without knowing whether they will face discrimination again) or stop trying and give up on their plan to become foster parents. This decision alone proves the basic idea that minority stress is *excess* stress, as a same-sex couple faces a burden that a different-sex couple would never encounter.

But the stress of that event will not stop with that discrete incident. Discriminatory events “have a powerful impact more because of the deep cultural meaning they activate than because of the ramifications of the events themselves.”⁶⁰ That is why even “[a] seemingly minor event *** may evoke deep feelings of rejection *** disproportionate to the event

⁶⁰ Ilan H. Meyer, *Minority Stress and Mental Health in Gay Men*, 36 J. HEALTH & SOC. BEHAV. 38, 41-42 (Mar. 1995).

that precipitated them.”⁶¹ It is also why research shows that individuals who have been subject to discrimination tend to alter how they interact with society, increase their vigilance to avoid future discrimination, and face an increased level of stress.⁶²

4. Hopeful foster parents, and the children who might have been fostered by them, are not the only people who will be harmed if Petitioners prevail. A ruling that would require states and localities to allow the agencies they contract with to discriminate against LGB people if they have a religious basis for such treatment will, in effect, force the government to subsidize discrimination. Using taxpayer dollars to support an entity that discriminates and having that discrimination occur in the context of a government program sends the message to LGB people (and indeed, all people) that the state or locality approves of and supports the stigmatization of same-sex parents. Studies show that message is not just symbolic, but will carry real-life mental-health consequences.

For example, research shows that the effect of passing constitutional amendments banning gay marriage during 2004 to 2005 led to increased mental health issues among LGB people.⁶³ The marriage

⁶¹ *Id.* at 42.

⁶² Meyer, *Prejudice, Social Stress, and Mental Health*, *supra* note 40, at 680-681. As noted *supra*, p. 18, even individuals who have not experienced recent discrimination alter their behavior “to avoid discrimination.” Singh & Durso, *supra* note 40.

⁶³ Mark L. Hatzenbuehler, et al., *The Impact of Institutional Discrimination on Psychiatric Disorders in Lesbian,*

bans established an anti-LGB stigma “as the law of the land, giving the state’s approval and support to the stigmatization of lesbians and gay men.”⁶⁴ A study on the psychological effect demonstrated a “significant increase in generalized anxiety disorder” for LGB people. And the data showed “consistent increases in rates of psychiatric disorders and comorbidity *** among LGB individuals living in states with amendments.”⁶⁵ That message of state-sanctioned stigmatization—whether made to a prospective LGB parent, a member of the LGB community, or even an LGB foster child—increases mental health issues among LGB people.⁶⁶

The appearance of state-sanctioned discrimination could also invite other serious acts of discrimination against LGB people. A 2019 study compared employment discrimination charges filed in states with anti-discrimination clauses expressly protecting LGB people to those that lacked such

Gay, and Bisexual Populations: A Prospective Summary, 100 AM. J. PUBLIC HEALTH 452, 455-456 (Mar. 2010), <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC2820062/pdf/452.pdf>.

⁶⁴ Decl. Ilan H. Meyer ¶54, *supra* note 49.

⁶⁵ Hatzenbuehler, et al., *The Impact of Institutional Discrimination*, *supra* note 63, at 454-456.

⁶⁶ Decl. Ilan H. Meyer ¶33, *supra* note 49 (explaining how the marriage ban in question affected more people than just those people seeking marriage because the ban “sends the message that lesbians and gay men and their present and future intimate relationships are of lower status and less legitimate than intimate relationships of heterosexuals”).

protections.⁶⁷ The data showed that LGB people face significantly more severe discrimination absent legal protection.⁶⁸ In states without antidiscrimination laws, there were more charges involving harassment, discharge, and retaliation.⁶⁹ These results support the notion that “social stigma is reflected and reinforced through heterosexism in institutions and ideological preferences, including the law.”⁷⁰ And they demonstrate the enhanced risks LGB people face if the state or locality does not prohibit—much less is forced to subsidize—discrimination.

⁶⁷ See Amanda K. Baumle et al., *New Research on Sexual Orientation and Gender Identity Discrimination: Effect of State Policy on Charges Filed at the EEOC*, 67 J. HOMOSEXUALITY 1135 (Apr. 2019).

⁶⁸ *Id.* at 1142.

⁶⁹ *Id.* at 1141.

⁷⁰ *Id.* at 1142.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

James E. Tysse
Counsel of Record
Pratik A. Shah
Margaret O. Rusconi*
AKIN GUMP STRAUSS
HAUER & FELD LLP

**Licensed to practice in Virginia only and under the direct supervision of a partner of Akin Gump Strauss Hauer & Feld who is an enrolled, active member of the D.C. Bar; application for admission to the D.C. Bar pending.*

August 20, 2020

APPENDIX: *AMICI CURIAE* SCHOLARS

Institutions for identification purposes only.

Susan Frelich Appleton, J.D.

Phoebe Couzins and Lemma Barkeloo Professor of
Law
Washington University

Sean Arayasirikul, Ph.D.

Assistant Professor
University of California, San Francisco

George Ayala, Psy.D.

Executive Director
MPact Global Action for Gay Men's Health and
Rights

M.V. Lee Badgett, Ph.D.

Professor of Economics and Co-Director of the Center
for Employment Equity
University of Massachusetts Amherst

Angela Irvine-Baker, Ph.D.

Founder and Principal Consultant
Ceres Policy Research

Juan Battle, Ph.D.

Presidential Professor of Sociology, Urban Education,
Public Health, & Social Welfare
The Graduate Center of the City University of New
York (CUNY)

2a

John R. Blosnich, Ph.D.

Assistant Professor
Suzanne Dworak-Peck School of Social Work
University of Southern California

Michael Boucai, J.D., M.Phil.

Associate Professor
University at Buffalo School of Law

Courtney Megan Cahill, J.D., Ph.D.

Donald Hinkle Professor of Law
Florida State University College of Law

Christopher S. Carpenter, Ph.D.

E. Bronson Ingram Professor of Economics
Vanderbilt University

Logan S. Casey, Ph.D.

Policy Researcher
Movement Advancement Project

Susan D. Cochran, Ph.D., M.S.

Vice Chair and Professor of Epidemiology and
Professor of Statistics
UCLA Fielding School of Public Health
University of California Los Angeles

Daniela Domínguez, Psy.D.

Assistant Professor
University of San Francisco, Counseling Psychology
Department

Jae Downing, Ph.D.

Assistant Professor
Oregon Health & Science University

Rachel H. Farr, Ph.D.

Associate Professor of Psychology
University of Kentucky

Jamie Feldman M.D., Ph.D.

Associate Professor of Family Medicine and
Community Health
University of Minnesota

Adam W. Fingerhut, Ph.D.

Professor
Loyola Marymount University

Jessica N. Fish, Ph.D.

Assistant Professor
Department of Family Science
School of Public Health
University of Maryland

Andrew R. Flores, Ph.D.

Assistant Professor of Government
Department of Government
School of Public Affairs
American University

David M. Frost, Ph.D.

Associate Professor
University College London

Kristi E. Gamarel, Ph.D., Ed.M.

John G. Searle Assistant Professor of Health
Behavior and Health Education
University of Michigan School of Public Health

Nanette Gartrell, M.D.

Visiting Distinguished Scholar
The Williams Institute

Marie-Amélie George, Ph.D., J.D., M.St.

Assistant Professor of Law
Wake Forest University School of Law

Abbie E. Goldberg, Ph.D.

Professor of Psychology and Director of Women's and
Gender Studies
Clark University

Naomi G. Goldberg, M.P.P.

Policy & Research Director
Movement Advancement Project

Shoshana K. Goldberg, Ph.D.

Research Assistant Professor
Gillings School of Global Public Health
University of North Carolina Chapel Hill

Susan Golombok, Ph.D., FBA

Professor of Family Research and Director of the
Centre for Family Research
University of Cambridge

5a

John C. Gonsiorek, Ph.D., ABPP

Founding Editor, Psychology of Sexual Orientation
and Gender Diversity
Past President, APA Division 44
Now retired

Gilbert Gonzales, Ph.D., M.H.A.

Assistant Professor
Department of Medicine, Health & Society
Department of Health Policy
Program for Public Policy Studies
Vanderbilt University

Michele Bratcher Goodwin, S.J.D., LL.M., J.D.

Chancellor's Professor
Director of the Center for Biotechnology & Global
Health Policy
University of California, Irvine

Allegra Gordon, Sc.D., M.P.H.

Assistant Professor of Community Health Sciences
Boston University School of Public Health

Nadav Antebi-Gruszka, Ph.D., M.A., MHC-LP

Adjunct Assistant Professor
Columbia University
City College of New York

Jody L. Herman, Ph.D.

Scholar of Public Policy
The Williams Institute
UCLA School of Law

Laura T. Kessler, J.S.D., LL.M., J.D.

Professor of Law
University of Utah, SJ Quinney of Law

Nancy J. Knauer, J.D.

Sheller Professor of Public Interest Law
Temple University Beasley School of Law

Craig J. Konnoth, J.D., M.Phil.

Associate Professor of Law
Director, Health Law Certificate
Faculty Director, Health Data & Technology
Initiative, Silicon Flatirons Center
University of Colorado School of Law

Holning Lau, J.D.

Willie Person Mangum Distinguished Professor of
Law
University of North Carolina School of Law

Allen J. LeBlanc, Ph.D.

Health Equity Institute Professor of Sociology
San Francisco State University

Christy Mallory, J.D.

Renberg Senior Scholar and the Legal Director
The Williams Institute
UCLA School of Law

Phoenix A.K. Matthews, Ph.D.

Professor and Clinical Psychologist
Associate Dean for Equity and Inclusion in the
College of Nursing
University of Illinois at Chicago

Heather L. McCauley, Sc.D.

Assistant Professor
Michigan State University

John Pachankis, Ph.D.

Susan Dwight Bliss Associate Professor of Public
Health and Psychiatry and Director of Yale's
LGBTQ
Yale School of Medicine

Charlotte J. Patterson, Ph.D.

Professor of Psychology
University of Virginia

Kim H. Pearson, J.D., M.St.

Associate Dean of Academic Affairs and Program
Innovation and Professor of Law
Gonzaga University School of Law

Tonia Poteat, PhD, M.P.H., PA-C

Assistant Professor
University of North Carolina Chapel Hill

Ellen D.B. Riggle, Ph.D.

Chair and Professor, Department of Gender and
Women's Studies
Professor, Department of Political Science
University of Kentucky

Esther D. Rothblum, Ph.D.

Visiting Distinguished Scholar at the Williams
Institute and Professor of Women's Studies
San Diego State University

**Elizabeth M. Saewyc, Ph.D., R.N., FSAHM,
FCAHS, FAAN**

Professor and Executive Director, Stigma and
Resilience Among Vulnerable Youth Centre
School of Nursing, University of British Columbia,
Vancouver, Canada

Sharon Scales Rostosky, Ph.D.

Professor of Counseling Psychology
University of Kentucky

R. Bradley Sears, J.D.

Associate Dean of Public Interest Law and David
Sanders Distinguished Scholar of Law & Policy
The Williams Institute
UCLA School of Law

Edward Stein, J.D., Ph.D.

Professor of Law
Director, Gertrud Mainzer Program in Family Law,
Policy and Bioethics
Cardozo School of Law

Scott Skinner-Thompson, J.D., LL.M.

Associate Professor
University of Colorado Law School

Brian de Vries, Ph.D.

Professor Emeritus, Gerontology
San Francisco State University

9a

Ari Ezra Waldman, J.D., Ph.D.

Professor of Law and Computer Science
Northeastern University

Deborah Widiss, J.D.

Professor of Law and Associate Dean for Research
and Faculty Affairs
Indiana University Maurer School of Law

Bianca D.M. Wilson, Ph.D.

Senior Scholar of Public Policy
The Williams Institute
UCLA School of Law

Jordan Blair Woods, J.D., M.Phil., Ph.D.

Associate Professor of Law and Faculty Director of
the Richard B. Atkinson LGBTQ Law & Policy
Program
University of Arkansas School of Law