

Docket No. 18-2574

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

SHARONELL FULTON, et al., Appellants
v.
CITY OF PHILADELPHIA, et al., Appellees

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

***AMICI CURIAE* BRIEF OF ORGANIZATIONS SERVING LGBTQ YOUTH
IN SUPPORT OF APPELLEES AND INTERVENORS-APPELLEES**

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1, counsel for *Amici* certify that *Amici Curiae* are registered non-profits and have no parent corporations, nor does any publicly held corporation own 10% or more of their stock.

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Adoption and Safe Families Act of 1997, Pub. L. No. 105-89,
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Foster Care Independence Act, Pub. L. No. 106-169,
 113 Stat. 1822 (1999) (codified at 42 U.S.C. § 677)..... 12

42 U.S.C. § 671(a)(10)..... 12

42 U.S.C. § 675(5)(a)..... 12

11 Pa. Stat. and Cons. Stat. Ann. § 2633 12

Other Authorities

Michelle Birkett et al, *Does It Get Better? A Longitudinal Analysis of Psychological Distress and Victimization in Lesbian, Gay, Bisexual, Transgender, and Questioning Youth*, 56 J. Adolescent Health 280 (2015)21

Mark L. Hatzenbuehler et al., *State-Level Policies and Psychiatric Morbidity in LGB Populations*, 99 Am. J. of Pub. Health 2275 (2009) 25

Mark L. Hatzenbuehler et al., *The Impact of Institutional Discrimination on Psychiatric Disorders in Lesbian, Gay, and Bisexual Populations: A Prospective Study*, 100 Am. J. Pub. Health 452 (2010) 27

Human Rights Campaign, *LGBTQ Youth in the Foster Care System* 17

Human Rights Campaign, *2018 LGBTQ Youth Report* (2018) 20, 21, 22, 23

Sandy E. James et al., Nat’l Ctr. for Transgender Equality, *The Report of the 2015 U.S. Transgender Survey* (2016)..... 21

Dongdong Li et al., *Comparing Long-Term Placement Outcomes of Residential and Family Foster care: A Meta-Analysis*, *Trauma, Violence, & Abuse* (2017)..... 18

Samantha Manzella, *According to the Trevor Project, Number of Trans Callers in Crisis Doubled After Trump’s Military Tweets*, *NewNowNext* (Aug. 4, 2017), <https://logo.to/2Ij7U3l>..... 24

Michael P. Marshal et al., *Suicidality and Depression Disparities Between Sexual Minority and Heterosexual Youth: A Meta-Analytic Review*, *49 J. of Adolescent Health* 115 (2011)..... 20, 21, 28, 29

Megan Martin et al., *Ctr. for the Study of Soc. Policy, Out of the Shadows: Supporting LGBTQ Youth in Child Welfare through Cross-System Collaboration* (2016) 18

Ilan H. Meyer, *Minority Stress and Mental Health in Gay Men*, *36 J. of Health and Soc. Behav.* 38 (1995)..... 28

Ilan H. Meyer & David M. Frost, *Minority Stress and the Health of Sexual Minorities*, in *Handbook of Psychology and Sexual Orientation* 252 (Charlotte J. Patterson & Anthony R. D’Augelli eds., 2013)..... 26, 28, 29

Cathryn Oakley, *Human Rights Campaign, Disregarding the Best Interest of the Child: License to Discriminate in Child Welfare Services* (2017)..... 9

Julia Raifman et al., *Association of State Laws Permitting Denial of Services to Same-Sex Couples with Mental Distress in Sexual Minority Adults: A Difference-in-Difference-in-Differences Analysis*, *75 JAMA Psychiatry* 671 (2018) 26, 27

Julia Raifman et al., *Difference-in-Differences Analysis of the Association Between State Same-Sex Marriage Policies and Adolescent Suicide Attempts*, *171 JAMA Psychiatry* 350 (2017) 25

Christina Wilson Remlin et al., Children’s Rights, Lambda Legal, & 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 2* (2017)..... 16, 19

Sharon S. Rotosky et al., *Marriage Amendments and Psychological Distress in Lesbian, Gay, and Bisexual (LGB) Adults*, 56 J. of Counseling Psychol. 56 (2009)..... 25

Stephen T. Russell & Jessica N. Fish, *Mental Health in Lesbian, Gay, Bisexual, and Transgender (LGBT) Youth*, 12 Ann. Rev. Clin. Psychol. 465 (2016) 22

Caitlin Ryan & Rafael Diaz, *Family Responses as a Source of Risk & Resiliency for LGBT Youth*, Paper Presented at the Child Welfare League of America Preconference Institute (Feb. 2005)..... 17

Caitlin Ryan et al., *Family Acceptance in Adolescence and the Health of LGBT Young Adults*, 23 J. of Child & Adolescent Psychiatric Nursing 205 (2010) 23

Caitlyn Ryan et al., *Family Rejection as a Predictor of Negative Health Outcomes in White and Latino Lesbian, Gay, and Bisexual Young Adults*, 123 Pediatrics 346 (2009) 21, 22, 23

Daniel E. Shumer et al., *The Effect of Lesbian, Gay, Bisexual, and Transgender-Related Legislation on Children*, 178 J. of Pediatrics 5 (2016)..... 24

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 2, 2017, 8:10 AM), <https://ampr.gs/2oTvayl> 27

U.S. Dep’t of Health & Human Servs., Admin. on Children, Youth, & Families, *Information Memorandum ACYF-CB-IM-12-04* (2012) 13

Shannan Wilber et al., Child Welfare League of America, *CWLA Best Practice Guidelines for Serving Youth in Out-of-Home Care* (2006) 16, 17, 19

Bianca D.M. Wilson et al., Williams Inst., *Sexual and Gender
Minority Youth in Foster Care* (2014)..... 15, 16, 17, 18, 19

Avalon Zoppo, *Transgender Hotline Reports Flood of Calls After
Trump Walks Back Federal Protections*, NBC News (Feb. 26,
2017, 5:14 PM), <https://nbcnews.to/2QaTNjf> 24

INTEREST OF *AMICI CURIAE*¹

Amici are organizations serving lesbian, gay, bisexual, transgender, and queer/questioning (“LGBTQ”) youth, whether through direct support services, health and wellness services, medical care, legal representation, crisis intervention and suicide prevention services, homelessness prevention, or grassroots and policy advocacy. *Amici* work directly with, for, and on behalf of LGBTQ youth in the foster care system and have seen firsthand the harmful impacts of stigma and discrimination on these youth, both as factors resulting in their disproportionate representation in the child welfare system and in affecting their physical and mental health. As this Court considers the implications of the Appellants’ request to require the City of Philadelphia to allow government-funded foster care agencies to discriminate against same-sex couples in the public child welfare system, *Amici* offer valuable perspectives on the implications of allowing such discrimination on the LGBTQ youth whose lives are in the City’s care.

FosterClub is a national network for youth in foster care, leading efforts of young people in and from foster care to become connected, educated, inspired, and represented so they can realize their personal potential and contribute to a better life for their peers. Through education, outreach, peer support, and public policy,

¹ No counsel for a party authored this brief in whole or in part, and no such counsel or party made a monetary contribution toward the preparation or submission of this brief. No person other than *Amici Curiae*, their members, or their counsel made a monetary contribution to its preparation or submission.

FosterClub engages and empowers those who have the most at stake in transforming the foster care system: young people themselves. FosterClub's mission includes working to ensure that LGBTQ foster youth and alumni receive safe and equal care.

Established in 2004, Garden State Equality ("GSE") is New Jersey's statewide advocacy and education organization for the LGBTQ community. GSE has led efforts to ensure the safety and wellbeing of LGBTQ youth, including passage of comprehensive anti-bullying legislation, banning conversion therapy, and working to secure safe living and learning environments. GSE works with child welfare officials to protect the best interests of LGBTQ youth and families.

The Gender and Sexuality Development Clinic of the Children's Hospital of Philadelphia offers psychosocial and medical support for gender variant, gender expansive, and transgender youth and their families. Their team includes specialists from the hospital's Departments of Social Work and Family Services, Adolescent Medicine, Endocrinology, and Behavioral Health. They work directly with families and provide consultation and training for providers and organizations interested in learning how to better serve the needs of gender-variant youth.

The Human Rights Campaign ("HRC") is the largest national LGBTQ political organization. HRC envisions an America where LGBTQ people are ensured of their basic equal rights, and can be open, honest, and safe at home, at

work, and in the community. Among those basic rights is freedom from discrimination and access to equal opportunity. Over the years, HRC has advocated for the legal rights and best interests of LGBTQ youth in a broad array of ways and venues, including in the Supreme Court of the United States.

Lambda Legal Defense and Education Fund, Inc. (“Lambda Legal”) is the nation’s oldest and largest non-profit legal organization committed to achieving full recognition of the civil rights of LGBTQ people, and people living with HIV through impact litigation, education, and public policy work. Lambda Legal’s Youth in Out-of-Home Care Project works to affirm and uphold the rights of LGBTQ youth and youth living with HIV in child welfare and juvenile justice systems and experiencing homelessness.

Mazzoni Center provides comprehensive health and wellness services in an LGBTQ-focused environment while preserving the dignity, and improving the quality of life of the individuals it serves. Mazzoni Center has been serving the needs of LGBTQ and HIV-positive people in the greater Philadelphia region for nearly 40 years, with services specifically targeting particularly vulnerable members of the LGBTQ community, including youth, people of color and low-income individuals.

Founded in 1973, the National LGBTQ Task Force (“Task Force”) is the oldest national LGBTQ civil rights advocacy organization. With members in every

state, the Task Force works to build the grassroots political power of the LGBTQ community by training state and local activists and leaders; engaging in policy analysis and advocacy; and organizing broad-based legislative and referendum campaigns. The Task Force works to ensure LGBTQ youth can fully participate in society, including by supporting LGBTQ youth experiencing homelessness and advocating for supportive placements for LGBTQ youth in foster care systems.

Founded in 2011, Pennsylvania Youth Congress Foundation (“PYC”) is Pennsylvania’s first statewide LGBTQ youth advocacy organization. PYC works to support affirming communities for young LGBTQ Pennsylvanians, engaging in collaborative partnerships to fulfill its mission. PYC is a leader in advocating for policies that protect LGBTQ youth and families from discrimination. PYC supports LGBTQ youth and parents involved in the foster care system, and maintains connections with current and former foster youth throughout Pennsylvania.

Founded in 1998, The Trevor Project is the world’s largest suicide prevention and crisis intervention organization for LGBTQ young people. The Trevor Project works to save young lives by providing the only accredited, free, and confidential phone, instant message, and text messaging crisis intervention services for LGBTQ youth, along with running TrevorSpace, a safe space social

networking site for LGBTQ youth. The Trevor Project also operates innovative education, research, and advocacy programs.

The True Colors Fund works to end homelessness among LGBTQ youth, creating a world where all young people can be their true selves. The True Colors Fund is committed to changing the reality that LGBTQ young people are 120% more likely to experience homelessness than non-LGBTQ youth. While LGBTQ youth experience homelessness for many reasons, True Colors Fund knows that many become homeless as a result of aging out of the foster care system or familial conflict over their sexual orientation or gender identity.

Amici file this brief pursuant to Federal Rule of Appellate Procedure 29(a)(2). All parties consent to its filing.

SUMMARY OF ARGUMENT

Among the people most critically affected by Catholic Social Services' ("CSS") exclusion of same-sex couples from the public child welfare services it provides pursuant to a contract with the City of Philadelphia ("the City" or "Philadelphia") are the estimated 1,100 LGBTQ youth in the City's foster care system. The interests of these youth confirm that the District Court properly concluded that the City's enforcement of the nondiscrimination requirements in its contracts with agencies providing family foster care services was justified, and that the court was correct in denying CSS's request for a preliminary injunction. Beyond the City's interests "in ensuring that the pool of foster parents and resource caregivers is as diverse and broad as the children in need of foster parents and resource caregivers[,]" and in avoiding the Establishment Clause and Equal Protection Clause claims that would result from allowing discrimination by government contractors, Appx. 0035, requiring nondiscrimination in foster care services is consistent with and, in fact, mandated by the City's legal obligation to ensure the wellbeing of *all* youth in its child welfare system, including LGBTQ youth.

That obligation involves both the general requirement to protect the wellbeing of youth in the City's custody and the more specific duty to ensure the equal dignity of LGBTQ youth. Ordering the City to permit contracted foster care

agencies to exclude same-sex couples as prospective foster parents would actively harm LGBTQ youth in the foster care system in multiple ways. First, allowing CSS to discriminate against LGBTQ people would send a government-endorsed stigmatic message to LGBTQ youth that, because of their identity, they are not deserving of dignity and equal protection under the law. LGBTQ youth would get the message that the City permits discrimination against people like them, and those LGBTQ youth specifically in the care of an agency that excludes same-sex couples would get the damaging message that the agency responsible for their care and support would not consider them to be acceptable parents when they grow up. Second, by excluding same-sex couples from eligibility as foster parents, the pool of LGBTQ-affirming placements that may best serve LGBTQ youth would be diminished. These harms are inconsistent with the City's obligation to ensure the wellbeing of children in foster care, and this Court should not allow the interests of agencies that would discriminate against LGBTQ people to be elevated over the best interests of these children – the paramount consideration in the child welfare system.

The disproportionately large number of LGBTQ youth in custody, many of whom entered the child welfare system for reasons related to rejection of their identity, already face disproportionate rates of depression, suicidality, and other mental and physical illnesses because of cultural stigma and prejudice. Decades of

social science confirms that discrimination, particularly in the provision of government services, causes this type of cognizable harm to LGBTQ people, including LGBTQ youth in care. At a bare minimum, it is the duty of the government to not inflict additional harm on the children it serves by ensuring, as Philadelphia has done here, that its contract providers do not endorse stigma and prejudice based on immutable aspects of a child's identity. Given the importance of caregiver acceptance to LGBTQ young people's mental health and the significant negative impact to their wellbeing when the government permits or endorses discrimination, forcing Philadelphia to permit discrimination by a government-funded contract would cause the City to violate core obligations to the foster children it serves. The District Court was correct to deny CSS's motion for a preliminary injunction and this Court should affirm.

ARGUMENT

I. Allowing Government Contractors to Discriminate Against LGBTQ People Would Violate the City's Legal Obligations to Protect the Wellbeing of LGBTQ Children in its Care.

A decision allowing child placing agencies to discriminate while providing services on behalf of the government would significantly harm LGBTQ youth in care, depriving them of equal dignity by branding them as inferior. It would dissuade and demean the LGBTQ youth in their care, stigmatizing them as less deserving of respect and sending the message that, when they grow up and

consider having families of their own, they will not be viewed as worthy to be parents or have a right to equal treatment in the provision of government services. Condemnation of same-sex relationships by a government-contracted foster care agency sends a deeply hurtful message to LGBTQ children.

Additionally, allowing CSS to provide government services while turning away otherwise qualified families based on religious criteria would violate Philadelphia's statutory duties to children in care by limiting the number and diversity of placements available and disregarding the best interests of individual foster children. *See* Cathryn Oakley, Human Rights Campaign, *Disregarding the Best Interest of the Child: License to Discriminate in Child Welfare Services* (2017)² (“It isn’t in the best interest of a child to deny them a qualified, loving family simply because that family doesn’t share all of the tenets of the placing agency’s faith[.]”). Every child in foster care has unique needs and limiting the available pool of parents to those who meet an agency’s religious criteria fails to provide for the “most appropriate setting” for all children. Using non-objective criteria to screen potential parents not only violates federal law, but also excludes diverse placements to serve the “best interest and special needs” of certain children in care. In particular, as the City has squarely recognized, addressing the needs of LGBTQ youth in the foster care system by finding LGBTQ-affirming placements

² Available at <https://bit.ly/2pAMYMQ>.

is critical. *See* Appellees’ Br. 9. Excluding same-sex couples from fostering fails to take into consideration the needs of those LGBTQ children whose individual interests may be best served by members of the LGBTQ community. As the District Court correctly noted, the City has a legitimate interest in “ensuring that the pool of foster parents and resource caregivers is as diverse and broad as the children in need[.]” Appx. 0035.

These harms to LGBTQ youth in the foster care system – both dignitary and substantive – implicate a wide range of constitutional and statutory rights these youth possess and would violate the City’s obligation to provide for the wellbeing, dignity, and security of all kids in care. First, all youth in state custody, including LGBTQ youth, are guaranteed, as a matter of Substantive Due Process, the rights to personal security, *see, e.g., Hernandez ex rel. Hernandez v. Tex. Dep’t of Protective & Regulatory Servs.*, 380 F.3d 872, 880 (5th Cir. 2004) (holding that foster children enjoy a substantive due process right “to personal security and reasonably safe living conditions”); freedom from psychological harm, *see, e.g., Marisol A. by Forbes v. Giuliani*, 929 F. Supp. 662, 675 (S.D.N.Y. 1996) *aff’d*, 126 F.3d 372 (2d Cir. 1997) (children in foster care have a “substantive due process right to be free from unreasonable and unnecessary intrusions into their emotional well-being”); freedom from physical and psychological deterioration, *see, e.g., K.H. through Murphy v. Morgan*, 914 F.2d 846, 851 (7th Cir. 1990);

adequate care, including the provision of services, *see, e.g., Youngberg v. Romeo*, 457 U.S. 307, 315, 317 (1982); and a reasonably suitable placement, *see, e.g., Johnson v. Collins*, 58 F. Supp. 2d 890, 904 (N.D. Ill. 1999) (recognizing “a clearly established substantive due process right to suitable foster care placement, which includes the right to adequate supervision and physical safety”), *vacated on other grounds*, 5 F. App’x 479 (7th Cir. 2001). As addressed more fully below, the damaging message sent to LGBTQ youth by allowing a government contractor working on behalf of the City to brand LGBTQ people as inferior parents causes psychological harm to these youth, intruding into their emotional wellbeing and damaging their physical and mental health. Moreover, diminishing the pool of LGBTQ-affirming placements deprives these youth of their rights to personal security and safe and suitable foster care placements.

Second, federal statutes obligate the City to provide for the wellbeing of youth in the child welfare system. The Adoption and Safe Families Act of 1997 requires child welfare systems to provide safety, permanency, and wellbeing for all youth in the government’s custody. *See* Pub. L. No. 105-89, 111 Stat. 2115 (1997) (codified at 42 U.S.C. § 671(a)(15)). Titles IV-E and IV-B of the Social Security Act require states receiving federal child welfare funding to place children in a “safe setting that is the least restrictive (most family like) and most appropriate setting available and in close proximity to the parents’ home, consistent with the

best interest and special needs of the child[.]” 42 U.S.C. § 675(5)(a). States receiving federal funds must also maintain standards for placements that are “reasonably in accord with recommended standards of national organizations concerned with standards for the institutions of homes, including standards related to admissions policies, safety, sanitation, and protection of civil rights[.]” 42 U.S.C. § 671(a)(10). Further, states receiving funds under the Foster Care Independence Act are required to “use objective criteria . . . for ensuring fair and equitable treatment of benefit recipients.” Pub. L. No. 106-169, 113 Stat. 1822 (1999) (codified at 42 U.S.C. § 677). These same principles are embodied in Pennsylvania law, clearly establishing that children in foster care have the right to “[t]reatment with fairness, dignity, and respect[;]” to freedom from discrimination, harassment, and abuse; to live in a safe, healthy, comfortable setting that best meets the child’s needs; to have their cultural and religious backgrounds and preferences respected and accommodated, and, most fundamentally, to safety, stability, permanence, and wellbeing. *See* 11 Pa. Stat. and Cons. Stat. Ann. § 2633. In addition to reducing the number of supportive and appropriate family homes available for placement of LGBTQ youth, which may increase the likelihood that these foster children will languish in congregate care, turning away same-sex couples injures the dignity of LGBTQ youth through unequal treatment under the law. The use of non-objective criteria in screening potential parents not only

violates federal and state law, but also violates the City’s obligation to provide for a setting that best fits the needs of LGBTQ children.

Finally, disparaging the dignity of same-sex couples by turning them away from government services harms the social and emotional wellbeing of LGBTQ youth in foster care – matters the Administration for Children and Families have recognized fall within the general duty to promote the wellbeing of youth in care, along with providing for “[i]dentity development, self-concept, self-esteem, [and] self-efficacy[.]” U.S. Dep’t of Health & Human Servs., Admin. on Children, Youth, & Families, *Information Memorandum ACYF-CB-IM-12-04* (2012).³ As the Commissioner for the City’s Department of Human Services noted, permitting CSS to refuse serve same-sex couples sends a “very strong signal to the [LGBTQ] community that their rights aren’t protected, and . . . to [LBGTQ foster] youth that while we support you now, we won’t support your rights as an adult.” Appx. 0483-84. The resulting feelings of stigmatization and inferiority are real, and, when caused by inequality with government approval, may rise to the level of constitutional injury. *See Heckler v. Matthews*, 465 U.S. 728, 739-40 (1984) (discrimination causes injury “by stigmatizing members of the disfavored group as innately inferior and therefore as less worthy participants in the political community”) (quotation omitted). As the Supreme Court noted in *Obergefell v.*

³ Available at <https://bit.ly/2OfUjiC>.

Hodges, 135 S. Ct. 2584, 2602 (2015), when “sincere, personal opposition becomes enacted law and public policy, the necessary consequence is to put the imprimatur of the State itself on an exclusion that soon demeans or stigmatizes those whose own liberty is then denied.” In both *Obergefell* and *U.S. v. Windsor*, 570 U.S. 744, 772 (2013), the Supreme Court condemned laws discriminating against same-sex couples, taking particular note of the ways those laws not only demean the dignity of the couples, but stigmatize children. As a constitutional matter, LGBTQ people “cannot be treated as social outcasts or as inferior in dignity and worth.” *Masterpiece Cakeshop, Ltd. v. Colo. Civil Rights Comm’n*, 138 S. Ct. 1719, 1727 (2018). To do so, would “diminish their personhood” and “work[] a grave and continuing harm.” *Obergefell*, 135 S. Ct. at 2602, 2604. While CSS is entitled to their religious beliefs, requiring the City to permit and endorse the exclusion of same-sex couples from public child welfare services not only deprives those couples of equality and dignity, but “result[s] in a community-wide stigma inconsistent with the history and dynamics of civil rights laws that ensure equal access to goods, services, and public accommodations.” *Masterpiece Cakeshop*, 138 S. Ct. at 1727. That community-wide stigma will be felt acutely by LGBTQ youth in the foster care system. Such government-endorsed messages are inconsistent with both the constitutional dimensions of sexual orientation as “central to personal dignity and autonomy,” *Lawrence v. Texas*, 539 U.S. 558, 574

(2003) (quoting *Planned Parenthood of Southeastern Pa. v. Casey*, 505 U.S. 833, 851 (1992); see also *Obergefell*, 135 S. Ct. at 2593 (the Constitution protects the rights of LGBTQ people to “define and express their identity,”), and the City’s obligation to promote the social and emotional wellbeing of LGBTQ youth in foster care.

II. Stigma and Discrimination Drive LGBTQ Youth into Child Welfare Systems in Disproportionate Numbers, Where They Face Disparate Treatment and Outcomes.

The types of discrimination and stigma that would result from requiring the City to allow CSS’s exclusionary foster care policies to persist have already played a role in the involvement of countless LGBTQ youth in the foster care system, where they are disproportionately represented, and continue to play a role as they face disparate treatment and outcomes.

It is well established that LGBTQ youth are disproportionately over-represented in the child welfare system compared to their non-LGBTQ peers. A federally-funded study of children in the child welfare system in Los Angeles County recently found that 19.1 percent of youth surveyed identified as LGBTQ, suggesting that “there are between 1.5 and 2 times as many LGBTQ youth living in foster care as LGBTQ youth estimated to be living outside foster care.” Bianca D.M. Wilson et al., Williams Inst., *Sexual and Gender Minority Youth in Foster*

Care 6 (2014).⁴ Other studies have found even higher rates of overrepresentation: although LGBTQ youth make up only about 5 to 7 percent of the general youth population, research estimates that 25 percent of youth in child welfare systems, 20 percent of youth in juvenile justice systems, and 50 percent of youth experiencing homelessness are LGBTQ. See Christina Wilson Remlin et al., Children’s Rights, Lambda Legal, & 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* 2 (2017).⁵ According to the City, there are currently 6,000 children in the protective custody of the Department of Human Services. Appx. 0173. Given professional estimates of the percentage of foster youth who identify as LGBTQ, this means that there are approximately 1,100 LGBTQ foster children in the City’s custody.

Family rejection of a young person’s LGBTQ identity is a frequent factor leading this population to enter the child welfare system. See Shannan Wilber et al., Child Welfare League of America, *CWLA Best Practice Guidelines for Serving Youth in Out-of-Home Care* 4 (2006)⁶ (“A high proportion of LGBT youth who end up in state care leave home or are ejected from their homes as a result of conflict related to their sexual orientation or gender identity.”). In one study of

⁴ Available at <https://bit.ly/2QYsvOo>.

⁵ Available at <https://bit.ly/2xAXIVa>.

⁶ Available at <https://bit.ly/2NEheVb>.

youth in out-of-care home settings, 42 percent of LGBTQ respondents were either removed or ejected from their homes over conflict related to their sexual orientation or gender identity. *Id.* (citing Caitlin Ryan & Rafael Diaz, *Family Responses as a Source of Risk & Resiliency for LGBT Youth*, Paper Presented at the Child Welfare League of America Preconference Institute (Feb. 2005)). This stigmatic experience means that many LGBTQ youth who enter the system have “the added layer of trauma that comes with being rejected or mistreated because of their sexual orientation, gender identity or gender expression.” Human Rights Campaign, *LGBTQ Youth in the Foster Care System*.⁷

Once in care, LGBTQ youth are also more likely to report negative outcomes and experiences than heterosexual and cisgender youth. A survey conducted by the Williams Institute found that LGBTQ youth are more likely to report mistreatment in out-of-home care: 37.7 percent of LGBTQ youth reported that they had experienced poor treatment connected with their gender expression, sexual orientation, or transgender status, compared with 18.5 percent of all youth who reported “some form of discrimination” based on people’s perceptions of their gender or sexuality. Wilson et al., *supra*, at 35. LGBTQ youth are also more likely to be hospitalized for emotional reasons, with 13.5 percent of LGBTQ respondents

⁷ Available at <https://bit.ly/2NLKJES>.

reporting this experience compared to only 4.3 percent of non-LGBTQ respondents. *Id.* at 38.

Additionally, LGBTQ youth have a higher than average number of placements, reporting an average of 2.85 total placements compared to 2.43 for non-LGBTQ youth, a statistically significant difference. *Id.* LGBTQ youth are also more likely to be living in a group home as opposed to a family home: 25.7 percent of LGBTQ youth respondents lived in a group home, compared with only 10.1 percent of non-LGBTQ youth. *Id.* Child welfare professionals agree that children in family homes have “consistently better experiences and less problems” than youth in group home settings. Dongdong Li et al., *Comparing Long-Term Placement Outcomes of Residential and Family Foster care: A Meta-Analysis, Trauma, Violence, & Abuse* (2017).⁸ Finally, LGBTQ youth are more likely to “age out” of child welfare systems without achieving permanency through either returning home to families of origin or a legal guardianship or adoption with relatives or another family secured through the child welfare system. Megan Martin et al., Ctr. for the Study of Soc. Policy, *Out of the Shadows: Supporting LGBTQ Youth in Child Welfare through Cross-System Collaboration* 25 (2016).⁹

Discrimination and stigma also inform and influence the disparate outcomes for LGBTQ youth in the child welfare system. LGBTQ youth face significantly

⁸ Available at <https://bit.ly/2OdDa9q>.

⁹ Available at <https://bit.ly/2uFrZOh>.

greater barriers to permanency than non-LGBTQ youth, such as repeated placement moves, being deemed “unadoptable” because of their sexual orientation or gender identity, and being blamed for harassment and abuse from others. Wilson et al., *supra*, at 11 (citing Wilber et al., *supra*). These disparities lead to negative life-long outcomes for system-involved LGBTQ youth, such as homelessness. LGBTQ youth in foster care are more likely than their straight and cisgender peers to become homeless at some point in their life, with 21.1 percent of LGBTQ foster youth reporting being homeless at some point in their life, compared with only 13.9 percent of their non-LGBTQ peers. Wilson et al., *supra*, at 38. Research shows that discrimination drives homelessness in LGBTQ youth: a study of youth in out-of-home care in New York City showed that 78 percent of LGBTQ youth experiencing homelessness were either removed or ran away from foster homes because of abuse or discrimination; 56 percent chose to live on the street rather than a foster care placement because they felt safer there. Remlin et al., *supra*, at 3 (citing Wilber et al., *supra*, at 5-6.).

Given the prevalence of trauma LGBTQ youth have experienced both prior to and during their time in the foster care system, permitting official discrimination against LGBTQ people within that system will only compound the harm these youth have experienced. Allowing agencies to turn away a class of families likely to offer a supportive family environment to LGBTQ youth would put them at risk

of continuing instability and distress and perpetuate the humiliation and degradation of having their LGBTQ identity deemed inferior. Ordering the City to allow CSS to discriminate against same-sex couples would completely undermine their obligation to ensure the wellbeing of these children in care.

III. The Stigma and Distress Resulting From Discrimination Harms the Health and Security of LGBTQ Youth in Care.

A. Rejection, Discrimination, and Stigma Cause LGBTQ Youth to Experience Higher Rates of Mental and Physical Illness.

The trauma of the experiences of LGBTQ youth with societal stigma and discrimination results in significant harm to their physical and mental health. Compared with their non-LGBTQ peers, LGBTQ youth report much higher rates of mood disorders, depression, anxiety, alcohol and drug use, and lower self-esteem. See Human Rights Campaign, *2018 LGBTQ Youth Report*, 6 (2018)¹⁰ (citing Michelle Birkett et al., *Does It Get Better? A Longitudinal Analysis of Psychological Distress and Victimization in Lesbian, Gay, Bisexual, Transgender, and Questioning Youth*, 56 *J. Adolescent Health* 280 (2015)¹¹). Of LGBTQ youth surveyed, 77 percent reported feeling down or depressed in the past week. HRC *2018 LGBTQ Youth Report*, *supra*, at 7. A 2011 meta-analysis found that, on average, 28 percent of LGB young people reported a history of suicidality, compared with only 12 percent of heterosexual youth. Michael P. Marshal et al.,

¹⁰ Available at <https://bit.ly/2IfS4X8>.

¹¹ Available at <https://bit.ly/2OewBmT>.

Suicidality and Depression Disparities Between Sexual Minority and Heterosexual Youth: A Meta-Analytic Review, 49 *J. of Adolescent Health* 115, 119 (2011).¹²

Transgender youth are at an event greater risk: according to a national study, 40 percent of transgender adults report having attempted suicide, with 92 percent of those individuals reporting that their suicide attempt occurred before age 25. Sandy E. James et al., Nat'l Ctr. for Transgender Equality, *The Report of the 2015 U.S. Transgender Survey* 114-115 (2016).¹³

Research strongly suggests that negative health outcomes and disparities for LGBTQ youth are the result of stigma, discrimination, and victimization over their identity. *See, e.g.*, Birkett et al., *supra*, 6 (LGBTQ youth who experienced higher rates of victimization and lower levels of social support reported greater depressive symptoms). Anti-LGBTQ animus stigmatizes LGBTQ youth, which is in turn associated with negative health outcomes like higher rates of mental illness, risky behavior, and poor academic performance. *See HRC 2018 LGBTQ Youth Report, supra; see also* Caitlyn Ryan et al., *Family Rejection as a Predictor of Negative Health Outcomes in White and Latino Lesbian, Gay, and Bisexual Young Adults*, 123 *Pediatrics* 346, 346 (2009) ¹⁴ (“several studies have linked minority stress (experiencing and internalizing negative life events and victimization in the social

¹² Available at <https://bit.ly/2NBcXC5>.

¹³ Available at <https://bit.ly/2NEMXWx>.

¹⁴ Available at <https://bit.ly/2NEoLDr>.

environment) with negative health outcomes in LGB adults, including depressive symptoms, substance abuse, and suicidal ideation”). In contrast, LGBTQ youth who report that “being out was a positive and affirming experience for them also report better outcomes in terms of their overall health and well-being.” HRC 2018 *LGBTQ Youth Report, supra*, at 16 (citing Stephen T. Russell & Jessica N. Fish, *Mental Health in Lesbian, Gay, Bisexual, and Transgender (LGBT) Youth*, 12 Ann. Rev. Clin. Psychol. 465 (2016)¹⁵).

In particular, rejection by families or caregivers causes significant harm to the mental health of sexual minority youth. The Family Acceptance Project has found that LGB young adults reporting higher levels of family rejection during adolescence “were 8.4 times more likely to have attempted suicide, 5.9 times more likely to report high levels of depression, 3.4 times more likely to report illegal drug use, and 3.4 times more likely to have engaged in unprotected sexual intercourse” when compared with their LGB peers who reported no or low levels of family rejection. Ryan et al., *Family Rejection, supra*, at 349-50. The Family Acceptance Project emphasizes the importance of affirming households to the mental health of LGBTQ youth:

Because families play such a critical role in child and adolescent development, it is not surprising that adverse, punitive, and traumatic reactions from parents *and caregivers* in response to their children’s LGB identity would have such a negative influence on their risk

¹⁵ Available at <https://bit.ly/2Dui00R>.

behaviors and health status as young adults. This study begins to help us understand the important role that parents *and caregivers* of lesbian, gay, and bisexual youth play in contributing to health problems in their LGB children. . . . [H]elping families identify and *reduce specific rejecting behaviors* is *integral* to helping prevent health and mental health problems for LGB young people.

Id. at 350 (emphasis added). Meanwhile, LGBTQ young people whose families are supportive and accepting have greater self-esteem and resilience and are at a lower risk of negative health outcomes like depression, hopelessness, and substance abuse. HRC 2018 LGBTQ Youth Report, at 4 (citing Caitlin Ryan et al., *Family Acceptance in Adolescence and the Health of LGBT Young Adults*, 23 J. of Child & Adolescent Psychiatric Nursing 205 (2010)¹⁶).

Further, it has been demonstrated that the legal status of LGBTQ rights has a notable impact on the health of LGBTQ young people. When anti-LGBTQ messaging is endorsed by government action or legislation, it is associated with negative mental health outcomes for LGBTQ youth. The Association of Medical School Pediatric Department Chairs recently expressed concern that state legislation permitting government-funded foster and adoption agencies to refuse to serve same-sex couples negatively impacts LGBTQ young people, stating that:

These bills create an environment of intolerance toward LGBT people and teach all children messages of fear and hatred of difference. They rely on the belief that sexual and gender minority individuals are not worthy of the compassion and respect owed to heterosexual and cisgender people, and, in fact, may not be welcome in that state. When

¹⁶ Available at <https://bit.ly/2N2vke1>.

young people who are gay or transgender receive these messages, the struggles they already may be facing in coming out or transitioning may become compounded. . . . Specifically, youth reporting perceived discrimination were more likely to also report self-harm, suicidal ideation, and depressive symptoms.

Daniel E. Shumer et al., *The Effect of Lesbian, Gay, Bisexual, and Transgender-Related Legislation on Children*, 178 J. of Pediatrics 5 (2016).¹⁷ Similarly, *Amicus Curiae* the Trevor Project, an organization that provides crisis intervention and suicide prevention services to LGBTQ young people, reported that their hotline received record numbers of calls directly after President Trump announced two anti-transgender policies: in the 24 hours after the transgender military ban was announced, the number of transgender hotline-callers more than doubled, and after the administration rolled back Title IX protections for transgender students, the hotline saw a 35 percent increase in calls. Samantha Manzella, *According to the Trevor Project, Number of Trans Callers in Crisis Doubled After Trump's Military Tweets*, NewNowNext (Aug. 4, 2017), <https://logo.to/2Ij7U3l>; Avalon Zoppo, *Transgender Hotline Reports Flood of Calls After Trump Walks Back Federal Protections*, NBC News (Feb. 26, 2017, 5:14 PM), <https://nbcnews.to/2QaTNjf>. In contrast, laws protecting LGBTQ rights are associated with positive health outcomes for youth; a recent study found that state-level marriage equality was associated with a 14 percent decline in reported suicide attempts among LGB

¹⁷ Available at <https://bit.ly/2Oc0STo>.

young people. Julia Raifman et al., *Difference-in-Differences Analysis of the Association Between State Same-Sex Marriage Policies and Adolescent Suicide Attempts*, 171 JAMA Psychiatry 350, 353 (2017).¹⁸

B. Discrimination and Stigma Against LGBTQ People Have Lifelong Effects on Mental and Physical Health.

While the number of studies specific to the impact of discrimination and stigma on LGBTQ youth is limited, additional research on LGBTQ adults supports the conclusion that discrimination and stigma harm the wellbeing of LGBTQ people, particularly when it is endorsed by the law. Being an LGBTQ person living in a state that either does not extend anti-discrimination protections to the community or affirmatively passes anti-LGBTQ legislation is associated with higher levels of psychological disorders and distress. See Mark L. Hatzenbuehler et al., *State-Level Policies and Psychiatric Morbidity in LGB Populations*, 99 Am. J. of Pub. Health 2275 (2009);¹⁹ Sharon S. Rotosky et al., *Marriage Amendments and Psychological Distress in Lesbian, Gay, and Bisexual (LGB) Adults*, 56 J. of Counseling Psychol. 56 (2009).²⁰ A study released earlier this year investigated the impact of laws permitting denial of services to same-sex couples, including, in particular, Michigan's law permitting religious child placing agencies to discriminate against same-sex couples, substantially the same issue that is currently

¹⁸ Available at <https://bit.ly/2lfzioR>.

¹⁹ Available at <https://bit.ly/2DzcmMN>.

²⁰ Available at <https://bit.ly/2R1g2JK>.

before this Court. This study found that laws like Michigan’s were associated with a “46% relative increase in the proportion of sexual minority adults reporting mental distress.” Julia Raifman et al., *Association of State Laws Permitting Denial of Services to Same-Sex Couples with Mental Distress in Sexual Minority Adults: A Difference-in-Difference-in-Differences Analysis*, 75 JAMA Psychiatry 671, 674 (2018).²¹ In contrast, government action to protect LGBTQ individuals from “prejudice, discrimination, and violence would help to reduce the occurrence of prejudice-related stressors[,]” particularly passing laws which “respect gay men and lesbians’ intimate relationships by providing them . . . the benefits afforded to heterosexual married people and their families.” Ilan H. Meyer & David M. Frost, *Minority Stress and the Health of Sexual Minorities*, in *Handbook of Psychology and Sexual Orientation* 252, 259 (Charlotte J. Patterson & Anthony R. D’Augelli eds., 2013).²²

Importantly, the study analyzing the Michigan law demonstrates that harm to the mental health of LGBTQ individuals flows not only from being denied services, but also from either hostility in the public discourse or the message sent when government permits unequal treatment. Raifman et al. (2018), *supra*, at 675 (increases in mental distress in the immediate aftermath of the law’s passage may stem from “mechanisms with an immediate impact, such as media coverage and

²¹ Available at <https://bit.ly/2J8fkKm>.

²² Available at <https://bit.ly/2OduIfO>.

the awareness of unequal rights, rather than slower mechanisms, such as direct exposure to service denial.”). Scholars have found that “exposure to antigay attitudes can lead to greater shame about LGB identity and more negative feelings about LGB group membership,” which is correlated with increased rates of substance abuse, mood disorders, and generalized anxiety disorder “characterized by hopelessness, chronic worry, and hypervigilance, which are common psychological responses to perceived discrimination.” Mark L. Hatzenbuehler et al., *The Impact of Institutional Discrimination on Psychiatric Disorders in Lesbian, Gay, and Bisexual Populations: A Prospective Study*, 100 Am. J. Pub. Health 452, 453, 456 (2010).²³ Similarly, research has shown that LGBT people who have recently experienced discrimination are more likely to hide their identities to avoid future mistreatment. See 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 2, 2017, 8:10 AM), <https://ampr.gs/2oTvayl>.

Additional research supports the conclusion that general anti-LGBTQ cultural stigma is a stressor that causes LGBTQ individuals to experience negative health-related conditions, such as mental disorders, psychological distress, physical disorders, detrimental health behaviors like smoking or lack of condom use, and a

²³ Available at <https://bit.ly/2Q8TV2M>.

general undermining of their sense of well-being. *See Meyer & Frost, supra*, at 252. The “minority stress model” posits that “because of stigma, prejudice, and discrimination, lesbian, gay, and bisexual people experience more stress than do heterosexuals and that this stress can lead to mental and physical disorders.” *Id.*; *see also* Ilan H. Meyer, *Minority Stress and Mental Health in Gay Men*, 36 *J. of Health and Soc. Behav.* 38 (1995).²⁴ The minority stress model points out how “seemingly minor events [of prejudice] can be damaging because of the symbolic message of rejection that they convey, especially when they accumulate over time.” Meyer & Frost, at 252. In addition to mental illness, individuals who experience prejudice-related stressful events are three times more likely to suffer a serious physical health problem in the next year. *Id.* at 255.

Applied to young people, the minority stress model explains that rejection and stigma drive the higher rates of suicidality and depression in LGBTQ youth:

Among the factors that researchers have found to be associated with psychosocial risks in [sexual minority youth] are the negative responses of other people to gender atypical behavior, high-risk sexual behavior, conflicts related to disclosure of sexual orientation to family and its consequences, and mistreatment in community settings, especially schools. One or more of these stressors can promote feelings of helplessness and hopelessness that may develop into depression and suicidality.

Marshal et al., *supra*, at 116; *see Meyer & Frost, supra*, at 255 (“Higher rates of suicide attempts among members of sexual minorities are related to minority stress

²⁴ Available at <https://bit.ly/2OPtkHL>.

encountered by youth due to coming out conflict with family and community[.]”). Research on minority stress makes clear that, in order to fulfill its obligation to provide for the best interests and wellbeing of LGBTQ youth, Philadelphia cannot allow contracted foster care agencies to discriminate against same-sex couples. Doing so would endorse stigma and rejection of LGBTQ individuals, driving negative health outcomes like depression and suicidality, rather than providing for the wellbeing of young people in the City’s custody.

CONCLUSION

The City's obligation to ensure the wellbeing of LGBTQ youth in the foster care system, the critical importance of protecting those youth from the harms of stigma and discrimination, and the need for foster families who reflect the diverse population of youth in care support the District Court's denial of CSS's requested injunction. These concerns not only constitute a compelling interest sufficient to justify enforcement of the City's nondiscrimination requirements against CSS, but should also feature prominently in the Court's balancing of the equities and consideration of the public interest. *Amici* respectfully urge this Court to affirm the District Court's denial of Appellant's preliminary injunction motion.

Dated: October 4, 2018

Respectfully submitted,

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CERTIFICATE OF BAR MEMBERSHIP

I hereby certify that all counsel for *Amici Curiae* are members of the bar of the United States Court of Appeals for the Third Circuit.

Dated: October 4, 2018

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CERTIFICATION OF COMPLIANCE

1. This brief complies with the type-volume limitations of Federal Rules of Appellate Procedure 29(a)(5) and 32(a)(7)(B) because this brief contains 6,499 words, excluding the parts of the brief exempted by Federal Rule of Appellate Procedure 32(f).
2. 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 a proportionally spaced typeface using Microsoft Word 2016 in Times New Roman 14-point font.
3. Pursuant to Third Circuit Local Appellate Rule 31.1(c), I hereby certify that the text of the electronic brief is identical to the text in the paper copies.
4. Pursuant to Third Circuit Local Appellate Rule 31.1(c), I hereby certify that a virus detection program was run on the electronic version of this brief using Symantec Endpoint Protection Cloud, version 22.11.2.7, and that no virus was detected.

Dated: October 4, 2018

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CERTIFICATE OF SERVICE

I hereby certify that on this date, I filed the foregoing *Amici Curiae* Brief of Organizations Serving LGBTQ Youth in Support of Appellees and Intervenor-Appellees with the Clerk of the Court for the United States Court of Appeals for the Third Circuit using the Appellate CM/ECF system, which will automatically serve electronic copies upon all counsel of record.

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