Case No. A-16-000018

IN THE NEBRASKA COURT OF APPEALS

Greg Stewart and Stillman Stewart;
Lisa Blakey and Janet Rodriguez; and
Todd Vesely and Joel Busch,

Plaintiffs/Appellees,

v.

Dave Heineman, in his official capacity as Governor of Nebraska;
Kerry Winterer, in his official capacity as the Chief Executive Officer
of the Nebraska Department of Health and Human Services; and
Thomas Pristow, in his official capacity as Director of the Nebraska
Division of Children and Family Services,

Defendants/Appellants.

Appeal From The District Court Of Lancaster County, Nebraska
Hon. John A. Colborn

BRIEF OF APPELLEES

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STATEMENT OF JURISDICTION

The Appellees concur in the statement of jurisdiction set forth by the Appellants.

STATEMENT OF CASE

A. Nature of the Case

The Appellees concur in the Appellants' statement of the nature of the case.

B. Issues Tried Below

Appellants moved for summary judgment and Appellees cross-moved for summary judgment based on the undisputed record of Defendants' unequal treatment of gay and lesbian individuals and couples, which burdens those individuals' and couples' constitutional rights to equal protection of the laws and to maintain intimate relationships protected by substantive due process.

C. How the Issues Were Decided

After full discovery, including document production and ten depositions, briefing and lengthy oral argument, the District Court granted Appellees' motion for summary judgment. Following Defendants' motion for reconsideration, the District Court heard further argument and subsequently issued an amended order, which is the subject of this Appeal. In its Amended Order, the District Court enjoined Defendants' unequal treatment of gay and lesbian individuals and couples in two respects. First, the District Court enjoined Memorandum #1-95 (the "Memorandum"), which prohibits issuing foster home licenses to, or placing children in foster homes with, either "persons who identify themselves as homosexuals" or persons who are "unrelated, unmarried adults residing together." Second, the District Court enjoined the stated current practice of the Department of Health and Human Services ("DHHS") subjecting gay and lesbian individuals and couples to additional levels of DHHS approval during the application process, beyond the approvals that heterosexual applicants are required to obtain.

The District Court determined the Memorandum is unconstitutional because it violates Appellees' rights to equal protection and substantive due process, is "wholly inconsistent" with Defendants' professed unwritten policy, and was also invalidated because the Memorandum was not adopted in accordance with the Nebraska Administrative Procedures Act. (T86-88) The District Court ordered that the Memorandum be rescinded or replaced and enjoined Defendants from enforcing the Memorandum or any other "categorical bar to gay and lesbian individuals and gay and lesbian couples seeking to be licensed as foster care parents or to adopt a state ward." (T90-91)

Furthermore, the Court held that Defendants' professed unwritten practice of subjecting gay and lesbian individuals and couples to additional approval requirements by DHHS administrators than heterosexual individuals and couples violates Appellees' rights to equal protection and substantive due process. (T90) The District Court enjoined Defendants "from adopting or applying policies, procedures, or review processes that treat gay and lesbian individuals and couples differently from similarly situated heterosexual individuals and couples when evaluating foster care or adoption applicants under the 'best interests of the child' standard." (T91) In sum, the District Court, based largely on Defendants' own admissions that no legitimate public policy is served by treating gay and lesbian individuals differently from heterosexual applicants, enjoined such disparate treatment.

At oral argument on summary judgment, Defendants-Appellants interposed hearsay objections to nine of the exhibits offered in support of Appellees' motion for summary judgment. (16:6-9) The District Court cited only two of these nine exhibits in its Amended Order granting Appellees' motion for summary judgment, implicitly overruling Defendants' objections to those exhibits. (T80, 85)

D. Scope of Review

Summary judgment should be granted "when the pleadings and evidence admitted at the hearing disclose that there is no genuine issue as to any material fact or as to the ultimate inferences that may be drawn from those facts and that the moving party is entitled to judgment as a matter of law." *Doty* v. *W. Gate Bank, Inc.*, 292 Neb. 787, 792-93 (2016) (citing *Bd. of Trs.* v. *City of Omaha*, 289 Neb. 993, 999 (2015)). "In reviewing a summary judgment, an appellate court views the evidence in a light most favorable to the party against whom the judgment is granted and gives such party the benefit of all reasonable inferences deducible from the evidence." *Id.* at 793.

Summary judgment is an appropriate mechanism for resolving constitutional claims. *See, e.g., Citizens of Decatur for Equal Educ.* v. *Lyons-Decatur Sch. Dist.*, 274 Neb. 278, 280-304 (2007) (affirming district court's grant of summary judgment relating to equal protection, procedural due process, and substantive due process claims). Questions of law are reviewed *de novo* by appellate courts. *See id.* at 286.

"Apart from rulings under the residual hearsay exception," appellate courts "review for clear error the factual findings underpinning a trial court's hearsay ruling and review de novo the court's ultimate determination to admit evidence over a hearsay objection or exclude evidence on hearsay grounds." *Arens* v. *NEBCO, Inc*, 291 Neb. 834, 852-53 (2015).

"Erroneous admission of evidence is harmless error and does not require reversal if the evidence erroneously admitted is cumulative and other relevant evidence properly admitted, or admitted without objection, supports the finding of the trier of fact." *State* v. *Morris*, 251 Neb. 23, 34 (1996)). Evidence is cumulative if it tends "to prove the same point to which other evidence has been offered." *Id.*

"When a Nebraska Evidence Rule is substantially similar to a corresponding federal rule of evidence, Nebraska courts may look to federal decisions interpreting the corresponding federal rule for guidance in construing the Nebraska rule." *State* v. *Draganescu*, 276 Neb. 448, 470-471 (2008).

PROPOSITIONS OF LAW

I.

Summary judgment is proper when the pleadings and evidence admitted at the hearing disclose that there is no genuine issue as to any material fact or as to the ultimate inferences that may be drawn from those facts and that the moving party is entitled to judgment as a matter of law.

Doty v. *W. Gate Bank, Inc.*, 292 Neb. 787, 792-93 (2016) (citing *Bd. of Trs.* v. *City of Omaha*, 289 Neb. 993, 999 (2015)).

II.

Under even the most lenient level of equal protection scrutiny, classifications made by the Legislature must rest upon real differences of situations and circumstances surrounding the members of the class relative to the subject of the legislation which render appropriate its enactment.

Snyder v. *IBP, Inc.*, 229 Neb. 224, 227 (1988) (citing *State ex rel. Douglas* v. *Nebraska Mortgage Finance Fund*, 204 Neb. 445 (1979); *Prendergast* v. *Nelson*, 199 Neb. 97 (1977)).

III.

State actions that draw classifications of individuals based on sexual orientation are quasi-suspect, triggering heightened scrutiny under the federal Constitution.

SmithKline Beecham Corp. v. *Abbott Labs.*, 740 F.3d 471, 489 (9th Cir. 2014).

IV.

Under other state's constitutions, government actions that burden the fundamental rights of individuals to form a family trigger heightened constitutional scrutiny.

Arkansas Dep't of Human Servs. v. *Cole*, 380 S.W.3d 429, 437 (Ark. 2011) (applying the Arkansas State Constitution).

V.

When the government erects a barrier that makes it more difficult for members of one group to obtain a benefit than it is for members of another group, a member of the former group seeking to challenge the barrier need not allege that he would have obtained the benefit but for the barrier in order to establish standing. The "injury in fact" in an equal protection case such as this is the denial of equal treatment resulting from the imposition of the barrier, and injury is not dependent on the ultimate inability to obtain the benefit.

Ne. Fla. Chapter of Assoc. Gen. Contractors of Am. v. *City of Jacksonville, Fla.* 508 U.S. 656, 666 (1993) (citing *Turner v. Fouche*, 396 U.S. 346, 362 (1970)).

VI.

The right to equal treatment guaranteed by the Constitution is a right distinct from any substantive rights to the benefits denied the party discriminated against. Discrimination itself, by perpetuating "archaic and stereotypic notions" or by stigmatizing members of the disfavored group as "innately inferior" and therefore as less worthy participants in the political community, can cause serious non-economic addressable injuries to those persons who are personally denied equal treatment solely because of their membership in a disfavored group.

Heckler v. *Mathews*, 465 U.S. 728, 739-40 (1984) (quoting *Miss. Univ. for Women* v. *Hogan*, 458 U.S. 718, 725 (1982)).

VII.

A case becomes moot when the issues initially presented in litigation cease to exist or the litigants lack a legally cognizable interest in the outcome of litigation. The public interest exception to the rule precluding consideration of moot issues, however, requires a consideration of the public or private nature of the question presented, the desirability of an authoritative adjudication to further inform public officials of their constitutional duties, and the likelihood of future recurrence of the same or similar problem.

State v. *Woods*, 255 Neb. 755, 762 (1998) (citing *DeCoste* v. *City of Wahoo*, 255 Neb. 266 (1998); *State ex rel. Shepherd* v. *Neb. Equal Op. Comm.*, 251 Neb. 517 (1997)).

VIII.

Hearsay is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted. Hearsay is not admissible unless otherwise provided for under the Nebraska Rules of Evidence or elsewhere.

State v. *Castillo-Zamora*, 289 Neb. 382, 392 (2014).

Neb. Rev. Stat. §§ 27-801, 802.

IX.

Erroneous admission of evidence is harmless error and does not require reversal if the evidence erroneously admitted is cumulative and other relevant evidence properly admitted, or admitted without objection, supports the finding of the trier of fact. Cumulative evidence means evidence tending to prove the same point to which other evidence has been offered. If other evidence in the record clearly establishes the facts supported by inadmissible evidence, the court neither abused its discretion nor prejudiced the defendant by receiving inadmissible evidence.

State v. *Morris*, 251 Neb. 23, 34 (1996).

State v. *Lenz*, 227 Neb. 692, 697 (1988).

X.

Questions generally are not intended as assertions, and therefore cannot constitute hearsay.

United States v. *Thomas*, 451 F.3d 543, 548 (8th Cir. 2006) (citing *United States* v. *Bellomo*, 176 F.3d 580, 586 (2d Cir. 1999), *cert. denied*, 528 U.S. 987 (1999); *United States* v. *Oguns*, 921 F.2d 442, 449 (2d Cir. 1990); *United States* v. *Lewis*, 902 F.2d 1176, 1179 (5th Cir. 1990); *United States* v. *Vest*, 842 F.2d 1319, 1330 (1st Cir. 1988), *cert. denied*, 488 U.S. 965 (1988)).

XI.

When a Nebraska Evidence Rule is substantially similar to a corresponding federal rule of evidence, Nebraska courts may look to federal decisions interpreting the corresponding federal rule for guidance in construing the Nebraska rule.

State v. *Draganescu*, 276 Neb. 448, 470-71 (2008) (citing *State* v. *Morrow*, 273 Neb. 592 (2007)).

XII.

A litigant's failure to make a timely objection waives the right to assert prejudicial error on appeal.

Hass v. *Neth*, 265 Neb. 321, 333 (2003) (citing *Davis* v. *Wimes*, 263 Neb. 504 (2002)).

XIII.

When an attorney fee is authorized, the amount of the fee is addressed to the discretion of the trial court, whose ruling will not be disturbed on appeal in the absence of an abuse of discretion. To determine proper and reasonable fees, it is necessary to consider the

nature of the litigation, the time and labor required, the novelty and difficulty of the questions raised, the skill required to properly conduct the case, the responsibility assumed, the care and diligence exhibited, the result of the suit, the character and standing of the attorney, and the customary charges of the bar for similar services. Such an inquiry necessarily contemplates that some evidentiary showing will be made.

Winter v. *Dep't of Motor Vehicles*, 257 Neb. 28, 34-35 (1999) (citing *Schirber* v. *State*, 254 Neb. 1002 (1998)).

XIV.

It is not strictly necessary for an applicant for attorney fees to introduce specific evidence to support an award of attorney fees, but before an award of attorney fees will be affirmed upon appeal, the record must contain the information that shows that the award is within the range of the trial court's discretion. If the contents of the record—*i.e.*, pleadings, introduced discovery documents, time spent in court as shown by the court record, and doubtless many other items which will support the award—do show the allowed fee not to be unreasonable, then that fee would not be untenable or an abuse of discretion.

Boamah-Wiafe v. *Rashleigh*, 9 Neb. App. 503, 519 (Neb. App. Ct. 2000).

XV.

A plaintiff prevails when actual relief on the merits of his claim materially alters the legal relationship between the parties by modifying the defendant's behavior in a way that directly benefits the plaintiff. An injunction or declaratory judgment, like a damages award, will usually satisfy that test.

Lefemine v. *Wideman*, 133 S. Ct. 9, 11 (2012).

Melanie M. v. *Winterer*, 290 Neb. 764, 777 (2015).

XVI.

When a motion for attorney fees under § 25–824 is made prior to the judgment of the court in which the attorney's services were rendered, the judgment will not become final and appealable until the court has ruled upon that motion.

Murry v. *Stine*, 291 Neb. 125, 130 (2015).

STATEMENT OF FACTS

1. Plaintiffs are three same-sex couples who seek to apply in Nebraska to be foster parents under the same process applied to heterosexual couples. (T11-15) (Complaint and Praecipe ¶¶ 41-70) The District Court found that all three couples have been in a committed relationship for at least eight years. (T81-82)

2. The Nebraska Department of Health and Human Services ("DHHS") has "is the legal guardian of all children committed to it" and "evaluates and licenses foster homes and places children with adoptive families." (T79-80 (citing Neb. Rev. Stat. § 43-905)) Within DHHS, the Children & Family Services division "is responsible for foster care and adoption services in Nebraska." (T16, ¶74)

3. The District Court found that Plaintiffs-Appellees Greg and Stillman Stewart contacted DHHS in October 2012 to inquire about a foster license, and DHHS informed them that they were "prohibited from obtaining a foster care license pursuant to DHHS policy." (T82) The District Court also found that Plaintiffs-Appellees Todd Vesely and Joel Busch met several requirements to become foster parents in 2008, but in 2010 received a letter from DHHS informing them that they were "categorically barred from obtaining a foster home license pursuant to DHHS policy." (T82)

A. The Memorandum

4. The Memorandum was issued on January 23, 1995 by the then-Director of the Nebraska Department of Social Services ("NDSS"). (T80) The Memorandum has never been repealed or abrogated. (T49, ¶ 19); (T80-81)

5. By its express terms, the Memorandum prohibits DHHS from issuing foster home licenses to, or placing children in foster homes with, either: (1) "persons who identify themselves as homosexuals" or (2) persons who are "unrelated, unmarried adults residing together." (E19,1:14-18, 253); *see also* (T80) Because individuals must be licensed foster parents before they may adopt children from state care, the Memorandum also categorically prohibits gay and lesbian individuals and couples from adopting non-kin children from state custody. (*Id.*); (E9, 39:14-18, 166)

6. The District Court found that the Memorandum is the only formal writing purporting to describe current DHHS policy with respect to licensing of or placements of children with applicants who live with a same-sex partner and/or identify as homosexual. (T80-81)

7. In 2014, then-Director of DHHS Pristow stated at his deposition that *no* Nebraska state interest is advanced by treating gay or lesbian persons differently from heterosexual persons in decisions involving licensing or placement of children in foster or adoptive homes. (E6,11-12:14-18, 104) He also testified that no child welfare interest is advanced by unequal treatment of gay and lesbian persons in decisions regarding licensing or placement in foster or adoptive homes. (E6,10-11, 13-16:14-18, 104-05); *see also* (E6,19-20:14-18, 106) ("nothing is advanced" by having a separate process for gay and lesbian applicants). Other DHHS administrators agreed. (E11,170-171:14-18, 189); (E10,80:14-18, 183); (E9,68-69:14-18, 171); (E8, 63:14-18,

148); (E14,52:14-18, 214); (E15,79:14-18, 223); (E13,97-98:14-18, 204-205); (E12,75-76:14-18, 195)

8. Then-DHHS CEO Kerry Winterer testified at deposition that a person's sexual orientation is irrelevant to whether they would make a suitable foster or adoptive parent. (E7,49, 61-62:14-18, 120, 122) No record evidence suggested otherwise, although some lower-level DHHS employees repeatedly expressed reluctance to place children with gay or lesbian persons and touted the policy expressed in the Memorandum. (E10, 30:23-34:24, 67:21-68:2); (E8, 90:24-92:15); (E14, 53:3-10); (E12, 76:25-77:6); (E16, 158:4-162:6); (E29,1:14-18, 291); (E30, 1-2:14-18, 292); (E33,1-3:14-18, 298)

9. Gay and lesbian persons can be equally suitable foster and adoptive parents as heterosexual individuals or couples. (E6,55-56:14-18, 113) ("[T]here is no reason for [gay and lesbian people] not to be foster parents."); (E7,109:14-18, 132); (E11,172:14-18, 189); (E10,86:14-18, 184); (E16,239:14-18, 246) Indeed, then-Director Pristow acknowledged a consensus in the scientific literature that there is no difference in outcomes for children placed with same-sex couples as compared to children placed with heterosexual couples. (E6,55-56:14-18, 113) DHHS was aware of no basis to disagree with research showing that there is no difference in outcome for children placed with same-sex couples as compared to children placed with heterosexual couples. (E6,56:14-18, 113); (E7,97-98:14-18, 130) And DHHS CEO Winterer agreed that in some cases, an individual who lives with a same-sex partner and/or identifies as homosexual may be the best placement match available for a particular child. (E7,111, 142-143:14-18, 132, 136)

10. Representatives of DHHS and CFS admitted that the policy dictated by the Memorandum does not promote or protect the well-being of children in any way. (E11,171:14-

18, 189); (E10,80:14-18, 183); (E9,128:14-18, ; (E8,119:14-18, 154); (E13,111:14-18, 205) They also testified that a policy that discourages persons who identify as homosexual from applying to foster or adopt would be contrary to the best interests of children. (E6,42:14-18, 111); (E7,105:14-18, 131); (E9,144-45:14-18, 167); (E8,125:14-18)

11. When an administrative memorandum setting forth DHHS policy should no longer be followed, DHHS typically rescinds or amends the administrative memorandum, informs DHHS staff in writing of the change, and removes the rescinded administrative memorandum from the DHHS website. (E9,88:14-18, 174); (E16,159-60:14-18, 240)

12. Director Pristow testified that Memorandum #1-95 was retained in training materials on the DHHS website. (E6,40:14-18, 109) Mr. Winterer also testified that the Memorandum had neither been rescinded nor had ceased being used in training DHHS employees. (E7,66-67:14-18, 123)

13. The District Court found that since the time of the Memorandum's enactment, despite being removed from the DHHS website toward the end of the litigation in the District Court, in February 2015, other steps to in any way repudiate the Memorandum had not been taken, and thus the Memorandum has never been rescinded or replaced. *See* (T80) *see also* (T84) ("Despite the direct contradiction between what Defendants assert is the current practice of DHHS and the policy outlined in Memo #1-95, Defendants have declined to formally rescind or replace Memo #1-95.") Defendants provided no evidence to the contrary.

14. At summary judgment, Plaintiffs-Appellees presented "undisputed evidence that confusion about whether Memo #1-95 is still the official policy of DHHS persisted throughout the department." (T84) That undisputed evidence included testimony and e-mails evidencing a

belief by DHHS employees involved in the child placement process that the Memorandum was still in full effect and must be followed. *See* (T84-85)

15. Officials acknowledged that the presence of the Memorandum on DHHS's website until February 2015, and the failure to rescind that policy, could deter lesbian and gay individuals and couples from applying to serve as foster or adoptive parents. (E6,30, 31, 33, 39-40, 42:14-18, 108-09); (E7,119-120:14-18, 134-35); (E10,91:14-18, 185) ("Because the existing policy, Memorandum 1-95, is on the public website, it could have a chilling effect in terms of who is willing to foster."); (E11,175-76:14-18, 190); (E9,145:14-18, ; (E8,125-126, 136-137:14-18, ; (E14,67-69:14-18, 217); (E13,49, 114:14-18, 201, 206); (E15,93-94:14-18, 225-26); (E12,84-85:14-18, 197); (E16,242-46:14-18, 247-48)

16. The Memorandum has been and continues to be a barrier to families becoming foster parents. *See* (E6,42:14-18, 111); (E7,119-20:14-18, 134-35); (E10,91, 102:14-18, 185, 187); (E8,125-26, 136-37, 140-41:14-18, 155, 156)

17. For instance, members of the public are under the impression that state policy bars placement of children with gay and lesbian individuals and couples. (E44,220:14-18, 323) ("[T]he school in Stuart is upset that we placed [a child] with [a same-sex couple] in Stuart. They said that we are breaking the law by placing there and the principal is implying that he is going to start calling central office and also media etc."); (E45,419-20:14-18, 324-25) (describing a caller who had read an article about a policy preventing same-sex couples from serving as foster parents and had threatened to call news stations about children being placed in same-sex foster homes)

B. The Pristow Procedure

18. In the summer of 2012, then-Director Pristow verbally informed a few DHHS employees—the DHHS Service Area Administrators and the Deputy Director—that DHHS may

place children with individuals who live with a same-sex partner and/or identify as homosexual, provided that such placements are personally approved by the Director of CFS (the "Pristow Procedure"). (E6,33-35:14-18, 108, 110); (E8,85-86:14-18, 151-52); (E14,21:14-18, 209) No such approval is required of heterosexual applicants. *See id.*; (T81)

19. The Pristow Procedure is not based on any concern about the suitability of such individuals to be foster or adoptive parents or the well-being of the children in their care. (E6,19-20:14-18, 106); *see also* (E6,19-22:14-18, 106-07); (E11,172-73:14-18, 189); (E10,86-87:14-18, 184); (E9,68:14-18, 171); (E8,61-62:14-18, 147-48); (E14,51-52:14-18, 214); (E15,80:14-18, 223); (E13,96:14-18, 203); (E12,75:14-18, 195); (E16,240:14-18, 246)

20. The District Court found that under the Pristow Procedure, DHHS requires only two tiers of review for approval of foster care placements with married, opposite-sex couples or single individuals who do not identify as homosexual (and are not convicted felons). (T81) Unrelated and unmarried adults who are not a same-sex couple and convicted felons receive four tiers of review. *Id.* By contrast, the District Court found that the Pristow Procedure requires *five* tiers of review for approval of foster care placements with gay or lesbian individuals and couples. *Id.* If a gay or lesbian applicant fails any one of the first four levels of review, no review by the Director is available. (T89); (E6,17:14-18, 105) In other words, the additional levels of review to which gay and lesbian applicants are subjected are provided only to applicants *approved*, not denied, at the level below. Thus, the additional levels of review can only deny a gay or lesbian applicant who, if subjected to the same review process as heterosexuals, would have been approved.

21. Despite the implementation of the Pristow Procedure, DHHS employees who have expressed personal objections to placing children with gay people have used failure by

DHHS to formally rescind the Memorandum as a means to exclude potential gay and lesbian applicants. (E16,63-64, 66, 68, 175-76, 220-21:14-18, 233, 234, 242, 245); (E32,286:14-18, 296) (On November 4, 2012 Marylyn Christenson sent Kathleen Stolz an emailing saying "I assumed [the Policy] was still in force since it's on the website."); (E29,281:14-18, 291) (On November 27, 2012, Cynthia Bremer sent Mary Christenson an email saying "I would just make her aware that memo which clarifies the policy has not been rescinded so she is aware it is basically against policy at this point."); (E30,282:14-18, 292) (On November 21, 2012, Marylyn Christenson sent an email to KaCee Zimmerman saying "Perhaps no one has clearly explained to me how we can license [same-sex couple's] home when this memo is still in effect."); (E33,302:14-18, 298) (On June 29, 2012, Bob Furr sent an email to Marylyn Christenson saying "[w]hile I may agree that the 1-95 policy memo needs to be changed I and any contractor needs to follow that memo until that policy is changed.")

22. No process has been put in place to ensure that all DHHS staff, including new hires, are informed of the Pristow Procedure. (E6,38-39. 43:14-18, 109, 111); (E7,68-70:14-18, 124); (E8,84:14-18, 151); (E14,26-27:14-18, 211); (E12,42:14-18, 194)

23. The next Director of DHHS could decide to discontinue the Pristow Procedure and return to applying the Memorandum as written, given that implementation of the Memorandum can change with new DHHS leadership. *See* (E16,40-43:14-18, 231-32)

C. Nebraska Has a Serious Need for More Foster and Adoptive Parents.

24. DHHS has a serious need for additional foster and adoptive parents. (E6,45:14-18, 111); (E7,8-9:14-18, 115); (E11,173:14-18, 189); (E10,87:14-18, 184); (E9,28:14-18, 164); (E8,10:14-18, 138); (E14,65:14-18, 216); (E15,80, 82-83:14-18, 223-224); (E13,111:14-18, 205); (E12,82:14-18, 197); (E16,240:14-18. 246)

25. As a result of DHHS's need for additional foster and adoptive parents, some children in state custody will continue to have damaging multiple temporary placements before a suitable permanent home is found; some children will continue to be separated from their siblings; some children will continue to be placed in emergency shelters or group homes; and some children will continue to be unable to be adopted at all and will instead reach the age of majority without ever being part of a permanent family. (E11,173-74:14-18, 189-90); (E10,87-88:14-18, 184); (E9,26-27. 28-30:14-18, 164-65); (E8,10-17:14-18, 138-39); (E14,65-67:14-18, 216-17); (E13,111-12:14-18, 205); (E12,82-83:14-18, 197); (E16,240-42:14-18. 246-47)

26. A June 15, 2013 report by Nebraska's Foster Care Review Office ("FCRO") recognized multiple deficiencies in the Nebraska foster care system and emphasized multiple areas of the foster care system "needing improvement," including that: (1) the "[l]ength of time between removal from the home and permanency remains an issue"; (2) "[t]he rate of re-entry into out-of-home care needs to be reduced"; and (3) "[t]he number of placement changes need[s] to be reduced." (E46,2:14-18, 327)

27. From July 1, 2013 to June 30, 2014, 5,466 Nebraska children were in out-of-home care for some portion of their lives. (E47,1:14-18, 356) (specifying that out-of-home care includes "foster family homes, foster homes of relatives, group homes, emergency shelters. . . . [and] youth rehabilitation facilities")

28. From July 1, 2013 to June 30, 2014, the average number of days Nebraska children had been in out-of-home care (excluding time during prior removals) was 416 days, with a median of 249 days. (E47,61:14-18, 412)

29. Of the 3,029 Nebraska children in out-of-home care as of June 30, 2014, 48% had been placed in out-of-home care for longer than a year, 23% had been in out-of-home care for

longer than two years, and 12% had been in out-of-home care for longer than three years. (E47,60:14-18, 411)

30. As of June 30, 2014, 33% of the children in out-of-home care had been through four or more placements. (E47,91:14-18, 438)

31. Children who experience four or more out-of-home placements suffer permanent, negative consequences, including problems with attachments and lifelong trauma. (E8,16-17:14-18, 139); *see also* (E47,89:14-18, 436) ("National research indicates that children experiencing four or more placements over their lifetime are likely to be permanently damaged by the instability and trauma of broken attachments.")

SUMMARY OF THE ARGUMENT

This appeal does not involve any disagreement about whether the Constitution permits the State to discriminate against lesbian and gay prospective foster or adoptive parents. Appellants admit that it does not, conceding that *no* Nebraska state interest is advanced by treating gay or lesbian persons differently from heterosexual persons in decisions involving licensing or placement of children in foster or adoptive homes. Appellants instead simply claim they are not discriminating, and ask this Court to disregard the District Court's findings of fact to the contrary.

In its effort to conjure up a question of material fact, Appellants argue that the policy of DHHS regarding gay and lesbian couples exists in a twilight zone, on the one hand "never adopted as a regulation" (Brief of Defendants-Appellants ("Defs.' Br.") at 17) and promulgated by "a state agency that no longer exists" (Defs.' Br. at 16), while simultaneously, on the other hand, purportedly repealed in 2012 and replaced by another procedure, which has even more uncertain provenance and longevity.

After the District Court carefully parsed what Appellants concede was a "plethora of evidence" (Defs. Br. at 4)—including sworn testimony and documents, the vast majority of which were undisputed—it determined that the reality was far simpler. As for the admitted facially discriminatory policy expressed in the Memorandum: regardless of whether or not verbally repealed, that policy is still formally in place and still perceived by many DHHS agents to be that agency's actual policy. Despite multiple invitations by Plaintiffs and the District Court to formally declare the Memorandum repealed, Defendants refused, and thus themselves required an adjudication on the issues.

As for the unwritten "Pristow Procedure," revealed to only a handful of DHHS employees, it is *also* discriminatory on its face—in sum, gay and lesbian applicants require approval at five levels of DHHS application review; with limited exceptions, heterosexual applicants need to be approved at only two levels. This convergence allowed the District Court to conclude that any dispute about the "true" policy of DHHS was academic, and to enjoin discrimination of both the formal policy expressed in the Memorandum and the Pristow Procedure at the same time.

The State also asserts that Plaintiffs-Appellees lacked standing to bring this suit because they "simply did not apply for a foster parent license." (Defs.' Br. at 22.) In the State's view, Plaintiffs-Appellants "have an adequate remedy at law" to achieve the relief they seek (*id.*), if only they had had been willing to subject themselves to the discriminatory procedures at DHHS to hopefully reach that outcome. This argument, too, fails. As the District Court correctly concluded, the Equal Protection and Due Process Clauses prohibit disparate treatment in procedures, without a rational basis, as well as in outcomes. Moreover, four of the six plaintiffs were specifically told by DHHS that their sexual orientations made them ineligible.

Finally, Defendants-Appellants argue that certain exhibits were improperly admitted over hearsay objections, and that attorneys' fees were improperly awarded due to a procedural oversight. These arguments are meritless.

ARGUMENT

I. THE DISTRICT COURT CORRECTLY FOUND NO GENUINE ISSUES OF MATERIAL FACT AS TO THE EXISTENCE OF THE STATE'S DISCRIMINATORY POLICY AND THE HARMS PLAINTIFFS SUFFERED AS A RESULT.

Appellants' second, third, and fourth purported assignments of error assert that the District Court overlooked genuine issues of fact and acted even though Plaintiffs-Appellees lacked standing and their claims were moot. For the reasons described below, Appellants are wrong on all counts: There were no genuine issues of fact—as Appellants in fact admitted by moving for summary judgment themselves—either as to the continuing effects of the Memorandum as a *policy*, or as to DHHS's actual *practices*, both of which were unconstitutional and entitled Appellees to a judgment and injunction. There was similarly no question that those practices gave rise to past and continuing legally cognizable harms, refuting Appellees' arguments on standing and mootness. Thus, summary judgment was appropriate and the District Court's Amended Order should be affirmed. *See Doty* v. *W. Gate Bank, Inc.*, 292 Neb. 787, 792-793 (2016) (citing *Bd. of Trs.* v. *City of Omaha*, 289 Neb. 993, 999 (2015)) (summary judgment should be granted "when the pleadings and evidence admitted at the hearing disclose that there is no genuine issue as to any material fact or as to the ultimate inferences that may be drawn from those facts and that the moving party is entitled to judgment as a matter of law.").

A. Appellants' Assertion that the Memorandum Has "Ceased To Be the Policy of DHHS" Is Contradicted by the Undisputed Factual Record.

Appellants claim that "Administrative Memo #1-95 had ceased to be the policy of DHHS at least by the summer of 2012" (Defs.' Br. at 15), and suggest there is a dispute of fact

between the parties as to whether the Memorandum is still the "policy" of the DHHS. (Defs.' Br. at 25-26.) That is a distortion of the undisputed record that was before the District Court. Indeed, in the District Court, Appellants formally *admitted* "that Administrative Memo #1-95 has not been rescinded or replaced" (T49, ¶ 19)—a necessary concession in light of the undisputed record summarized below.

1. The District Court correctly found no genuine factual dispute that the Memorandum has not been rescinded; it remains entrenched in DHHS practice and is believed by at least some DHHS employees to state current policy.

The undisputed record showed that the Nebraska Department of Social Services, now part of DHHS, issued the Memorandum on January 23, 1995 (E19,1:14-18, 253; Defs.' Br. at 16), and that the Memorandum remains undisturbed by any rescission. (T49, ¶ 19); (T80-81); (E28,1-2:14-18, 289) Appellees do not deny that the Memorandum was and is discriminatory on its face, in that it prohibits DHHS from issuing foster home licenses to, or placing children in foster homes with, either: (1) "persons who identify themselves as homosexuals" or (2) persons who are "unrelated, unmarried adults residing together." (E19,1:14-18, 253) The District Court found the Memorandum "on its face [] violates the Equal Protection and Due Process Clauses," citing the Supreme Court's recent decision in *Obergefell* v. *Hodges*, 135 S. Ct. 2584 (2015). (T88) *See also Snyder* v. *IBP, Inc.*, 229 Neb. 224, 227 (1988) (citing *State ex rel. Douglas* v. *Nebraska Mortgage Finance Fund*, 204 Neb. 445 (1979); *Prendergast* v. *Nelson*, 199 Neb. 97 (1977)) (statutes which make artificial and baseless classifications violate Neb. Const. art. III, § 18; classifications must rest upon real differences relative to the subject of the legislation).

Normally, when an administrative memorandum setting forth DHHS policy should no longer be followed by DHHS staff, the agency rescinds or amends the administrative memorandum, informs DHHS staff in writing of the change, and removes the rescinded

administrative memorandum from the website. (E9,88:14-18, 174; E16,159-160:14-18, 240) It is undisputed that DHHS has not followed that approach with the Memorandum.

a. Director Pristow's 2012 Meeting with Certain Staff

To support their claim that the Memorandum nevertheless "ceased to be the policy of "DHHS," Appellants presumably rely on an in-person meeting between DHHS Director Pristow and DHHS Deputy Director and Service Area Administrators in the summer of 2012, at which he issued verbal instructions regarding gay and lesbian applicants never committed to writing by DHHS. (E6,33, 34-35:14-18, 108, 110) Specifically, Director Pristow informed the Service Area Administrators that he would need to personally approve placements with individuals that were identified as gay or lesbian, suggesting that such placements were in fact possible if an applicant was approved at all levels of review. (E6,34-35:14-18, 110) These verbal instructions became the ad-hoc "Pristow Procedure" described in more detail *infra* in Part I.B, at pages 26-31. Director Pristow did not review denials of gay or lesbian applicants.

As described below, the extent to which these verbal instructions repudiated the Memorandum was entirely uncertain and, precisely for that reason, DHHS's discriminatory policy remained in effect.

Director Pristow testified on September 25, 2014, more than two years after giving his verbal instructions in the summer of 2012, that the Memorandum"currently is included in the packet of administrative memos that is given to new trainees as they enter into our system," and "as part of their training." (E6,30, 31:14-18, 108); *see also* (E7,67:14-18, 123) Director Pristow further explained that nothing in the training materials states that the Memorandum is no longer DHHS policy. (E6,31, 39:14-18, 108-109) Director Pristow said that he was not aware of any other instances where a policy that was, in fact, supposedly not a policy,

was conveyed to new employees as part of their training and retained on the DHHS website. (E6,40-41:14-18, 109)

Director Pristow also testified that he did not issue, and was not aware of, any written document reflecting his verbal instructions to the Service Area Administrators. (E6,34:14-18, 110) Director Pristow's verbal instructions were limited to the small group of individuals he met with in the summer of 2012. Appellants provided no evidence that Pristow's verbal instructions were circulated beyond that small group of administrators. As of September 2014, four new Service Area Administrators had been hired after Director Pristow issued his verbal instructions in 2012. (E6,38:14-18, 109) Director Pristow testified that he was sure his "general intent and theme of what [he] wanted to have happen . . . was conveyed through the deputy and in some manner or form as we went through the years," but he conceded that he had no subsequent discussions with new Service Area Administrators after issuing his instructions in 2012, and that the training for new Service Area Administrators does not directly address his instructions contradicting the Memorandum. (E638-39:14-18, 109) In light of these facts, Director Pristow's one-time instructions to a limited audience contradicting the Memorandum fell far short of repealing the Memorandum across DHHS.

Likewise, the CEO of DHHS, Kerry Winterer, testified that he was not aware of any explicit effort to disseminate the Pristow Procedure, but "assumed" that others were aware of it. (E7,68-69:14-18, 124) While he testified that he believed new staff were informed of DHHS' current practices during training, and that DHHS policy on the issues identified in the Memorandum would be communicated from the Director to service area administrators, supervisors, and case workers (E7,67-69:14-18, 123-24), he also admitted that this was merely

an assumption and that he was not aware of any instances of any updated DHHS "policy" on these issues actually being communicated. *Id.*

b. The DHHS Website

Defendants-Appellants also point to the elimination of the Memorandum from the DHHS website approximately two years after this litigation commenced as evidence of a question of fact about current "policy." But the undisputed facts indicate that any removal was not a "repeal," and was ineffective, both prior and subsequent to the removal of the Memorandum from the website.

Prior to 2015, the Memorandum had remained on the DHHS website for years after Director Pristow's verbal instruction, without any indication that it was no longer DHHS policy. (E6,30-31, 39-40:14-18, 108-109) Director Pristow admitted at his deposition that the memorandum's presence on the website during that time had the potential to discourage gay and lesbian individuals from applying to adopt or become foster parents. (E6,42:14-18, 111)

The Memorandum was not removed from the DHHS website until on or around February 20, 2015, while Defendants' motion for summary judgment was pending before the District Court. (E60,2:17, 549) (T80) Even today, the Memorandum is still not included on the website's list of policy memoranda that have been replaced or rescinded. (E28,1-2:14-18, 289); Nebraska DHHS, *Archived Administrative & Policy Memos*, Division of Children & Family Services, http://dhhs.ne.gov/children_family_services/Pages/jus_am_archive.aspx (last visited June 1, 2016)

Appellants cite no support for the proposition that removal from a website constitutes repeal of the policy expressed in the Memorandum. The belated website removal is not sufficient to create a genuine issue of material fact as to the continuing discriminatory effects of the policy, especially in light of the testimony that the Memorandum is included in training

materials, the agency's failure to list the policy among the memoranda that have been repealed or replaced, Director Pristow's failure to continue training new Service Area Administrators on his contradicting instructions, and the record of DHHS staff and affiliate confusion over the Memorandum's status. *See infra* at Part I.A.2., pages 24-26.

2. The District Court correctly found no genuine factual dispute that the Memorandum continues to cause confusion and discrimination.

The District Court found that "Plaintiffs have produced undisputed evidence that confusion about whether Memo # 1-95 is still the official policy of DHHS persisted throughout the department at the time this lawsuit was filed," and that "[e]mails between several employees of DHHS and outside contractors demonstrate that many people within the department were confused about the status of Memo #1-95 even after Director Pristow states that he directed Service Area Administrators to stop enforcing the policy." (T84)

In fact, the evidence before the District Court on this point was overwhelming. In its Order, the District Court quoted the following e-mails involving DHHS employees in 2012 and 2013 (T84-85), which stated:

- "I would just make her aware that the [Memorandum] which clarifies the policy has not been rescinded so she is aware it is basically against policy at this point." (E29,1:14-18, 291)
- "Perhaps no one has clearly explained to me how we can license a [same-sex couple's] home when this memo is still in effect." (E30,1:14-18, 292)
- "Oh. I assumed [the Memorandum] was still in force since it's on the website." (E32,1:14-18, 296)

- "While I may agree that the 1-95 policy memo needs to be changed I and any contractor needs to follow that memo until that policy is changed." (E33,1:14-18, 298)
- "Is [the Memorandum] still the current policy or has it been rescinded?" (E34,1:14-18, 301)
- "This [Memorandum] is still active and has not been rescinded. An exception to the memo must be granted by Director Pristow." (E36,2:14-18, 304)
- "Okay Nathan, be patient with me as I try to get clarity on this Admin [Memorandum] on behalf of my staff." (E36,1-2:14-18, 304)
- "Can we have a brief time on Thursday to agree on whether or not unmarried unrelated adult exceptions are to come to the central office. We are doing this differently across the state. We should only need a few minutes. The current policy memo is not clear on this issue." (E38,1:14-18, 309)
- "I am writing to request clarification . . . The memo from the 90's seems to be in affect [sic], restricting agencies and the State, to approve/license homes of same-sex couples ... I understand this is not policy but has been a barrier to many families becoming foster parents, as the memo seems to be in full affect." (E42,1:14-18, 318)

Appellants attempt to minimize this uncontradicted evidence by characterizing the confused employees as "low level." (Defs.' Br. at 22.) But that argument fails to appreciate that a constitutional injury remains the same regardless of whether it is committed by a "high-level" or "low-level" employee. In fact, the "low level" DHHS employees and affiliates confused by DHHS's failure to repeal the Memorandum effectively are precisely the employees who are most likely to interact with the public, provide information, and process applications in the first

instance. Absent clear guidance, proper training, and effective supervision, "low level" staff and affiliates will continue to enforce DHHS' discriminatory policy.

In summary, the undisputed record shows—and Appellants admit (T49, ¶ 19)—that the Memorandum has not been repealed. Appellants' contention that the Memorandum is no longer DHHS policy is completely inconsistent with the record, which shows that administrators believe the Memorandum is still included in DHHS training materials, that the Memorandum is not listed on the DHHS website among the administrative and policy memoranda that have been rescinded or replaced; that Director Pristow's contradicting instructions were not broadly distributed or formalized within DHHS; and that a number of DHHS staff and affiliates believe that the Memorandum reflects the current policy of the agency.

At oral argument on the cross-motions for summary judgment, the District Court repeatedly invited Appellants to formally declare the memorandum to be rescinded, and Appellants repeatedly declined that invitation. (*E.g.*, , (41:25-52:13) ("THE COURT: With that, is [the Memorandum] rescinded? MS. FORCH: It has been taken off the DHHS website. THE COURT: That's not my question. Is it rescinded as an operational memorandum of the Department of Health & Human Services, previously known as the Department of Social Services, when that was adopted, I believe in 1995? MS. FORCH: It has been off the website. There has been no formal rescission, but there is no reason to rescind it . . . .")

B. The Informal "Pristow Procedure" Also Treats Gay and Lesbian Applicants Unequally and Is Unconstitutional.

Appellants contend that the actual stated practice of DHHS at the time of this action is not to follow the Memorandum but to subject gay and lesbian applicants to three additional levels of DHHS approval not required of heterosexual applicants. Appellants do not justify or contest the discrimination; they simply ignore it. But the District Court properly held

on the basis of undisputed evidence that *both* the Memorandum *and* the Pristow Procedure discriminated against lesbian and gay people in violation of the federal Equal Protection and Due Process clauses, rendering any distinction between those two discriminatory policies legally irrelevant. (T87-90(citing *Obergefell* v. *Hodges*, 135 U.S. 2584 (2015)))

1. The District Court Correctly Found No Genuine Issue of Fact that the Pristow Procedure Explicitly Applied Greater Scrutiny to Gay or Lesbian Applicants Without Even a Rational Basis.

In both Orders, the District Court properly found no genuine dispute that "gay and lesbian couples are subject to five levels of review" before approval of an application or placement, while heterosexual individuals and couples were always subject to fewer levels of review. (T89) In the proceedings below, Appellants argued that this separate procedure for gay and lesbian applicants was not discriminatory because, at each level of additional review, Appellants purportedly applied the same "best interest of the child" standard that was applied for heterosexual applicants. (28:9-12, 24-25) But the District Court rejected this characterization, noting that subjecting one class of applicants to more review than another similarly situated class of applicants without any rational basis is inherently unequal treatment. (T88-90)

Having found that gay and lesbian couples were subjected to disparate treatment on the basis of sexual orientation, the District Court concluded that the Pristow Procedure did not survive rational basis review, as it serves no legitimate government interest. (T89-90) *See also* *Snyder* v. *IBP, Inc.*, 229 Neb. 224, 227 (1988) (a "classification must rest upon real differences of situations and circumstances surrounding the members of the class relative to the subject of the legislation which render appropriate it enactment"). Appellants admitted that subjecting gay and lesbian applicants to a separate review process serves no child welfare interests. (E6,11-12:14-18, 104) Appellants further acknowledged that gay and lesbian applicants are equally

qualified to parent foster children. (E6,55-56:14-18, 113); (E7,46-49:14-18, 119-120); (E7,108-109:14-18, 132)

Appellants only made one argument justifying the Pristow Procedure: that extra layers of review were needed to "prevent bias." (T89) The District Court properly dismissed this justification as "not logical": if Defendants-Appellants truly had "wanted to prevent bias against gay and lesbian couples, Defendants would review *denials* of placements rather than [reviewing only] *approvals* of placements." (T89 (emphases added)) Prevention of bias may be a legitimate government interest, but it is not one that could be rationally related to the Pristow Procedure, because the Procedure provides only additional opportunities for gay and lesbian applicants to be rejected, and no additional opportunity to be approved.

Because the Memorandum and the Pristow Procedure do not survive rational basis review, no further analysis was required by the District Court. However, even if the District Court had found that a rational basis for the Memorandum or Pristow Procedure did exist, because they condition the treatment of individuals based on sexual orientation, numerous federal and state courts would deem such classifications at least quasi-suspect, triggering heightened constitutional scrutiny. *See, e.g.*, *SmithKline Beecham Corp.* v. *Abbott Labs.*, 740 F.3d 471, 489 (9th Cir. 2014) ("We hold that heightened scrutiny applies to classifications based on sexual orientation . . . ."); *see also Arkansas Dep't of Human Servs.* v. *Cole*, 380 S.W.3d 429, 437 (Ark. 2011) (striking down law prohibiting foster licensure or adoption for individuals cohabiting outside of marriage because it substantially burdened plaintiff's fundamental right to intimate relationships under the Arkansas Constitution and thus was subject to heightened scrutiny).

2. Appellants Have Standing to Challenge Both the Memorandum and the Pristow Procedure.

In the proceedings below, Appellants argued that under the Pristow Procedure, DHHS had placed some children with gay or lesbian applicants, and thus the introduction of the Pristow Procedure had eliminated any harm to those or other gay and lesbian applicants. Appellants now rely on this point—that equal *outcomes* are theoretically possible—to assert that Appellees lack injury, and therefore standing.

Appellants' only argument regarding standing is that Plaintiffs-Appellees have failed to "present evidence of[] any injury that they have suffered." (Defs.' Br. at 29) That argument fundamentally misunderstands the nature of a constitutional injury. "When the government erects a barrier that makes it more difficult for members of one group to obtain a benefit than it is for members of another group . . . [t]he 'injury in fact' . . . is the denial of equal treatment resulting from the imposition of the barrier, not the ultimate inability to obtain the benefit." *Ne. Fla. Chapter of Assoc. Gen. Contractors of Am.* v. *City of Jacksonville, Fla.* 508 U.S. 656, 666 (1993) (citing *Turner* v. *Fouche*, 396 U.S. 346, 362 (1970)).

Thus, the very existence of the separate Pristow Procedure, requiring extra levels of approval, subjects gay and lesbian applicants to an extra opportunity to be rejected, and stigmatizes them by sending the message that, in the eyes of the State, they are inherently less qualified to be parents than other applicants. "[D]iscrimination itself, by perpetuating 'archaic and stereotypic notions' or by stigmatizing members of the disfavored group . . . can cause serious non-economic injuries to those persons who are personally denied equal treatment solely because of their membership in a disfavored group." *Heckler* v. *Mathews*, 465 U.S. 728, 739-40 (1984) (quoting *Miss. Univ. for Women* v. *Hogan*, 458 U.S. 718, 725 (1982)). The stigmatizing logic of the Pristow Procedure is obvious: single or married heterosexual individuals are favored

applicants in the eyes of the State, and so require only two levels of approval; unmarried heterosexual couples living together, and felons, are more problematic and less-favored applicants, and thus require four levels of approval; gay and lesbian applicants are the most problematic and least-favored applicants, and so require five levels of approval, including Director-level approval. In short, the stigma imparted by the Pristow Procedure is a "[d]ignitary wound[]." *Obergefell* v. *Hodges*, 135 S. Ct. 2584, 2606 (2015).

Even if a more concrete injury than a different, more burdensome—and stigmatizing—process were required to establish a legally cognizable injury (and it is not), such an injury was found by the District Court here. As noted above, the State did not contest and the District Court found that Greg and Stillman Stewart contacted DHHS months after the Pristow Procedure was implemented, and they were nevertheless told that"as a same-sex couple, they are prohibited from obtaining a foster care license *pursuant to DHHS policy*." (T81-82 (emphasis added).) That is injury enough.

3. Appellees' Case Was Not Moot.

Appellants argue that "[r]emoval of a memo that was not the State's policy from the website in 2015 mooted any related claims Appellees may have had." (Defs.' Br. at 30) The fact that the State claims to have removed a document from its website—but steadfastly refused to actually repeal the Memorandum (,41:20-42:18)—changes nothing. "[A] defendant claiming that its voluntary compliance moots a case bears the formidable burden of showing that it is absolutely clear the allegedly wrongful behavior could not reasonably be expected to recur." *Already, LLC v. Nike, Inc.*, 133 S. Ct. 721, 727 (2013)) (quoting *Friends of the Earth, Inc.* v. *Laidlaw Envtl. Servs. (TOC), Inc.*, 528 U.S. 167, 190 (2000)) (internal quotation marks omitted); *see also Campaign for S. Equal.* v. *Miss. Dep't of Human Servs.*, No. 3:15-cv-578 (DPJ-FKB), 2016 WL 1306202, at *8 (S.D. Miss. Mar. 31, 2016). Defendants have not introduced any

evidence that discrimination will not reoccur, let alone meeting their burden of proving it "absolutely clear[ly]." *Campaign for S. Equal.* v. *Miss. Dep't of Human Servs.*, 2016 WL 1306202, at *8. To the contrary, both the uncontested evidence that the Memorandum has not been repealed and the facial inequality of the Pristow Procedure demonstrated that, absent the Court's ruling and injunction, continued reoccurrence of discrimination was and is a certainty. Appellants point to no policy that treats gay and lesbian applicants the same as heterosexuals, yet offers no state interest in refusing to do so.

Finally, even assuming this case was moot specifically as to Plaintiffs-Appellees, the District Court's Order was still appropriate in light of the public interest exception to mootness. *State* v. *Woods*, 255 Neb. 755, 762 (1998) (citing *DeCoste* v. *City of Wahoo*, 255 Neb. 266 (1998); *State ex rel. Shepherd* v. *Neb. Equal Op. Comm.*, 251 Neb. 517 (1997)). The public interest exception requires "consideration of the public or private nature of the question presented, the desirability of an authoritative adjudication for further guidance of public officials, and the likelihood of future recurrence of the same or similar problem." *Id.* Authoritative rulings on the constitutionality of the Memorandum and the Pristow Procedure are "necessary to guide public officials, resolve public concerns, and prevent a recurrence of the uncertainty that is evident from the case at bar." *Id.*

II. THE DISTRICT COURT DID NOT ERR BY RECEIVING INTO EVIDENCE PLAINTIFFS' EXHIBITS 18, 27, 34, 43, AND 48.

Appellants' first purported assignment of error contends that the District Court erred by receiving into evidence exhibits 18, 27, 34, 43, and 48.

As an initial matter, only two of those exhibits—exhibits 27 and 34—were cited by the District Court's Amended Order granting Plaintiffs' motion for summary judgment. (T80, 85.) Even as to those two exhibits, Appellants' arguments are meritless.

A. Excluding Exhibit 27 Would Have No Effect.

Exhibit 27 is a *Lincoln Journal Star* article entitled "Senators seek clarity on HHS policy against gay foster parents," by Joanne Young dated March 2, 2015. (E27,1:14-18, 287) The District Court cited Exhibit 27 in its amended order for the proposition that "Memo #1-95 was removed from the DHHS website in February 2015" (T80)—a fact which is supported by numerous other pieces of evidence, and indeed, which Appellants concede five times in their appellate brief. (Defs.' Br. at 4, 6, 15, 21, 30)

Hearsay is defined as "a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted" and is generally inadmissible unless pursuant to an exception under the rules of evidence. Neb. Rev. Stat. §§ 27-801(3), 802; *see also State* v. *Castillo-Zamora*, 289 Neb. 382, 392 (2014). Admission of hearsay that is cumulative, being supported by other competent evidence, is not reversible error. *See State* v. *Morris*, 251 Neb. 23, 34 (1996) ("Erroneous admission of evidence is harmless error and does not require reversal if the evidence erroneously admitted is cumulative and other relevant evidence properly admitted, or admitted without objection, supports the finding of the trier of fact."); *State* v. *Lenz*, 227 Neb. 692, 697 (1988).

Appellants do not contest the District Court's finding based on Exhibit 27 and, therefore, there was no error.

B. Exhibit 34 Is Not Hearsay.

Exhibit 34 is an email from Julie Pham, Deputy for Welfare Services in the Nebraska Ombudsman's Office, to Nathan Busch, Protection and Safety Policy Chief at the Division of Children and Family Services, dated June 4, 2013—about a year after Director Pristow told a few DHHS administrators about his new procedure. (E34,1:14-18, 301) In the email, Ms. Phan notes: "I have a parent who does not want her children, state wards, placed with

the potential foster parents because the parents are lesbians. I need to find out the current DHHS policy on this issue. I read through the Rules/regs but it's silent on this issue. However, the 1995 Administrative Memo states that 'children will not be placed in the homes of persons who identify themselves as homosexuals.' Is this still the current policy or has it been rescinded?" *Id.*

The District Court cited Ms. Pham's email as an example of evidence of confusion regarding whether the Memorandum remained the official policy of DHHS after Director Pristow's verbal instructions in 2012. (T84-85)

Exhibit 34 is not inadmissible hearsay. Among other reasons, Ms. Pham's email was not "offered in evidence to prove the truth of the matter asserted." Neb. Rev. Stat. § 27-801(3). Rather, Ms. Pham's question – "Is this still the current policy or has it been rescinded?" – was offered in evidence to establish Ms. Pham's confusion and lack of certainty as to whether the Memorandum had been rescinded.

Moreover, hearsay requires a "statement," which is defined as "(a) an oral or written assertion or (b) nonverbal conduct of a person, if it is intended by him as an assertion." Neb. Rev. Stat. §§ 27-801(1), (3). But questions, such as Ms. Pham's, "generally are not intended as assertions, and therefore cannot constitute hearsay." *United States* v. *Thomas*, 451 F.3d 543, 548 (8th Cir. 2006) (citing *United States* v. *Bellomo*, 176 F.3d 580, 586 (2d Cir. 1999), *cert. denied*, 528 U.S. 987 (1999); *United States* v. *Oguns*, 921 F.2d 442, 449 (2d Cir. 1990); *United States* v. *Lewis*, 902 F.2d 1176, 1179 (5th Cir. 1990); *United States* v. *Vest*, 842 F.2d 1319, 1330 (1st Cir. 1988), *cert. denied*, 488 U.S. 965 (1988)); *see also State* v. *Draganescu*, 276 Neb. 448, 470-471 (2008) ("When a Nebraska Evidence Rule is substantially similar to a corresponding federal rule of evidence, Nebraska courts will look to federal decisions

interpreting the corresponding federal rule for guidance in construing the Nebraska rule.") (citing *State* v. *Morrow*, 273 Neb. 592 (2007)).

Additionally, even if Exhibit 34 is hearsay, its admission was not reversible error because the conclusion the District Court reached based on Exhibit 34 is supported by cumulative evidence. *See State* v. *Morris*, 251 Neb. 23, 34 (1996); *State* v. *Lenz*, 227 Neb. 692, 697 (1988). There is extensive undisputed evidence in the record of confusion as to the status of the Memorandum among DHHS staff and affiliates. *See, e.g.*, (E29,1:14-18, 291); (E30,1:14-18, 292); (E32,1:14-18, 296); (E33,1:14-18, 298); (E36,2:14-18, 304); (E38,1:14-18, 309); (E42,1:14-18, 318).

C. Exhibits 18, 43, and 48 Are Unneeded to Sustain the District Court's Order.

The District Court's Amended Order granting Plaintiffs' motion for summary judgment does not cite to or rely upon exhibits 18, 43, and 48. The admissibility of these exhibits is irrelevant for purposes of sustaining the District Court's Amended order.

III. THE DISTRICT COURT DID NOT ERR BY AWARDING PLAINTIFFS' ATTORNEYS' FEES.

Appellants' fifth assignment of error makes several "alternative" arguments attacking the District Court's award of attorneys' fees and costs. None of these arguments has merit.

A. Appellants' Challenge to the Evidence Supporting the District Court's Fees Award Is Waived and Belied by the Record.

Appellants' argument that "the district court erred by awarding $173,960.55 in fees and costs without any evidence" is belied by the record. (Defs.' Br. at 33.)

As an initial matter, because Appellants did not "make a timely objection" to the District Court's reliance on the proof put forward by Appellees—including that such proof was

not formally admitted into evidence—they are barred from raising that issue on appeal. *Hass* v. *Neth*, 265 Neb. 321, 333 (2003). As for costs, more than simply failing to raise an objection, Appellants affirmatively waived such arguments by representing to the District Court that they were "not disputing costs." (57:23); s*ee Davis* v. *Wimes*, 263 Neb. 504, 508 (2002) ("A litigant's failure to make a timely objection waives the right to assert prejudicial error on appeal.").

In any event, during the hearing on fees below, although failing to raise the "reliance" issue above, Appellants made arguments against the reasonableness of the work performed by Appellees' counsel, and based those arguments on the same evidence they now argue does not exist. *See* (54:4-55:25) (arguing that it was unreasonable for Appellees' counsel to spend 98.75 hours on the motion to dismiss and 145.8 hours on the dual motions for summary judgment).) Appellees submitted detailed records supporting the number of hours worked by counsel, the reasonableness of the hourly rate requested, and the reasonableness of the costs sought. *See* (Supp. T1-78) Counsel for Appellees submitted declarations establishing the qualifications of the attorneys that worked on the case, descriptions of the work performed, and nature of the costs incurred, and why the time for which Appellees sought fees was necessary. *See id.* The District Court, in turn, made adjustments to the requested award and ultimately applied an 18% reduction, considering and weighing the evidence submitted by counsel. *See* (48:1-59:7) When a trial court has determined the amount of an authorized attorney fee, that "ruling will not be disturbed on appeal in the absence of an abuse of discretion." *Winter v. Dep't of Motor Vehicles*, 257 Neb. 28, 34-35 (1999) (citing *Schirber v. State*, 254 Neb. 1002 (1998)).

At its core, Appellants' complaint that the award of fees was made "without any evidence" boils down to the incorrect hyper-technical and formalistic premise that only evidence appearing as an exhibit in the Bill of Exceptions can properly support an award of attorneys'

fees. But that is not an absolute rule; District Courts may rely on other factors in awarding fees and costs, such as the record in the case. *See Boamah-Wiafe* v. *Rashleigh*, 9 Neb. App. 503, 519 (Neb. App. Ct. 2000) ("It is not strictly necessary for an applicant for attorney fees to introduce specific evidence to support an award of attorney fees."); *Luikart* v. *Flannigan*, 130 Neb. 901, 901 (1936) ("The district court has a general knowledge of the value of legal services and attorney's fees are often allowed for services performed in that court without calling witnesses.").

Indeed, the circumstances here contrast starkly with the cases cited by Appellants, which involved situations where the lower court had essentially no evidence to support the fee request. *See, e.g., Emery* v. *Moffett*, 269 Neb. 867, 869 (2005) ("[T]he only evidence is Emery's attorney's oral unsworn statement at the hearing on the motion for new trial that Emery expended around $2,800."); *Lomack* v. *Kohl-Watts*, 13 Neb. App. 14, 20 (Neb. Ct. App. 2004) (noting that the only document purporting to address the amount of attorneys' fees was not even file-stamped by the court and that the applicant's attorney "essentially admitted" that he "had not presented at trial any evidence regarding . . . attorney fees").

And even if the District Court's failure to include the basis for its fees award in the Bill of Exceptions was error, a remand would serve no purpose in this case. In cases where appellate review of an attorneys' fee award has been necessary and made impossible by omission of evidence from the Bill of Exceptions, courts have remanded the case to the trial court with instructions to conduct an evidentiary hearing. *See In re Guardianship of Forster*, 22 Neb. App. 478, 492 (Neb. App. Ct. 2014). But here, the evidentiary hearing already has happened, so the only task below would be to formally incorporate the evidence that already forms the basis of the

fee award into the Bill of Exceptions. A remand for that purpose is not legally required, would elevate form over substance, and would needlessly subject the parties to further litigation costs.

B. Appellants' Merits-Based Fees Arguments Are Inconsequential.

Appellants' first and second alternative arguments regarding why the District Court "erred" with respect to fees both depend on their arguments with respect to the merits of the appeal.

First, Appellants' argument that a reversal in this Court on appeal would strip Appellees of "prevailing party" status under 42 U.S.C. § 1988 (Defs.' Br. at 31) must fail for the same reasons that Appellants' challenges to the summary judgment order fail; that order, respectfully, should be affirmed.

Second, Appellants' argument that Appellees are not prevailing parties, because the District Court's order did not "materially alter[] the legal relationship between the parties" (Defs.' Br. at 31), blatantly fails on the facts. Even if Appellants were correct that there was "no evidence" that the Memorandum "has been enforced against anyone since at least 2012" and that the Memo was removed from the State's website in February 2015 (Defs.' Br. at 29-30), the relationship between the parties still would have changed materially as a result of clarifying that the Memorandum may no longer be enforced, since the District Court expressly found that many employees of DHHS were confused about whether the Memorandum remained the official policy. (T84-86)

Moreover, Appellants entirely ignore the District Court's unassailable finding that the Pristow Procedure treated gay and lesbian applicants differently by subjecting them to additional levels of approval. (T88-90) By expressly prohibiting Appellants from "adopting or applying policies, procedures, or review processes that treat gay and lesbian individuals and couples differently from similarly situated heterosexual individuals and couples" (T91), the

District Court prospectively enjoined Appellants' stated current practice (the Pristow Procedure), which undoubtedly "modifi[ed] the defendant's behavior in a way that directly benefit[ed]" Appellees. *Lefemine* v. *Wideman*, 133 S. Ct. 9, 11 (2012); *see also Melanie M.* v. *Winterer*, 290 Neb. 764, 777 (2015). In sum, Appellants admit that before the District Court order they employed a procedure that discriminated; after the order, they were enjoined from doing so.

C. The District Court Had Jurisdiction to Order Attorneys' Fees.

As noted in Appellants' Statement of Jurisdiction (Defs.' Br. at 1-3), the District Court's order below was not final and appealable until after Appellees' outstanding petition for attorneys' fees was resolved by the Court. *See Murry* v. *Stine*, 291 Neb. 125, 130 (2015). Accordingly, the District Court retained jurisdiction to consider Appellees' petition for attorneys' fees.

Furthermore, even if the District Court's Amended Order on summary judgment dated September 16, 2015 was final and appealable, later consideration of the fees petition was appropriate because the Court had expressly reserved the fees issue for consideration "[a]fter the Court issue[d] a decision on Defendants' motion to amend or alter judgment." (2nd Supp. T2) *Olson* v. *Palagi*, 266 Neb. 377, 381 (2003), cited by Appellants (Defs.' Br. at 35), is not to the contrary, since the final order there was silent with respect to a request for an award of attorney fees. 266 Neb. at 380. In that case, there was no indication that the request would be considered at a later time and the Court had noted in the docket that there was "[n]othing under advisement." *Id.*

CONCLUSION

For all the foregoing reasons, this Court should affirm the judgment of the District Court in its entirety.

Dated this 1st day of June, 2016.

Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that on June 1, 2016, a true and accurate copy of the foregoing was served on Appellants herein by United States Mail, first-class postage prepaid, and e-mail addressed to their attorney of record:

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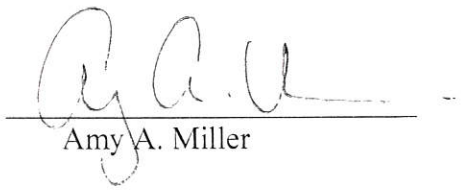

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