

IN THE NEBRASKA COURT OF APPEALS

GREG STEWART and STILLMAN STEWART; LISA BLAKEY and
JANET RODRIGUEZ; and TODD VESLEY 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.

On Appeal from the District Court of Lancaster County (Colborn, J.)

**BRIEF FOR AMICI CURIAE CHILD-WELFARE ORGANIZATIONS
IN SUPPORT OF PLAINTIFFS-APPELLEES**

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American Academy of Pediatrics, <i>Policy Statement, Promoting the Well-Being of Children Whose Parents are Gay or Lesbian</i> , 131 Pediatrics 827 (2013), available at http://pediatrics.aapublications.org/content/early/2013/03/18/peds.2013-0376	1, 3, 13
American Medical Association, Policy H-60.940, <i>Partner Co-Adoption</i> , available at http://www.ama-assn.org/ama/pub/about-ama/our-people/member-groups-sections/glb-t-advisory-committee/ama-policy-regarding-sexual-orientation.page ? (last visited July 15, 2016).....	3
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American Psychological Association, <i>Resolution on Sexual Orientation, Parents, and Children</i> (2004), available at http://www.apa.org/about/policy/parenting.aspx	2, 3

Brodzinsky, David M. & Donaldson Adoption Institute, <i>Expanding Resources for Children III: Research-Based Best Practices in Adoption by Gays and Lesbians</i> (2011), available at http://adoptioninstitute.org/old/publications/2011_10_Expanding_Resources_BestPractices.pdf	7, 10, 11
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Kaye, Sarah & Katherine A. Kuvalanka, <i>State Gay Adoption Laws and Permanency for Foster Youth</i> (2006), available at https://sph.umd.edu/sites/default/files/files/GayadoptionbriefFINAL0806.pdf	11
Kim, Hyoun K., et al., <i>The Placement History Chart: A Tool for Understanding the Longitudinal Pattern of Foster Children’s Placements</i> , 34 <i>Child. & Youth Servs. Rev.</i> 1459 (2012).....	8, 12
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Nebraska Foster Care Review Office 2013 Annual Report, available at http://www.fcro.nebraska.gov/pdf/FCRO-Reports/2013-FCRO-Annual-Report-issued-December-2013.pdf	8
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Nebraska Foster Care Review Office 2015 Annual Report, available at http://www.fcro.nebraska.gov/pdf/FCRO-Reports/2015-Q4-FCRO-Annual-Report.pdf	8, 12, 14
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Sharma, Anu R., et al., <i>The Emotional and Behavioral Adjustment of United States Adopted Adolescents: Part II. Age of Adoption</i> , 18 <i>Child. & Youth Servs. Rev.</i> 101 (1996)	12

Spar, Karen & Matthew Shuman, Congressional Research Service, <i>Child Welfare: Implementation of the Adoption and Safe Families Act (P.L. 105-89)</i> (Nov. 8, 2004), available at http://greenbook.waysandmeans.house.gov/sites/greenbook.waysandmeans.house.gov/files/2012/RL30759_gb.pdf	12
Stoddard, Martha, <i>Without Fanfare, Nebraska Lifts Ban on Gay People Being Foster Parents</i> , Omaha World Herald, Mar. 2, 2015, available at http://www.omaha.com/news/nebraska/without-fanfare-nebraska-lifts-ban-on-gay-people-being-foster/article_742579c4-06da-5a69-8e3a-8f7a46e5bb2c.html	5
Telingator, Cynthia J., <i>Clinical Work with Children and Adolescents Growing Up with Lesbian, Gay, and Bisexual Parents</i> , in <i>LGBT-Parent Families</i> 261 (Abbie E. Goldberg & Katherine R. Allen eds., 2013).....	2, 14
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U.S. Department of Health & Human Services, Administration for Children and Families, <i>Working with Lesbian, Gay, Bisexual, and Transgender (LGBT) Families in Adoption</i> (2011), available at https://www.childwelfare.gov/pubPDFs/f_profbulletin.pdf	7, 11
Young, JoAnne, <i>Senators Seek Clarity on HHS Policy Against Gay Foster Parents</i> , Lincoln J. Star, Mar. 2, 2015, available at http://journalstar.com/news/state-and-regional/senators-seek-clarity-on-hhs-policy-against-gay-foster-parents/article_5a4c9934-a0af-5b69-ab9d-9abe49f46263.html	4, 5
Westat, Inc., <i>A National Evaluation of Title IV-E Foster Care Independent Living Programs for Youth, Final Report</i> (1991) (report prepared for U.S. Dep't of Educ.), available at http://files.eric.ed.gov/fulltext/ED348599.pdf	12

INTEREST OF AMICI CURIAE

Amici—the Child Welfare League of America, the National Center for Adoption and Permanency, Nebraska Appleseed, Voices for Children in Nebraska, and the Donaldson Adoption Institute—are national and statewide organizations that promote children’s health and welfare. Based on their experience and expertise, amici believe that a diversity of families is needed to help ensure that all children find permanent, loving families, and further believe that gay and lesbian parents are essential partners in this effort. Amici therefore urge this Court to uphold the trial court’s judgment rescinding and enjoining enforcement of Memo #1-95 and ordering defendants to refrain from enacting and applying other policies that treat prospective foster and adoptive parents differently based on their sexual orientation.

STATEMENT OF THE CASE, PROPOSITIONS OF LAW, AND STATEMENT OF FACTS

Amici adopt appellees’ statement of the case, propositions of law, and statement of facts.

ARGUMENT

THE DEPARTMENT’S DISCRIMINATORY POLICY AND PROCEDURE ARE CONTRARY TO THE BEST INTERESTS OF NEBRASKA’S CHILDREN

Gay and lesbian parents are a critical part of the fabric of our nation’s families. Approximately two million children in the United States are being raised by gay or lesbian couples or individuals. Am. Acad. of Pediatrics (AAP), *Policy Statement, Promoting the Well-Being of Children Whose Parents are Gay or Lesbian*, 131

Pediatrics 827, 828 (2013). These two million include “many adopted and foster children.” *Obergefell v. Hodges*, 135 S. Ct. 2584, 2600 (2015).

Gay and lesbian parents “provide loving and nurturing homes to their children, whether biological or adopted.” *Obergefell*, 135 S. Ct. at 2600. Not surprisingly, then, research demonstrates that children raised by gays and lesbians are just as likely to flourish as those raised by heterosexual parents. *See, e.g.*, Farr & Patterson, *Lesbian and Gay Adoptive Parents and Their Children*, in *LGBT-Parent Families* 39, 48 (Goldberg & Allen eds., 2013) (explaining that “the existing literature” shows that “children with adoptive lesbian and gay parents appear to fare as well as do those with adoptive heterosexual parents”). Put simply, “there is no scientific evidence that parenting effectiveness is related to parental sexual orientation: Lesbian and gay parents are as likely as heterosexual parents to provide supportive and healthy environments for their children.” Am. Psychological Ass’n (APA), *Resolution on Sexual Orientation, Parents, and Children* (2004).

Research also shows that children’s well-being turns on precisely such nurturing and stability. Children who receive loving parental guidance and a secure home environment tend to show more positive adjustment, regardless of their parents’ sexual orientation. *See, e.g.*, Telingator, *Clinical Work with Children and Adolescents Growing Up with Lesbian, Gay, and Bisexual Parents*, in *LGBT-Parent Families* 261, 270 (Goldberg & Allen eds., 2013); Lamb & Lewis, *The Role of Parent-Child Relationships in Child Development*, in *Developmental Science: An Advanced*

Textbook 429 (Bornstein & Lamb eds., 5th ed. 2005). For these reasons, amici, like every other major child-welfare organization, have affirmed that same-sex couples, as well as gay and lesbian individuals, are just as fit to be parents as heterosexuals. *See* Movement Advancement Project, Family Equality Council & Center for American Progress, *All Children Matter: How Legal and Social Inequalities Hurt LGBT Families*, CWLA Foreword (2011); AAP, *Policy Statement*, 131 *Pediatrics* at 828; APA, *Resolution*, *supra* p. 2; Am. Psychoanalytic Ass’n, *Position Statement: Parenting* (2012); Nat’l Ass’n of Soc. Workers, *Policy Statement: Lesbian, Gay, and Bisexual Issues*, in *Social Work Speaks* 219, 221 (9th ed. 2012); Am. Psychiatric Ass’n, *Position Statement: Support of Legal Recognition of Same-Sex Civil Marriage* (2005); Am. Med. Ass’n, Policy H-60.940, *Partner Co-Adoption*.

Appellants do not dispute any of this. In fact, as the trial court explained, they “acknowledge that no child welfare interest is advanced by treating gay and lesbian persons differently from heterosexual persons in decisions regarding licensing or placement in foster or adoptive homes.” (T89-90). Appellants nonetheless insist that they should prevail here because Nebraska’s Department of Health and Human Services (“Department”) no longer follows the discriminatory policy set forth in Memo #1-95 (“Memo” or “Policy”). *See* Appellants’ Br. 26. That argument misses the mark. The Department’s disparate treatment of gay and lesbian applicants did not end when it quietly abandoned the Memo in 2012. In place of the Department’s discriminatory *policy*—which for nearly two decades categorically barred openly gay

and lesbian people from fostering and adopting children in Nebraska, *see* (T80)—the Department now employs a discriminatory *procedure* (“Pristow Procedure”) when evaluating gay and lesbian applicants, *see* (T3-4, 12). Because the Department never formally rescinded the Policy, much less repudiated it, confusion has remained among Department staff, outside contractors, and the public about the Department’s current position on gay and lesbian parents. *See, e.g.*, (T80-81, 84); Young, *Senators Seek Clarity on HHS Policy Against Gay Foster Parents*, Lincoln J. Star, Mar. 2, 2015.

The damage the Policy did persists as well. Uncertainty about the Department’s position, together with its discriminatory Pristow Procedure, continues to harm not only same-sex couples and gay and lesbian individuals who wish to foster or adopt, but also the many children around the state in need of secure, loving homes. In particular, the Department’s practices needlessly reduce the applicant pool of qualified adoptive and foster parents, thereby preventing some children from finding permanent, loving homes. This creates the trauma of multiple placements, involving group homes and emergency shelters. The Department’s practices also stigmatize children in families headed by same-sex couples and gay or lesbian individuals. This Court should affirm the trial court’s recognition that the Constitution does not countenance those outcomes.

A. The Department’s Unequal Treatment Of Gay And Lesbian Parents Senselessly Perpetuates The State’s Shortage Of Suitable Foster And Adoptive Parents

As the trial court found, plaintiffs “produced undisputed evidence that confusion about whether Memo #1-95 is still the official policy of [the Department] persisted throughout the department at the time this lawsuit was filed.” (T84); *see also* (T85-86) (highlighting evidence of staff confusion and/or continuing belief that Policy remained in effect). That confusion is understandable, given that the Memo remained on the Department’s website long after then-Director Thomas Pristow verbally advised some of his staff that the Department would no longer enforce the Policy, and even long after this case was filed in 2013. When the Department finally removed the Memo from its website in February 2015, moreover, it did so without comment, neither replacing nor formally rescinding the Memo. *See* (T80). Although appellants maintain that the Memo was not Department policy after mid-2012, not even top state officials—and certainly not the public—knew as much by early 2015. Indeed, a month after the Policy was removed from the Department’s website, a spokesperson for the governor confusingly stated: “The policy *hasn’t* changed but the Department has fallen out of compliance with it.” Stoddard, *Without Fanfare, Nebraska Lifts Ban on Gay People Being Foster Parents*, Omaha World Herald, Mar. 2, 2015 (emphasis added); *see also* Young, *supra* p. 4 (noting that a spokesperson for the governor explained that “the policy is being reviewed,” and quoting a state senator

observing that “[t]here’s a policy in place but the procedure isn’t following the policy, so there just isn’t clarity”); (T85-86).

Despite the Department’s informal policy change, the Memo has continued to be a barrier to gays and lesbians fostering and adopting children in Nebraska. For example, when plaintiffs Greg and Stillman Stewart contacted the Department in late 2012 about obtaining a foster license, they were advised that, as a same-sex couple, they were prohibited by the Policy from fostering children. *See* (T82); *see also* (T86) (quoting e-mail after the policy change from Lutheran Family Services to Director Pristow: “I understand this is not policy but [it] has been a barrier to many families becoming foster parents, as the memo seems to be in full [e]ffect”). It is virtually certain that many other prospective foster and adoptive parents have likewise been wrongly turned away because they were gay and lesbian.

Furthermore, the Department’s new practice continues to deter gay and lesbian prospective foster and adoptive parents from even applying. Those who know of the policy change will likely know that it was done quietly and informally, with no repudiation of the notorious Memo. That shift looks more like a reluctant and tentative approach than a clear acknowledgement by the Department that gay and lesbian people—as the evidence has long shown, *see supra* pp. 2-3—are just as likely to be good parents as heterosexuals. The Department also *continues* to treat gay and lesbian applicants differently, a fact appellants remarkably never acknowledge in their opening brief. Specifically, although gays and lesbians are no longer categorically

barred from consideration, the Pristow Procedure subjects them to five levels of scrutiny, requiring the personal approval of the Director of Children and Family Services before they may foster or adopt a child in state care. (T81). By contrast, opposite-sex couples are subject to just two tiers of review, and opposite-sex unmarried co-habitants are subject to four. (T81).

This enduring disparate treatment sends an unmistakable signal that gay and lesbian applicants are not welcome and—in the Department’s mistaken view—are not as qualified as heterosexual applicants, thereby discouraging gays and lesbians from applying. *See* U.S. Dep’t of Health & Hum. Servs. (HHS), Admin. for Child. & Fams., *Working with Lesbian, Gay, Bisexual, and Transgender (LGBT) Families in Adoption* 5 (2011) (noting that when adoption agencies decline to recruit adoptive parents from the lesbian and gay community, “many LGBT adults feel that agencies will not welcome them or will treat them as second-class applicants”); Brodzinsky & Donaldson Adoption Inst. (DAI), *Expanding Resources for Children III: Research-Based Best Practices in Adoption by Gays and Lesbians* 34 (2011) (prospective gay and lesbian adoptive parents look “[f]irst and foremost” for “an agency or professional known to be ‘gay friendly’” when choosing an adoption source).

The result of this overt discrimination is fewer foster and adoptive parents for the many children in the state’s care. That is tragic because as the evidence in this litigation (and the state’s own numbers) reveal, Nebraska faces a serious shortage of foster and adoptive parents. *See* Appellees’ Br. 15-17; *see generally* Nebraska Foster

Care Review Office (FCRO) Annual Reports. In particular, in 2012 “7,652 Nebraska children were in out-of-home care,” FCRO 2013 Annual Report 1—meaning that, in addition to foster homes, thousands of children were in group homes, emergency shelters, child-care institutions, and youth-rehabilitation facilities, FCRO 2014 Annual Report 1 n.1. The following year the number dropped to 5,466 because the state stopped counting children under the supervision of the Office of Probation Administration. FCRO 2014 Annual Report 1. But it was up again in 2014, to 5,630 children, most of whom “had experienced a significant level of trauma prior to their removal from the parental home.” FCRO 2015 Annual Report 1.

Even worse, many of these kids spend a disturbingly long time in temporary, out-of-home settings, and many are uprooted repeatedly, bounced from one home or facility to the next. As the state’s own FCRO recently noted, it is “particularly concerning” that more than 20 percent of the state’s wards have been “in out-of-home care for two years or longer,” “a very long time” from “a child’s perspective.” FCRO 2015 Annual Report 47. In fact, approximately 30 percent of children in Nebraska’s care have had *four or more* placements, *id.* at 3, 75—an alarming statistic since research has shown that “children experiencing four or more placements over their lifetime are likely to be permanently damaged by the instability and trauma of broken attachments,” FCRO 2014 Annual Report 89; *see also* Kim et al., *The Placement History Chart: A Tool for Understanding the Longitudinal Pattern of Foster Children’s Placements*, 34 *Child. & Youth Servs. Rev.* 1459, 1459-1460 (2012)

(noting that disruptions in care are “potentially detrimental,” with “multiple placement transitions negatively affect[ing] attachment to primary caregivers and significantly increas[ing] risk for psychopathology and other adjustment problems”). The FCRO has thus recognized that both “[t]he number of placement changes” and “the rate of re-entry into out-of-home care,” “need to be reduced.” Nebraska FCRO Quarterly Report 2 (June 15, 2013).

Seeking to combat these depressing numbers, both the legislature and the FCRO have instructed that barriers to placement should be eliminated whenever possible. State law, for example, mandates that “[t]he department ... minimize the use of licensing mandates for nonsafety issues” and “provide assistance to families in overcoming licensing barriers.” Neb. Rev. Stat. § 71-1904(3). It also requires that “[t]he department and child-placing agencies ... provide resources for and assistance with licensure ... to address home safety or other barriers to licensure.” *Id.* § 71-1902(3); *see also* FCRO 2015 Annual Report 46 (noting “recommendations to reduce the barriers to children reaching a timely and appropriate permanent home”); Child Welfare Info. Gateway & Child. Bureau, *The Adoption Home Study Process* 7 (2015) (“Within State guidelines, many agencies are looking for ways to rule families *in* rather than rule them *out* in order to meet the needs of children in the U.S. foster care system waiting for adoptive families.”). Yet the Department, through its unequal treatment of gay and lesbian applicants, continues to create barriers, making it even more difficult to match children in need of loving homes with supportive families. As

long as it does so, the shortfall of suitable foster and adoptive parents is unlikely to go down.

B. The Department's Discriminatory Practices Prevent Children From Finding Stable, Loving Homes

Same-sex couples and gay and lesbian individuals are a valuable resource for child-welfare agencies, serving as foster parents to an estimated 14,000 foster children nationwide, or 3 percent of all foster children. *See* Movement Advancement Project, Family Equality Council & Center for American Progress, *LGBT Foster and Adoptive Families: Finding Children Forever Homes* 3 (2012). A same-sex couple is four times more likely than an opposite-sex couple to be raising an adopted child, and six times more likely to be raising foster children. Gates, *LGBT Parenting in the United States* 3 (Feb. 2013). Among married same-sex couples, the contrast is even starker. Eight percent of those couples have an adopted or foster child under age 18, compared to just 1.5 percent of married different-sex couples, “making married same-sex couples more than five times more likely to have these children than their married different-sex counterparts.” Gates Amicus Br. 11-12, *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015). Indeed, more than 20 percent of same-sex couples have an adopted or foster child, compared to just 3 percent of married opposite-sex couples. *Id.* at 12. All told, “[n]early 27,000 same-sex couples are raising an estimated 58,000 adopted and foster children in the United States.” *Id.* at 14; *see also* Brodzinsky & DAI, *Expanding Resources for Children III*, *supra* p. 7, at 6 (among gay and lesbian

parents, “[o]ver 50% ... adopted children from the child welfare system, and 60% adopted transracially”).

Gay and lesbian parents are also more likely to foster and adopt difficult-to-place children, including those with special physical and mental needs. *See* Brodzinsky & DAI, *Expanding Resources for Children III*, *supra* p. 7, at 33-34; *Finding Children Forever Homes*, *supra* p. 10, at 3; Kaye & Kuvalanka, *State Gay Adoption Laws and Permanency for Foster Youth* 1 (2006). The Stewarts exemplify this: They adopted all five of their children out of foster care in California, and some entered their home with “severe medical, cognitive, and behavioral issues.” (T12). The Stewarts also exemplify the outstanding care same-sex parents can give: One child who entered their home still in diapers at age 5, unable to use eating utensils and suffering from serious speech impediments, was earning As and Bs by age 17. *Id.* Another struggled with autism but was a full-time college student at age 19. *Id.*

Many other gays and lesbians would similarly be willing to open their hearts and homes to children. In fact, “there are significant numbers of LGBT adults who would welcome the opportunity to foster or adopt if they knew they were wanted and needed and would be treated with respect.” HHS, *Working with Lesbian, Gay, Bisexual, and Transgender (LGBT) Families in Adoption*, *supra* p. 7, at 5. Yet rather than cultivating and partnering with this critical population, the Department has created obstacles. And the resulting harm is significant. Discouraging prospective gay and lesbian applicants means not only that more children will be separated from

siblings or suffer the “potentially detrimental” effects of multiple placements, Kim, *The Placement History Chart*, *supra* p. 8, at 1459-1460, but also that more children will age out of foster care without ever finding a permanent, secure family, *see* Appellees’ Br. 10. That is in derogation of both federal and state law, which “unequivocally establish[.]” permanency as a central goal for children in out-of-home care. FCRO 2015 Annual Report 1; *see also* Spar & Shuman, Congressional Research Service, *Child Welfare: Implementation of the Adoption and Safe Families Act (P.L. 105-89)*, at 1 (Nov. 8, 2004) (explaining that Congress, in enacting the Adoption and Safe Families Act “in response to rising numbers of children in foster care,” intended to “expedite permanency for foster children and to promote adoption for those children who cannot safely return home”).

The importance of this goal cannot be overstated. Aging out of the foster-care system without finding a permanent, loving home can have a devastating impact on a child’s future. Studies have found that such children exhibit low rates of post-high school education, low incomes, high reliance on public assistance, high rates of teen pregnancy, and high levels of unemployment, mental health disorders, homelessness, and poverty. *See* Triseliotis, *Long-Term Foster Care or Adoption? The Evidence Examined*, 7 *Child & Fam. Soc. Work* 23, 29-30 (2002); Westat, Inc., *A National Evaluation of Title IV-E Foster Care Independent Living Programs for Youth, Final Report* 14, 83 (1991) (report prepared for U.S. Dep’t of Educ.); *cf.* Sharma et al., *The Emotional and Behavioral Adjustment of United States Adopted Adolescents: Part II*.

Age of Adoption, 18 Child. & Youth Servs. Rev. 101, 106 (1996) (“[A]s age at adoption increases, emotional and behavioral adjustment of adoptees decreases.”). Although children who grow up without their biological parents can be just as happy and well-adjusted as other kids, they “need secure and enduring relationships,” and support from “stable, healthy, and well-functioning adults” in order to thrive. AAP, *Policy Statement*, 131 Pediatrics at 828. Sadly, uncertainty about the Department’s position on gay and lesbian parents, combined with the Department’s discriminatory evaluation procedure, denies many children a chance for such support—and the happy life it often brings.

C. The Discriminatory Policy And Procedure Stigmatize Families Headed By Same-Sex Couples And Gay And Lesbian Individuals

The Department’s discriminatory practices do not just harm children waiting for foster and adoptive families. They also harm kids who (despite the barriers erected by the Department) find homes with gay or lesbian parents.

As the U.S. Supreme Court recognized in the context of marriage bans, laws that treat same-sex couples unequally demean not only the couple, but also their children. *See United States v. Windsor*, 133 S. Ct. 2675, 2694 (2013). The same is true of unequal policies and procedures that govern states’ child-welfare systems. Like marriage laws, these policies send a clear message about what the state considers to be the ideal family and whom the state regards as fit parents. As a result, less favorable rules for gay and lesbian foster and adoption applicants not only denigrate

gay and lesbian parents, but also “harm and humiliate the children of same-sex couples” and gay and lesbian individuals. *Obergefell*, 135 S. Ct. at 2600-2601; *see also* Telingator, *supra* p. 2, at 268 (explaining that “homophobic stigmatization” can lead to “low self-esteem” and “increased levels of anxiety” for children of gay and lesbian parents).

This stigma is a serious concern for adopted and foster children. Whether because of a sense of abandonment or other identity struggles, many of these children develop “marked feelings of inferiority” related to their foster or adoptive status. McWhinnie, *Adopted Children, How They Grow Up: A Study of Their Adjustment As Adults* 239 (1967), and “show significantly lower levels of optimism [and] self-confidence” than their non-adopted peers, Sharma et al., *The Emotional and Behavioral Adjustment of United States Adopted Adolescents: Part I. An Overview*, 18 *Child. & Youth Servs. Rev.* 83, 90 (1996). Before entering state-provided care, moreover, many of these children have “experienced a significant level of trauma,” and hence are particularly psychologically vulnerable. FCRO 2015 Annual Report 1. Although all children demonstrate better adjustment in the care of parents who provide a nurturing, secure environment, *see, e.g.*, Telingator, *supra* p. 2, at 270, such support and security is especially critical for children coming out of state care.

A state’s foster and adoption policies should reinforce children’s sense of security and self-worth, not undermine them. Nebraska’s child-welfare system has chosen the opposite approach. In refusing to formally renounce its ban on gay and

lesbian parents, and in continuing to treat gay and lesbian foster and adoption applicants unequally, the Department sends a clear signal that gay and lesbian parents are disfavored. In turn, the children of gay and lesbian parents “suffer the stigma of knowing their families are somehow lesser.” *Obergefell*, 135 S. Ct. at 2600. This Court should reject that result.

CONCLUSION

The trial court’s judgment should be affirmed.

Dated this 15th day of July, 2016.

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PROOF OF SERVICE

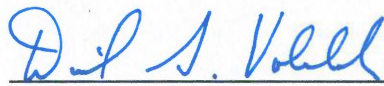
On this 15th day of July, 2016, I served copies of the foregoing brief on all parties participating in this appeal by certified U.S. mail addressed to appellants' and appellees' counsel at the following addresses:

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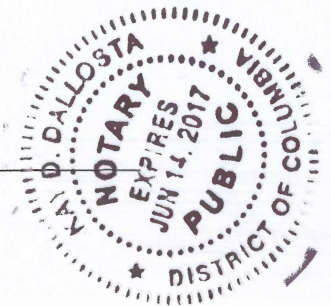


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Notary Public



KAY D. DALLOSTA
Notary Public of District of Columbia
My Commission Expires June 14, 2017