IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

No. 34618

KATHRYN KUTIL and CHERYL HESS,

Petitioners

vs.

Fayette County Juvenile Abuse and Neglect No. 07-JA-72

THE HONORABLE PAUL M. BLAKE, JR., CIRCUIT JUDGE, TWELFTH JUDICIAL CIRCUIT, and WEST VIRGINIA DEPARTMENT OF HEALTH AND HUMAN RESOURCES, MARTHA YEAGER WALKER, SECRETARY,

Respondents.

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BRIEF OF *AMICI CURIAE* NATIONAL ASSOCIATION OF SOCIAL WORKERS; NATIONAL ASSOCIATION OF SOCIAL WORKERS – WEST VIRGINIA CHAPTER; EVAN B. DONALDSON ADOPTION INSTITUTE; NORTH AMERICAN COUNCIL ON ADOPTABLE CHILDREN; AND WEST VIRGINIA COALITION AGAINST DOMESTIC VIOLENCE IN SUPPORT OF PETITIONERS

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STATEMENT OF INTEREST OF AMICI CURIAE

Amici curiae, national and West Virginian organizations dedicated to the welfare of children, believe that Respondents failed to act in the best interests of Baby Girl Cales ("B.G.C.") by seeking to remove her from her existing and successful foster placement, the only home she has ever known, in order to make her available for adoption by a heterosexual married couple that has not yet materialized and may never materialize. *Amici* submit this brief to (a) inform the Court of the extensive body of social science research demonstrating that children raised by same-sex couples develop just as well, and are as healthy and well-adjusted as children raised by heterosexual couples; (b) show the Court that this research has been embraced by every authoritative professional organization devoted to the health and welfare of children; and (c) explain to the Court why implementation of the Circuit Court's order would be contrary to B.G.C.'s interests and to the best interests of other children in the West Virginia child welfare system.

Following are brief descriptions of the *amici*:

The National Association of Social Workers ("NASW") was established in 1955 as a nonprofit professional association dedicated to the practice and interests of the social work profession. It is the largest social work association in the world, with 145,000 members and 56 chapters throughout the United States and abroad. As part of its mission to improve the quality and effectiveness of social work practice, NASW promulgates professional standards and the NASW Code of Ethics, conducts research, provides continuing education, and advocates for sound public policies (including by

filing *amicus curiae* briefs in appropriate cases). NASW is committed to advancing policies and practices that will improve the lives of all children, including those raised in same-sex-parent families.

NASW is joined on the brief by the **NASW – West Virginia Chapter**, which has 566 members.

The Evan B. Donaldson Adoption Institute ("Adoption Institute") is a national, non-profit organization devoted to improving adoption policy and practice. To achieve this goal, the Adoption Institute engages in research regarding adoption, trains and educates child welfare professionals, and advances public policies that support ethical, high quality adoption practices.

The North American Council on Adoptable Children ("NACAC") was founded in 1974 to serve as a strong, consistent voice for children in foster care in the United States and Canada. NACAC's mission is to promote and support permanent families for children and youth in the U.S. and Canada who have been in care – especially those in foster care and those with special needs. NACAC is committed to meeting the needs of waiting children and the families who adopt them through education, adoption support, parent leadership capacity building, and advocacy.

West Virginia Coalition Against Domestic Violence ("WVCADV") is committed to the elimination of personal and institutional violence against women, children, and men. By developing a strong network of shared resources and support, WVCADV provides safe space and quality service for victims of domestic violence, and works for systemic change to assure families' options for building lives free from

violence. WVCADV fully supports children being raised in loving, caring, and non-abusive homes regardless of the marital status or sexual orientation of adults or parents. As one of its grounding principles of unity, WVCADV believes in the equality of all persons and works to end discriminatory practices based on race, sexual orientation, class, gender, etc. Given the all too frequent occurrence of violence in homes across the country, WVCADV champions all efforts to provide children with home environments of safety where they are honored, respected, and loved.

INTRODUCTION

Thousands of children in the West Virginia child welfare system – and nationwide – are in desperate need of responsible and loving caregivers and a safe place to call home. Yet there is a critical shortage of good homes for these children. There are approximately 1,100 children waiting to be adopted, and more than 4,200 children in state custody in West Virginia. *See* U.S. Dep't of Health & Human Servs., Administration for Children and Families, Adoption and Foster Care Analysis and Reporting System ("AFCARS Report"), *Children in the Public Foster Care System Waiting to be Adopted: Fiscal Years 1999-2006*, *available at* http://www.acf.hhs.gov/programs/cb/stats_research/afcars/waiting2006.htm; Child Welfare League of America, National Data Analysis Systems ("NDAS Report"), *Number of Children in Out-of-Home Care, West Virginia (2006), available at* http://ndas.cwla.org/data_stats/access/predefined/home.asp?MainTopicID=3&SubTopicID=28.[1] On average, children in West Virginia wait 17.9 months after their parents' rights have been terminated before being adopted. *See* NDAS Report, *Mean and*

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[1] Nationwide, there are almost 500,000 children in foster care – over 125,000 of whom are waiting for adoption. On average, each child has been waiting for more than three years (39.4 months). Evan B. Donaldson Adoption Institute, *Expanding Resources for Waiting Children II: Eliminating Legal and Practice Barriers to Gay and Lesbian Adoption from Foster Care* 11 (Sept. 2008) ("Expanding Resources II"), *available at* http://www.adoptioninstitute.org/publications/2008_09_Expanding_Resources_Legal.pdf. Children placed with foster families often find themselves shuffled from one family to another. In 2006, each child in foster care in West Virginia experienced a mean of 2.9 different placements. NDAS Report, *Mean and Median Number of Placements for Children in Out-of-Home Care, West Virginia (2006), available at* http://ndas.cwla.org/data_stats/access/predefined/home.asp?MainTopicID=3&SubTopicID=29.

Median Months Between the Time of Termination of Parental Rights and Adoption, West Virginia (2006), *available at* http://ndas.cwla.org/data_stats/access/predefined/home.asp?MainTopicID=4&SubTopicID=36. Since the number of children in state custody far exceeds the number of approved foster families, almost one third of West Virginian foster children live in institutions or group homes rather than family environments. NDAS Report, *Number of Children in Out-of-Home Care, by Placement Setting, West Virginia (2006), available at* http://ndas.cwla.org/data_stats/access/predefined/home.asp?MainTopicID=3&SubTopicID=27.

Unlike the hundreds of children who continue to wait for families, upon her release from the hospital, still suffering withdrawal from her *in utero* drug addiction, B.G.C. was placed in the home of two caring and responsible foster parents, Petitioners Kathryn Kutil and Cheryl Hess. These women, who have indisputably provided B.G.C. with excellent foster care for the past thirteen months, now seek to provide what all parties agree is the best possible outcome for a child in state custody: a permanent adoptive family.

Against this backdrop, the Circuit Court has inexplicably ruled that it is in B.G.C.'s best interest to be removed from the care of Petitioners, to whom she has formed lasting attachments, so that pursuit of a heterosexual couple can be undertaken, even though the statistics show that there is a severe shortage of potential adoptive couples.[2] Rather than simply evaluating B.G.C.'s best interests based on the facts of her

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[2] While Judge Blake's Response to Petition For Writ of Prohibition ("Blake Resp.") attempts to frame his decision as unrelated to the sexual orientation of the Petitioners

case, the court below announced an unprecedented ruling that, if upheld, could negatively influence subsequent adoptions in West Virginia. Based not on social science evidence but apparently on only its personal opinion, the Circuit Court concluded that children in the foster care system should be adopted by "traditional" families consisting of a married mother and a father, and that a "non-traditional" placement should be considered only if all options for a traditional placement have been exhausted. The Circuit Court has essentially created an irrebuttable presumption that any minimally adequate placement with a heterosexual couple is always better than placement with a same-sex couple. Such a presumption cannot be reconciled with this Court's precedents on evaluating children's best interests. This view is contrary to the social science evidence, which shows that children raised by lesbian and gay couples develop just as well as children raised by married heterosexual couples.

Elevating the Circuit Court's view of a "traditional" family above all other factors in placement decisions would block optimal placements for children and is inconsistent with the individualized, case-by-case determination that is required by the "best interests of the child" standard and child welfare policy. In addition, such a policy has the potential to result in the displacement of many children, like B.G.C., who are currently living happily with same-sex foster parents, may delay permanent placements for foster

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(*see, e.g.*, Blake Resp. at 5-6 n.16), it is clear that the Circuit Court's presumption in favor of adoption by "two-parent" households is a proxy for adoption by heterosexual couples. After all, Petitioners' household ***is*** a two-parent household. As this *amicus* brief will demonstrate, the social science research shows that lesbians and gay men can and do raise children as successfully as their heterosexual counterparts.

children, and may discourage capable gay men and lesbians from seeking to become foster and adoptive parents, thereby exacerbating the dire shortage of nurturing homes. At a time when thousands of children in West Virginia are languishing in foster care, a policy that disfavors adoption by a significant demographic of capable adults, and prevents many children in critical need of parents from finding their optimal families, simply cannot be justified.

STATEMENT OF FACTS

B.G.C., born on December 8, 2007 in Charleston to a drug-addicted mother, tested positive for cocaine, opiates and benzodiazepines at birth. The West Virginia Department of Health and Human Resources ("DHHR") immediately instituted child abuse and neglect proceedings, and sought to remove B.G.C. from her biological mother's custody. *See* Petition to Institute Child Abuse and Neglect Proceedings (Dec. 11, 2007). The day B.G.C. was released from the hospital, December 24, 2007, DHHR placed B.G.C. with Petitioners, a same-sex couple. On October 8, 2008, after finding that there was no likelihood that the biological mother's drug abuse would be corrected and that the unknown father had abandoned the child, the Circuit Court of Fayette County terminated the biological mother's parental rights. *See* Dispositional and Termination of Parental Rights Order (Nov. 6, 2008).

Shortly after the termination of parental rights, in accordance with DHHR's procedures, the members of a multidisciplinary treatment team ("MDT"), consisting of the government attorney, the guardian *ad litem*, counsel for the foster parents, the

assistant attorney general, the child welfare consultant, the adoption unit supervisor, the foster parents, and the child protective service worker, met to discuss transferring B.G.C.'s case to the Regional Adoption Unit, which they unanimously determined was in B.G.C.'s best interests. The team's status report concluded that "[B.G.C.] is nearly eleven months old and continues to reside in the home of Kathryn Kutil and Cheryl Hess. [B.G.C.] presently has no medical or developmental concerns and seems to be thriving in her present placement." MDT/Status Report (Oct. 28, 2008). The Adoption Unit Supervisor stated that "the Adoption Unit would be reluctant to 'uproot' a child from the only home she knows," acknowledging that the Regional Adoption Unit would make an official recommendation regarding B.G.C.'s prospective adoptive placement. *Id.* With the exception of the guardian *ad litem*, Thomas K. Fast, the MDT recommended that B.G.C. remain with her foster parents. *Id.*

At the Permanency Hearing on November 6, 2008 before the Circuit Court, the DHHR attorney took the position, consistent with the MDT's recommendation, that B.G.C.'s interests would be best served by facilitating an adoption, and explained that the Adoption Unit would make a recommendation as to the placement. Transcript of Permanency Hearing (Nov. 6, 2008) ("Nov. 6 Tr.") at 4-6. DHHR's permanency plan further noted that Petitioners had expressed their desire to adopt B.G.C., and that placement with Petitioners would be appropriate because, *inter alia*, their home "is the least restrictive and a family setting," "is in close proximity to [B.G.C.'s] sibling," "is consistent with the best interest of child," "is the only placement child has been in," and

because B.G.C. "has a bond with foster parents with whom she has resided her entire life." *See* DHHR Permanency Plan (Oct. 31, 2008).

Mr. Fast, who had previously filed a motion in the Circuit Court entitled, *Motion To Order DHHR To Remove Child From Physical Placement in Homosexual Home And For Other Injunctive Relief*, requested that the Circuit Court "immediately set for a hearing, a full hearing, and let's duke it out here, Your Honor, this whole issue of the homosexuality." Nov. 6 Tr. at 17. After praising the Petitioners for taking good care of B.G.C., the Court went on to state, "I think I've indicated time and time again, this Court's opinion is that the best interest of a child is to be raised by a traditional family, mother and father. Now, that's this Court's opinion as to what a typical West Virginian would feel and what the typical attitude is of the West Virginia Supreme Court, a traditional family." *Id.* at 22-23. The Circuit Court ruled that it would entertain adoption by a "nontraditional" family only if there were no other alternative, stating, "[n]ow, occasionally there may be situations where there is no traditional family, there's not a mother and father, a young couple that are willing and able to adopt a little girl. And if that's the situation, if there's no other alternative for a traditional family, then you look at a nontraditional family, whether it be two men, two women or such." *Id.* at 23.

The Circuit Court set a date for an evidentiary hearing on Mr. Fast's motion, and expressed its view that "this permanency plan needs to include adoption by a traditional family unit." Nov. 6 Tr. at 27-28. Without hearing any evidence about the appropriateness of the current foster placement, the court below ordered that B.G.C. "be placed in a traditional home with a mother and a father." *Id.* Recognizing that "it would

be too traumatic to take the child at this time and just uproot her right now," the Circuit Court ordered that B.G.C. be transitioned to a new foster home over a two-week period. *Id.* Petitioners filed a Petition for Writ of Prohibition on November 17, 2008. The next day the court below entered an order to stay the transfer of custody pending the evidentiary hearing on the guardian *ad litem's* motion to be held on November 21, 2008.

On November 22, 2008, B.G.C. was removed from the Petitioners' care pursuant to the Circuit Court's order following the prior day's evidentiary hearing. At no time during the hearing did the guardian *ad litem* submit any individualized evidence showing why a transfer of custody was in the best interests of B.G.C. DHHR placed B.G.C. with a set of potential adoptive parents identified by the Petitioners after DHHR was unable to locate a willing foster/adoptive family. Petitioners filed a Motion for Emergency Stay with this Court on November 24, 2008. Two days later, the potential adoptive parents contacted DHHR to say they were no longer interested in adopting B.G.C. On the same day, this Court granted Petitioners' motion, and B.G.C. was returned to them. Petitioners filed an Amended Petition for Writ of Prohibition with this Court on December 4, 2008.

ARGUMENT

Every authoritative child welfare and child health organization of which *amici* are aware recognizes, and an overwhelming body of scholarly research demonstrates, that children fare just as well in families with same-sex parents as in families with heterosexual parents. The Circuit Court's directive that children may be placed with same-sex couples as a last resort – only after all options for adoption by heterosexual

married couples are exhausted – is a departure from the nationwide consensus that placement decisions should be made on a case-by-case basis based on the best interests of each child. Disfavoring adoption by same-sex couples undermines the welfare of the many children in West Virginia seeking permanent families in several ways: (i) it increases the likelihood of institutionalization, which all experts agree is to be avoided if at all possible, by disfavoring a category of capable, caring parents; (ii) it prolongs the period of impermanency, which all research shows is contrary to the best interests of the child, while the hunt for a theoretical "traditional family" proceeds;[3] and (iii) by driving a wedge between the criteria for foster parenthood and adoptive parenthood, it increases the chances that a child will have to be uprooted from a successful and potentially permanent foster placement.

I. Social Science Research Demonstrates that Children Raised by Same-Sex Couples Are as Healthy and Well-Adjusted as Those Raised by Heterosexual Couples.

The Circuit Court's conclusion that families headed by heterosexual couples are more "family-like" than families headed by same-sex couples is contrary to both the unanimous opinion of authoritative professional organizations dedicated to the health and welfare of children and to the social science research.

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[3] According to the Center for Disease Control, National Center for Health Statistics, National Vital Statistics System, West Virginia has one of the highest divorce rates in the country. *See* http://www.cdc.gov/nchs/data/nvss/mardiv.htm.

A. Every Authoritative Pediatric, Psychological, Psychiatric and Child Welfare Organization to Address the Issue Has Concluded that Parenting Effectiveness Is Unrelated to Parents' Sexual Orientation.

Every leading professional child health and child welfare organization recognizes that sexual orientation has no correlation with the ability to be a good parent and raise healthy and well-adjusted children. The policy statements issued by these organizations reflect their professional experiences and their expert reviews of the research related to the effects of parenting by gay men and lesbians on childhood development. The statements are striking in their unanimous rejection of the assumption that optimal development requires heterosexual parents. Indeed, *amici* are unaware of any authoritative child welfare or medical organization that has taken a contrary view of the research and its policy implications.

The Child Welfare League of America ("CWLA"), the nation's oldest and largest membership-based child welfare organization, and the nationally recognized standard-setter for child welfare services, has issued a position statement that "affirms that lesbian, gay, and bisexual parents are as well suited to raise children as their heterosexual counterparts," and that "[a]ny attempt to preclude or prevent gay, lesbian, and bisexual individuals or couples from parenting, based solely on their sexual orientation, is not in the best interest of children." CWLA, *Position Statement on Parenting of Children by Gay, Lesbian, and Bisexual Adults, available at* http://www.cwla.org/programs/culture/glbtqposition.htm. Instead, "[a]pplicants should be assessed on the basis of their abilities to successfully parent a child needing family membership and not on . . . differing life style, or sexual orientation. Applicants should be accepted on the basis of an individual

assessment of their capacity to understand and meet the needs of a particular available child at the point of the adoption and in the future." CWLA, *Standards of Excellence for Adoption Services* § 4.7 (2000) ("CWLA Adoption Standards"); *see also* CWLA, *Standards of Excellence for Family Foster Care Services* § 3.18 (1995) ("CWLA Family Foster Care Standards") ("The family foster care agency should not reject foster parent applicants solely due to their . . . sexual orientation[.]"). CWLA formulated this policy based on the research conducted in, and experiences of, the fields of social work, child development, psychology, psychiatry, medicine, and sociology. *See* CWLA Adoption Standards, *supra,* at v.

Similarly, *amicus* NASW's policy on foster care and adoption supports the removal of barriers that prevent children from being placed in permanent homes. "Barriers that are unsupported by tested experience—such as resistance to using single parents, foster parents (for adoption), and nontraditional family patterns (including lesbian and gay, bisexual, and transgender parents) as potential foster care and adoption resources – must be removed." NASW, *Foster Care and Adoption, in* SOCIAL WORK SPEAKS 167-69 (7th ed., 2006). NASW "supports the adoption of local, state, federal, and international policies/legislation that protect the rights and well-being of the children of lesbian, gay, and bisexual people." NASW, *Lesbian, Gay and Bisexual Issues, in* SOCIAL WORK SPEAKS 247 (7th ed., 2006).

The American Academy of Pediatrics ("AAP"), the nation's oldest and largest association of pediatricians with over 60,000 pediatrician members, has concluded that "the weight of evidence gathered during several decades using diverse samples and

methodologies is persuasive in demonstrating that there is no systematic difference between gay and non-gay parents in emotional health, parenting skills, and attitudes toward parenting. No data have pointed to any risk to children as a result of growing up in a family with 1 or more gay parents." AAP, *Technical Report: Coparent or Second-Parent Adoption by Same-Sex Parents,* 109 PEDIATRICS 341, 343 (Feb. 2002), *available at* http://aappolicy.aappublications.org/cgi/content/full/pediatrics;109/2/341.pdf. The AAP "recognizes that a considerable body of professional literature provides evidence that children with parents who are homosexual can have the same advantages and the same expectations for health, adjustment, and development as can children whose parents are heterosexual." AAP, *Coparent or Second-Parent Adoption by Same-Sex Parents,* 109 PEDIATRICS 339, 339 (Feb. 2002), *available at* http://aappolicy.aappublications.org/cgi/content/full/pediatrics;109/2/339.pdf. Like many other medical and child welfare organizations, AAP has concluded that children's development is more powerfully influenced by the quality of the relationships within the family unit than by the configuration of the family unit itself. AAP, 109 PEDIATRICS at 343.

> Children in all family constellations have been described by parents and teachers to have more behavioral problems when parents report more distress and more dysfunctional parent-child interactions. In contrast, children are rated as better adjusted when their parents report greater relationship satisfaction, higher levels of love, and lower interparental conflict regardless of their parents' sexual orientation.

Id. Consequently, in 2002 the AAP adopted a policy supporting the legal adoption of children by same-sex parents and recommending that pediatricians "[a]dvocate for

initiatives that establish permanency through coparent or second-parent adoption for children of same-sex partners through the judicial system, legislation, and community education." AAP, 109 PEDIATRICS at 339-40.[4]

Likewise, the American Academy of Child and Adolescent Psychiatry ("AACAP"), an association of over 6,500 psychiatrists, has determined that "[t]here is no evidence to suggest or support that parents with a gay, lesbian, or bisexual orientation are per se different from or deficient in parenting skills, child-centered concerns and parent-child attachments, when compared to parents with a heterosexual orientation," and further that "[o]utcome studies of children raised by parents with a homosexual or bisexual orientation, when compared to heterosexual parents, show no greater degree of instability in the parental relationship or developmental dysfunction in children." AACAP, *Gay, Lesbian, and Bisexual Parents Policy Statement* (June 1999), *available at*

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[4] A group of approximately 60 of AAP's more than 60,000 members opposed AAP's adoption of this policy and in dissent, formed the "American College of Pediatricians" ("ACP") in 2002. *See* http://www.acpeds.org/?CONTEXT=art&cat=10002&art=150&BISKIT=2142663156. This small and marginal group has filed an *amicus* brief in support of Respondents in keeping with the ACP's position that "it is inappropriate, potentially hazardous to children, and dangerously irresponsible to change the age-old prohibition on homosexual parenting, whether by adoption, foster case, or by reproductive manipulation." *See* http://www.acpeds.org/?CONTEXT=art&cat=10005&art=50&BISKIT=2142663156. Dr. Joseph Zanga, one of ACP's charter members, has described the ACP as a group "with Judeo-Christian, traditional values that is open to pediatric medical professionals of all religions *who hold true to the group's core beliefs*: that life begins at conception; and that the traditional family unit, headed by an opposite-sex couple, poses far fewer risk factors in the adoption and raising of children." Bill Fancher & Jody Brown, Am. Family Ass'n, *Pro-Life Pediatric Group Stands Contrary to Established AAP*, *at* http://headlines.agapepress.org/archive/7/afa/292003e.asp (July 29, 2003) (emphasis added). This small faction's views are out of step with the research-based positions of the AAP and other medical and child welfare authorities.

http://www.aacap.org/cs/root/policy_statements/gay_lesbian_and_bisexual_parents_policy_statement. The AACAP therefore resolved to oppose "any discrimination based on sexual orientation against individuals in regard to their rights as custodial or adoptive parents." *Id.*

Many other medical organizations have issued policy statements opposing restrictions on parenting by gay men and lesbians. The American Academy of Family Physicians ("AAFP"), an association of over 94,000 family physicians, family medicine residents, and medical students, which was founded in 1947, "establishes policy and is supportive of legislation which promotes a safe and nurturing environment, including psychological and legal security for all children, including those of adoptive or foster parents, regardless of the parents' sexual orientation." AAFP, *Children's Health* (2002) (2007), *available at* http://www.aafp.org/online/en/home/policy/policies/c/children.html. The American Psychoanalytic Association, the oldest national psychoanalytic organization in the nation, comprised of over 3,500 psychoanalysts, has unequivocally stated: "Gay and lesbian individuals and couples are capable of meeting the best interest of the child and should be afforded the same rights and should accept the same responsibilities as heterosexual parents." Am. Psychoanalytic Ass'n, *Position Statement on Gay and Lesbian Parenting* (May 16, 2002), *available at* http://www.apsa.org/aboutapsaa/positionstatements/gayandlesbianparenting/tabid/471/Default.aspx.

The American Psychiatric Association ("APA"), a national medical specialty society, which has over 38,000 physician members, adopted a position statement in November 2002, which emphasized that "[n]umerous studies over the last three decades

consistently demonstrate that children raised by gay or lesbian parents exhibit the same level of emotional, cognitive, social, and sexual functioning as children raised by heterosexual parents," and that "research indicates that optimal development for children is based not on the sexual orientation of the parents, but on stable attachments to committed and nurturing adults." APA, *Adoption and Co-parenting of Children by Same-sex Couples: Position Statement* (Nov. 2002), *available at* http://www.psych.org/Departments/EDU/Library/APAOfficialDocumentsandRelated/PositionStatements/200214.aspx. In view of this body of research, in 2002, the APA adopted an official policy supporting initiatives which allow same-sex couples to adopt and co-parent children. *Id.*

The American Psychological Association, a scientific and professional organization with 148,000 members, which represents psychology in the United States, has endorsed the view that:

> Not a single study has found children of lesbian or gay parents to be disadvantaged in any significant respect relative to children of heterosexual parents. Indeed, the evidence to date suggests that home environments provided by lesbian and gay parents are as likely as those provided by heterosexual parents to support and enable children's psychosocial growth.

Charlotte J. Patterson, *Lesbian and Gay Parents and Their Children: Summary of Research Findings, in* LESBIAN AND GAY PARENTING 15 (Am. Psychological Ass'n, 1995), *available at* http://www.apa.org/pi/lgbc/publications/lgparenting.pdf. The American Psychological Association issued a resolution opposing "any discrimination based on sexual orientation in matters of adoption, child custody and visitation, foster care, and reproductive health services." Am. Psychological Ass'n, *Resolution on Sexual*

Orientation, Parents, & Children (2004), *available at* http://www.apa.org/pi/lgbc/policy/parentschildren.pdf. The resolution was based on the Association's findings that, "[t]here 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" and "[r]esearch has shown that the adjustment, development, and psychological well-being of children is unrelated to parental sexual orientation and that the children of lesbian and gay parents are as likely as those of heterosexual parents to flourish." *Id.*

Organizations specializing in adoption issues have reached similar conclusions. *Amicus* NACAC takes the position that "[a]ll prospective foster and adoptive parents, regardless of sexual orientation, should be given fair and equal consideration," and opposes rules and legislation that restrict the consideration of current or prospective foster and adoptive parents based on their sexual orientation. NACAC, *Position Statements: Gay and Lesbian Adoptions and Foster Care* (Apr. 9, 2005), *available at* http://www.nacac.org/policy/positions.html#gay. In addition, NACAC believes "[c]hildren and youth should not be denied a loving family due to restrictions on particular types or categories of prospective foster or adoptive parents. Limitations that prevent classes of individuals or groups from becoming foster or adoptive parents hurt children and youth who are in need of loving families. Experience and research have shown that diverse and non-traditional families can successfully parent children and youth in foster care and adoption." NACAC, *Position Statements: Eliminating*

Categorical Restrictions in Foster Care and Adoption (Jul. 25, 2007), *available at* http://www.nacac.org/policy/positions.html#eliminating.

Amicus Adoption Institute has concluded that:

> Based on both the available research and growing experience, adoption by gays and lesbians holds promise as an avenue for achieving permanency for many of the waiting children in foster care. . . .
>
> Against a backdrop of increasing public acceptance, social science research concludes that children reared by gay and lesbian parents fare comparably to those of children raised by heterosexuals on a range of measures of social and psychological adjustment. . . . virtually every valid study reaches the same conclusion: The children of gays and lesbians adjust positively and their families function well. . . .
>
> Laws and policies that preclude adoption by gay or lesbian parents disadvantage the tens of thousands of children mired in the foster care system who need permanent, loving homes.

Evan B. Donaldson Adoption Institute, *Expanding Resources for Children: Is Adoption by Gays and Lesbians Part of the Answer for Boys and Girls Who Need Homes?* Policy Perspective (Mar. 2006), *available at* http://www.adoptioninstitute.org/policy/2006_Expanding_Resources_for_Children.php. In June 2008, the National Adoption Center approved a policy stating that no person should be denied consideration in the adoption process solely based on marital status or sexual orientation. National Adoption Center, *Policies: Adoptive Parent Assessment, available at* http://www.adopt.org/assembled/policies.html.

B. Social Science Research Overwhelmingly Supports the Conclusion that Same-Sex Couples Are as Capable and Successful at Raising Well-Adjusted Children as Heterosexual Couples.

The policy positions of the leading medical and child welfare organizations are based on the overwhelming social science evidence. Over the past twenty-five years, a number of researchers have studied the overall well-being of children raised by lesbian or gay parents, as measured by these children's psychological and emotional development, social development, sexual development, and cognitive development.[5] The research is unanimous on the following key findings:

- Children of gay and lesbian parents do not experience higher rates of, or more severe, emotional or behavioral problems than children of heterosexual parents. *See* Ellen C. Perrin, M.D., SEXUAL ORIENTATION IN CHILD AND ADOLESCENT HEALTH CARE 118 (Springer 2002) (review of literature reveals no significant differences in emotional

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[5] Some studies compared children raised from birth by lesbian mothers to children raised from birth by heterosexual mothers; others compared children raised by divorced lesbian mothers to children raised by divorced heterosexual mothers. *See, e.g.,* David K. Flaks et al., *Lesbians Choosing Motherhood: A Comparative Study of Lesbian and Heterosexual Parents and Their Children*, 31 DEV. PSYCHOL. 105 (1995); Sharon L. Huggins, *A Comparative Study of Self-Esteem of Adolescent Children of Divorced Lesbian Mothers and Divorced Heterosexual Mothers*, 18 J. HOMOSEXUALITY 123 (1989). Yet other studies compared children of single lesbian mothers to children of single heterosexual mothers, or children of lesbian couples to children of heterosexual couples. *See, e.g.*, Susan Golombok et al., *Children Raised in Fatherless Families from Infancy: Family Relationships and the Socioemotional Development of Children of Lesbian and Single Heterosexual Mothers*, 38 J. CHILD PSYCHOL. & PSYCHIATRY & ALLIED DISCIPLINES 783 (1997); Raymond W. Chan et al., *Division of Labor Among Lesbian and Heterosexual Parents: Associations with Children's Adjustment*, 12 J. FAM. PSYCHOL. 402 (1998). Social science research on children raised by gay fathers is still developing, but there is little reason to suppose that these children will differ from children raised by lesbian couples.

and conduct difficulties between children of gay or lesbian parents and children of heterosexual parents); Fiona Tasker & Susan Golombok, *Adults Raised as Children in Lesbian Families*, 65 AM. J. ORTHOPSYCHIATRY 203, 212 (1995) (in a longitudinal study, researchers found no significant differences in anxiety or depression levels between children of divorced lesbian and divorced heterosexual mothers); Susan Golombok et al., *Children in Lesbian and Single-Parent Households: Psychosexual and Psychiatric Appraisal*, 24 J. CHILD PSYCHOL. PSYCHIAT. 551, 570 (1983) (finding psychiatric problems more prevalent in heterosexual single-parent group than lesbian mother group).

- Children of lesbian and gay parents are as healthy as children raised by heterosexual parents in terms of their psychological well-being and social adjustment. *See* David K. Flaks et al., *Lesbians Choosing Motherhood: A Comparative Study of Lesbian and Heterosexual Parents and Their Children*, 31 DEV. PSYCHOL. 105, 109 (1995) (finding that parents' sexual orientation did not affect the cognitive and behavioral functioning of their children); Raymond W. Chan et al., *Psychosocial Adjustment among Children Conceived via Donor Insemination by Lesbian and Heterosexual Mothers*, 69 CHILD DEV. 443, 453 (1998) (finding that on measures of social competence and behavior problems, "it was impossible to distinguish children born to and brought up by lesbian versus heterosexual parents"); Sharon L. Huggins, *A Comparative Study of Self-Esteem of Adolescent Children of Divorced Lesbian Mothers and Divorced Heterosexual Mothers*, 18 J. HOMOSEXUALITY 123 (1989) (finding no significant difference in the level of self esteem of children with heterosexual mothers and children with lesbian mothers); Jennifer L. Wainright et al., *Psychosocial Adjustment, School Outcomes, and Romantic*

Relationships of Adolescents With Same-Sex Parents, 75 CHILD DEV. 1886, 1895 (2004) ("Across a diverse array of assessments, we found that the personal, family, and school adjustment of adolescents living with same-sex parents did not differ from that of adolescents living with opposite-sex parents.").

- Children of lesbian parents are just as successful as their peers at making friends and forming healthy peer relationships. *See, e.g.*, Charlotte J. Patterson, *Children of Lesbian and Gay Parents*, 63 CHILD DEV. 1025, 1033 (1992) (review of existing research reveals no significant differences in quality of peer relationships or popularity among peers); Katrien Vanfraussen et al., *What Does It Mean for Youngsters to Grow Up in a Lesbian Family Created by Means of Donor Insemination?*, 20 J. REPROD. & INFANT PSYCHOL. 237, 250 (2002) (children of lesbian and heterosexual parent families showed no differences with respect to perceived acceptance by peers); Tasker & Golombok, *supra*, at 212 (children of lesbian mothers were no more likely to experience peer stigma during adolescence than children of heterosexual mothers).

- There is no relationship between parental sexual orientation and a child's cognitive abilities and development. *See, e.g.*, Richard Green et al., *Lesbian Mothers and Their Children: A Comparison with Solo Parent Heterosexual Mothers and Their Children*, 15 Archives of Sexual Behav. 167 (1986) (finding no significant differences in the IQ of children of lesbian mothers and solo parent heterosexual mothers); Judith Stacey & Timothy Biblarz, *(How) Does the Sexual Orientation of Parents Matter?*, 66 AM. SOC. REV. 159, 172 (2001) ("[A]cross studies, no relationship has been found between parental sexual orientation and measures of children's cognitive ability.").

- Children of gay or lesbian parents are not more likely to become gay or lesbian themselves. *See* Susan Golombok & Fiona Tasker, *Do Parents Influence the Sexual Orientation of Their Children? Findings from a Longitudinal Study of Lesbian Families*, 32 DEV. PSYCHOL. 3, 8 (1996) (finding no statistically significant difference between young adults from lesbian and heterosexual family backgrounds with respect to sexual orientation); Wainright et al., *supra*, at 1895 ("[O]ur results are consistent with the view that adolescents living with same-sex parents have romantic lives that are much like those of other adolescents.").[6] Children of same-sex parents also show no differences in gender identity (i.e. a child's sense of himself or herself as a boy or a girl). *See* AAP, *Technical Report: Coparent or Second-Parent Adoption by Same-Sex Parents*, 109 PEDIATRICS 341, 342 (2002) ("None of the more than 300 children studied to date have shown evidence of gender identity confusion, wished to be the other sex, or consistently engaged in cross-gender behavior."); Martha Kirkpatrick et al., *Lesbian Mothers and Their Children: A Comparative Survey*, 51 AM. J. ORTHOPSYCHIATRY 545, 551 (1981) (finding no differences in gender development between children raised by lesbian mothers and those raised by unmarried heterosexual mothers).[7]

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[6] There is some evidence suggesting (unsurprisingly) that children of gay or lesbian parents may be more comfortable acknowledging or acting on same-sex attraction if they have such feelings. *See* Stacey & Biblarz, *supra*, at 170-171. Nonetheless, the majority of children raised by gay or lesbian parents identified themselves as heterosexual. *Id.*

[7] Some studies have, however, found that children raised by lesbian parents may feel less constrained by sex stereotypes (i.e. societal notions of what behavior is appropriate for boys and for girls) than children raised by heterosexual parents, but all were within normal ranges. *See, e.g.*, Green, *supra*, at 167 (finding that daughters

In addition, multiple studies have examined same-sex relationships and parenting skills of lesbians and gay men. Each of these studies concluded that same-sex couples have the same capacity and desire as heterosexual couples to form stable, long-lasting, intimate relationships and found that the quality of their parenting skills are comparable to heterosexual parents. Specifically, these studies concluded:

- Same-sex couples are comparable to heterosexual couples in their ability to sustain long-lasting, stable relationships and be effective parents. *See* Jerry J. Bigner & R. Brooke Jacobsen, *Parenting Behaviors of Homosexual and Heterosexual Fathers*, 18 J. HOMOSEXUALITY 173, 180-81 (1989) (finding that gay fathers did not differ significantly from heterosexual fathers in terms of overall parental involvement, intimacy, and parenting skills); Anne Brewaeys et al., *Donor Insemination: Child Development and Family Functioning in Lesbian Mother Families*, 12 HUM. REPROD. 1349, 1356 (1997) (finding that the quality of the relationship between lesbian mothers and their partners was comparable to that of the heterosexual couples); Flaks et al., *supra*, at 111. In fact, some studies have found that same-sex parents offer certain advantages in child-rearing. *See, e.g.*, Bigner & Jacobsen, *supra*, at 180 (study found that gay fathers tended to be more communicative with their children, enforced rules more strictly, and were more responsive to the perceived needs of their children); Susan Golombok et al., *Children*

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of lesbians were more likely than daughters of heterosexuals to show interest in toys and activities that are considered traditionally masculine in addition to those that are traditionally feminine); Mary E. Hotvedt & Jane Barclay Mandel, *Children of Lesbian Mothers*, *in* HOMOSEXUALITY: SOC., PSYCHOL., AND BIOLOGICAL ISSUES 275 (W. Paul ed., 1982) (finding that daughters of lesbians tended to pick possible occupations that were less traditionally female).

with Lesbian Parents: A Community Study, 39 DEV. PSYCHOL. 20, 29-30 (2003) (finding that "lesbian mothers reported smacking their children less and engaged more frequently in imaginative and domestic play than did heterosexual mothers"); Stacey & Biblarz, *supra*, at 174 (review of literature shows that donor-inseminated lesbian social mothers spent significantly more time on child-care activities and scored significantly higher than heterosexual fathers of children conceived by donor-insemination on parenting skills and quality of interactions with children).

- Same-sex parents are also devoted to their children and form strong parent-child bonds, just like heterosexual parents. *See* Susan Golombok et al., *Children Raised in Fatherless Families from Infancy: Family Relationships and the Socioemotional Development of Children of Lesbian and Single Heterosexual Mothers*, 38 J. CHILD PSYCHOL. & PSYCHIATRY & ALLIED DISCIPLINES 783, 787 (1997) (finding no differences in lesbian mothers' and single heterosexual mothers' warmth or emotional involvement with their children).

- The quality of parent-child relationships rather than the sexual orientation of the parents correlates with healthy child development. Chan et al., *Psychosocial Adjustment*, *supra,* at 454; Charlotte J. Patterson, *Children of Lesbian and Gay Parents*, 15 CURRENT DIRECTIONS IN PSYCHOL. SCI. 241, 243 (2006); Wainright et al., *supra*, at 1895. Factors associated with raising well-adjusted children include secure attachments between parents and children, harmonious relationship between the parents (if there are two), and the availability of adequate economic resources. *See* E. Mark Cummings & Patrick Davies, CHILDREN AND MARITAL CONFLICT: THE IMPACT OF FAMILY DISPUTE AND

RESOLUTION 2-5 (Guilford Press 1994). This finding is consistent with many years of social science research on the factors that influence children's development. Same-sex parents are just as able to possess these attributes as heterosexual parents.

In contrast to this body of research, the guardian *ad litem* in this case relied on psychologist Paul Cameron to make entirely unsupported claims that gay parents are more likely to molest their children and pressure them to become gay. *See Motion To Order DHHR To Remove Child From Physical Placement in Homosexual Home And For Other Injunctive Relief.* This Court should be aware that Dr. Cameron has been widely discredited by courts and his profession alike. *See, e.g., Baker v. Wade*, 106 F.R.D. 526, 536 (N.D. Tex. 1985) (characterizing Cameron's conclusion that homosexuals abuse children at a greater rate than heterosexuals as a "total distortion" of the data on which he relies), *rev'd on other grounds*, 769 F.2d 289 (5th Cir. 1985); Stacey & Biblarz, *supra*, at 161 (noting that Cameron was expelled by the American Psychological Association and denounced by the American Sociological Association for "willfully misrepresenting research"). Dr. Cameron's pronouncements, which are contrary to the findings of every respected researcher to have studied the issue, should not be credited by this Court.[8]

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[8] Furthermore, the guardian *ad litem's* testifying expert, Dr. Trayce Hansen, not only relied on the biased research of the ACP, but also recently has been found "not qualified to serve as an expert witness on the subject of the relevance of parental sexual orientation on children's development." *See Kulstad v. Maniaci*, No. DR-07-34, at 15 (Mont. Sept. 29, 2008) (order disqualifying Dr. Hansen as an expert witness). Only a few weeks ago, a federal district court described Dr. Hansen, who testified in support of the "Silent Reflection and Student Prayer Act," as having "little experience with child and adolescent psychiatry or psychology." *Sherman v. Twp. High Sch. Dist. 214*, No. 07 C 6048, 2009 U.S. Dist. LEXIS 3904, at *25 (N.D. Ill. Jan. 21, 2009).

In its *amicus* brief in support of Respondents, ACP disingenuously attacks all research conducted on same-sex parenting as methodologically flawed, claiming that the studies are non-longitudinal or utilize small or biased samples. *See Brief for American College of Pediatricians as Amicus Curiae Supporting Respondents* ("ACP Amicus Brief") at 8. This is simply untrue. Research on same-sex parenting includes longitudinal studies in which researchers followed children over the course of their childhoods, with some continuing through adolescence and into adulthood. *See, e.g.*, Henny M. W. Bos et al., *The USA National Longitudinal Lesbian Family Study (NLLFS): Homophobia, Psychological Adjustment, and Protective Factors*, 12 J. LESBIAN STUD. 455 (2008) (22 year study of 84 planned lesbian families with children conceived by donor insemination); Fiona MacCallum & Susan Golombok, *Children Raised in Fatherless Families from Infancy: A Follow-Up of Children of Lesbian and Single Heterosexual Mothers at Early Adolescence*, 45 J. CHILD PSYCHOL. & PSYCHIAT. 1407, 1409 (2004) (follow-up to study conducted 7 years earlier of 25 lesbian mother families, 38 single heterosexual mother families, and 38 two-parent heterosexual families). It also includes studies which utilized relatively large, random sample sets. *See, e.g.*, Wainright et al., *supra*, at 1889 (88 representative adolescents, half raised by lesbian couples, drawn from national sample of 12,105 adolescents); Golombok et al., *Children with Lesbian Parents*, *supra*, at 22 (39 representative lesbian-mother families, partly drawn from a geographic population study of almost 14,000 mothers and children, compared with 134 heterosexual-headed families); Chan et al., *Psychosocial Adjustment*, at 445 (comparing families of 34 lesbian couples, 21 lesbian single mothers, 16 heterosexual couples, and 9

single heterosexual mothers, all drawn from people using same sperm bank); Brewaeys et al., *supra*, at 1351 (comparing 30 lesbian couple families and 38 heterosexual couple families who conceived via donor-insemination, and 30 heterosexual couple families who conceived naturally, all of whom attended the same two fertility clinics).[9]

In support of its conclusions, the ACP cites to studies showing poorer outcomes for children in single-parent families as compared to two-parent families and draws the erroneous conclusion that children are best served by adoption by heterosexual parents. ACP Amicus Brief at 5-8.[10] This research is entirely inapposite to the question of

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[9] The ACP also implicitly criticizes the use of "convenience sampling," the practice of seeking out eligible subjects where the researcher expects to find them. *See* ACP Amicus Brief at 8. This technique is well-accepted and commonly used in psychological research, especially where the population being studied is a small minority that is hard to find. If it were sufficient to dismiss a body of research based on the use of convenience sampling, much research on child development, and in the field of psychology more generally, also would have to be dismissed.

[10] The studies relied upon by Dr. Hansen to support her view that "[t]he optimal family structure for raising children, the one that ensures the best interests of the children, will be seen as in the traditional mother/father family" (Transcript of Hearing on Guardian *Ad Litem*'s Motion (Nov. 21, 2008) ("Nov. 21 Tr.") at 87), suffer from much the same problem – none of these studies utilized same-sex parents as a control group. Furthermore, the ACP "study" that Dr. Hansen relied on (*id.* at 93-94) appears simply to have been a position statement on adoption from an organization with an anti-homosexual parenting agenda. *See infra* note 4; *see also* ACP, *Parenting Issues: Adoption, available at* http://www.acpeds.org/index.cgi?CONTEXT=art&cat=10005&art=171&BISKIT=1083593671. Second, Dr. Hansen stated her agreement with the Alabama Policy Institute's Family Matters study which concluded that "[t]he effect of nontraditional family structure on children's academic and social development is negative and significant." Nov. 21 Tr. at 92. This study, however, generally defined "traditional" as "two married parents and their biological children." Barbara Schneider et al., Alabama Policy Institute, *Family Matters: Family Structure and Child Outcomes*, at 3, *available at* http://www.alabamapolicy.org/pdf/currentfamilystructure.pdf. It is undisputed that a "traditional" family, so

whether two women or two men, both in parental roles, regardless of the legal status of their parental rights, can raise a healthy, happy, and well-adjusted child. Where, as here, there are two active, involved parents, this research is not applicable; the negative traits associated with single parenthood, such as reduced financial and emotional resources and conflict and disruption attending a divorce or separation (the route to single-parent family life for most children), are not present. In addition, despite the dismal picture of single-parent families portrayed in the studies, the West Virginia Legislature has seen fit to extend eligibility to adopt to unmarried individuals, perhaps in recognition of the fact that adoption by a single parent represents a good outcome for many children. W. Va. Code § 48-22-201 (2008); *see* Michael E. Lamb & Catherine S. Tamis-Lemonda, *The Role of the Father: An Introduction*, *in* THE ROLE OF THE FATHER IN CHILD DEVELOPMENT, at 7 (Michael E. Lamb ed., 4th ed. 2004); Sara McLanahan & Julien Teitler, *The Consequences of Father Absence*, *in* PARENTING AND CHILDHOOD DEVELOPMENT IN "NONTRADITIONAL" FAMILIES, 91-96 (Michael E. Lamb ed., 1999). Only one of the studies cited by ACP even purports to compare children of gay parents to children of heterosexual parents.[11]

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defined, is not in the cards for B.G.C. and this study does not speak to the best placement for a child in her circumstances.

[11] A literature review conducted by the American Psychological Association points to at least three characteristics of the methodology and sample of this 1996 study by Sotirios Sarantakos that are highly likely to have skewed the results and concludes that "[t]he anomalous results reported by this study – which contradict the accumulated body of research findings in this field – are attributed to idiosyncrasies in its sample and methodologies and are therefore not reliable." Patterson, *Lesbian and Gay Parents and Their Children, supra* at n.1.

In conclusion, the social science research on same-sex parenting overwhelmingly concludes that lesbian and gay couples can provide stable, loving homes and that their children do just as well on every measure of healthy adjustment as children of heterosexual parents.

II. Disfavoring Adoption By Same-Sex Couples Is Inconsistent with the Favored Individualized Approach to Placement Decisions and Contrary to the Best Interests of Children.

DHHR's policy is to engage in a comprehensive process to determine whether a placement in a particular foster or adoptive home is in best interests of the particular child, taking into account all relevant factors. By all accounts, B.G.C.'s placement with Petitioners has been extremely successful, and the child is bonded to the only parents she has ever known. Requiring DHHR to preference heterosexual couples in adoption decisions would not only disrupt B.G.C.'s placement, but also prevent many children from receiving optimal placements, lead to unnecessary and traumatic displacements of children who are currently being cared for by same-sex foster parents, discourage same-sex couples from becoming foster or adoptive parents, and result in increased costs to the State and delays in the permanent placement of children.

A. Well-Established Child Welfare Policy Requires Individualized Evaluation of Parents' Ability to Meet the Needs of the Particular Child.

The Circuit Court's ruling is a striking departure from an otherwise consistent and coherent scheme designed to match the needs of individual children with the abilities and circumstances of prospective adoptive parents. Prospective adoptive parents are evaluated on a case-by-case basis "based on their ability to meet the social, emotional,

and financial needs of the child." W. Va. Dept. of Health & Human Res., Adoption Policy § 7.3 (2004) ("DHHR Adoption Policy"), *available at* http://www.wvdhhr.org/bcf/policy/adoption/Adoption_Policy.pdf.[12] This individualized assessment of the skills of prospective adoptive parents and the needs of each child ensures that children are placed with parents who are best suited to meet their particular needs. DHHR regulations specify that foster and adoptive parents must be "nurturing, responsible, patient, stable, flexible, mature, healthy adults capable of meeting the individual and specific needs of children referred for placement services." W. Va. Code § 78-2-13.1.b (2008). The assessment of prospective foster or adoptive parents' fitness is based on a comprehensive home study, including a minimum of one individual in-person interview for each parent, and two joint interviews. *Id.* § 78-2-16.1. In evaluating the abilities of prospective foster and adoptive parents to provide care to children, DHHR's policy calls for an examination of a wide range of factors, including (but not limited to) the prospective parents' childhood and family experiences; education and employment history; important life experiences; values, ideals, and religious beliefs; attitudes towards discipline; decision-making processes; health history; hobbies and interests; parenting and child care experience; financial resources; living arrangements; and understanding of the legal rights of the child. *Id.* §§ 78-2-13, 78-2-16. None of these factors bear any relationship to the sexual orientation of the prospective foster and adoptive parents.

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[12] None of West Virginia's statutes indicate a legislative preference for adoption by married couples or by heterosexuals. Section 48-22-201 of the West Virginia Code draws no distinctions between married couples and other persons and is silent regarding the sexual orientation of prospective adoptive parents.

The Circuit Court erroneously relies on Rule 41(a)(6) of the Rules of Procedure for Child Abuse and Neglect Proceedings (the "Rules"), which requires consideration of whether a placement is "the least restrictive (most family-like one) available," as support for its conclusion that the State favors adoption by married couples. Blake Resp. at 23. It is clear from a review of the Rules in their entirety that the phrase "family-like" in Rule 41(a)(6) was intended to indicate a preference for a foster home over a group home or institutional setting. *See* W. Va. R. P. Abuse & Neglect Pro. 41(a)(10)(E) (2008) ("If placement in a group home or institution is recommended, [matters for discussion at permanent placement review conference shall include] an explanation of why treatment outside a family environment is necessary, including a brief summary of supporting expert diagnoses and recommendations; and a discussion of why a less restrictive, more family-like setting is not practical, including placement with specially trained foster parents."); *see also id.* at 28(c)(3) (DHHR's case plan shall include, among other things, a description of the recommended placement or type of home or institutional placement and whether or not it is the least restrictive (most family-like) one available). Requiring DHHR to prefer heterosexual couples in adoption proceedings undermines the individualized evaluation process codified in statutes, regulations, and DHHR policy documents by injecting a new and irrelevant factor – the prospective parents' sexual orientation – into the process, and making it one of the most important factors in the placement decision.

B. Disfavoring Adoption By Same-Sex Couples Undermines the Best Interests of Children.

Requiring DHHR to exhaust all options for placement with a heterosexual married couple before considering a same-sex couple is contrary to the best interests of the children of West Virginia in several ways. First, the Circuit Court's ruling may prevent children from receiving the best possible adoptive placement, if that placement is with a family headed by a same-sex couple. By expressing a preference for married (*ergo,* heterosexual) couples, the Circuit Court has deprived children of the opportunity to be adopted by a same-sex couple or a single person who may be a better match for their specific needs than any of the heterosexual couples who are available and willing to serve as adoptive parents.

Second, just as B.G.C. risks being uprooted from the only home she knows, establishing a preference for adoption by heterosexual couples is likely to result in similar displacements of other foster children currently in the care of same-sex couples or single individuals (regardless of their sexual orientation). Moving children from one placement to another is widely understood to have potentially harmful effects on their development. *See* Rae R. Newton et al., *Children and Youth in Foster Care: Disentangling the Relationship Between Problem Behaviors and Number of Placements,* 24 CHILD ABUSE & NEGLECT 1363, 1371 (2000) (concluding that children who experience numerous changes in placement may be at particularly high risk for negative behavior effects); AAP, *Development Issues for Young Children in Foster Care,* 106 PEDIATRICS 1145, 1146 (Nov. 2000), *available at* http://aappolicy.aappublications.org/cgi/content/

full/pediatrics;109/3/536.pdf (noting that "[a]ttachment to a primary caregiver is essential to the development of emotional security and social conscience," that separations from a primary caregiver after the first six months of a child's life can lead to "emotional disturbances," and that "the emotional consequences of multiple placements or disruptions are likely to be harmful at any age"); Nat'l Scientific Council on the Developing Child, *Young Children Develop in an Environment of Relationships*, Working Paper No. 1, 4 (2004), *available at* http://www.developingchild.net/pubs/wp/Young_Children_Environment_Relationships.pdf ("prolonged separations from familiar caregivers and repeated 'detaching' and 're-attaching' to people who matter are emotionally distressing and can lead to enduring problems"); *see generally* Vera I. Fahlberg, A CHILD'S JOURNEY THROUGH PLACEMENT (Perspectives Press 1991). The consensus of the child welfare professional community, based on the social science research, is that it is harmful and contrary to the best interests of a child to remove her from a bonded long-term placement based on nothing more than mere generalized speculation, as opposed to actual individualized evidence, about the possibility of a better placement.

West Virginia, through its child welfare laws and policies, recognizes the detrimental effects of disrupting children's relationships through placement changes. *See State ex rel. Treadway v. McCoy,* 189 W. Va. 210, 214 (1993) ("[t]he best interests of a child are served by preserving important relationships in that child's life."); DHHR Adoption Policy § 3.10.11 (2004) (emphasizing the importance of "respect for the sense of time of young children *because separations and relationship disruptions in the early*

months and years of life interfere with the younger child's initial capacity to learn how to trust and form secure attachments with adults") (emphasis added). Yet the Circuit Court's ruling undermines these well-founded policies by requiring that DHHR seek to place foster children of gay couples in "traditional homes" for adoption, regardless of the length of the foster relationship.

Disfavoring non-traditional parents in the adoption process may have the effect of discouraging lesbians and gay men from becoming foster parents, thereby exacerbating existing shortages of qualified foster parents and making it more difficult for DHHR to find good homes for children in West Virginia. Nationwide, the number of willing foster parents has been decreasing over the last 25 years, while the number of children requiring foster care has increased. *See* Sandra Stukes Chipungu & Tricia B. Bent-Goodley, *Meeting the Challenges of Contemporary Foster Care,* 14 FUTURE OF CHILD. 75, 84 (2004); *see also* CWLA Family Foster Care Standards, *supra*, at 101 (noting an approximate 50% decline in available foster parents from 1980 to 1992); The Pew Commission on Children in Foster Care, *Fostering the Future: Safety, Permanence, and Well-Being for Children in Foster Care* 12, *available at* http://pewfostercare.org/research/docs/FinalReport.pdf (noting that number of children in foster care almost doubled from 1980 to 2002).

There is a staggeringly small number of approved foster families in West Virginia, compared to the number of children requiring foster care. At the end of 2006, there were approximately 4,226 children in some form of foster care residing in West Virginia (out of the almost 500,000 in the United States). *See* NDAS Report, *Number of*

Children in Out-of-Home Care, West Virginia (2006), available at http://ndas.cwla.org/data_stats/access/predefined/home.asp?MainTopicID=3&SubTopicID=28. Yet there were only about 429 approved foster families (including pre-adoptive and kinship families) in West Virginia (out of 172,000 nationwide) – many more are needed to place every eligible child in a foster home, let alone ensure a good match. *See* NDAS Report, *Number of Licensed, Approved and Certified Homes and Facilities, West Virginia (2004), available at* http://ndas.cwla.org/data_stats/access/predefined/home.asp?MainTopicID=3&SubTopicID=32. As a result, many children who would benefit from a family placement remain in congregate care facilities, a situation that all parties agree is not in their best interests. In West Virginia alone, 1,242 children, or approximately 29% of foster children in the state, resided in a group home or institution in 2006. NDAS Report, *Number of Children in Out-of-Home Care, by Placement Setting, West Virginia (2006), available at* http://ndas.cwla.org/data_stats/access/predefined/home.asp?MainTopicID=3&SubTopicID=27. The Circuit Court's ruling is likely to exacerbate the shortage of foster homes by deterring lesbians and gay men, an heterosexual single people, from becoming foster parents, thereby reducing the current pool of qualified foster homes in West Virginia. Thus, rather than improving the welfare of children in West Virginia, implementing the Circuit Court's ruling at a systemic level would actually have precisely the opposite effect.

Discouraging lesbians and gay men and heterosexual single people from fostering would have the added effect of reducing the likelihood of adoption for many children, since approximately 60% of children adopted from the foster care system are adopted by

their foster parents. AFCARS Report, #14, *Preliminary FY 2006 Estimates as of January 2008*, *available at* http://www.acf.hhs.gov/programs/cb/stats_research/afcars/tar/report14.htm. As discussed above, as of 2006 there were over 125,000 children in the U.S. waiting for adoptive homes, over 1000 of whom reside in West Virginia. *Expanding Resources II*, at 11; AFCARS Report, *Children in the Public Foster Care System Waiting to be Adopted: Fiscal Years 1999-2006, available at*http://www.acf.hhs.gov/programs/cb/stats_research/afcars/waiting2006.htm. Many of these children never find adoptive homes – indeed, approximately 25,000 youths or children "age out" of foster care each year (including over 200 youths in West Virginia), and studies show that these children are at a high risk of negative outcomes such as poverty, homelessness, incarceration, and early parenthood. NDAS Report, *Number of Children Exiting Out-of-Home Care, by Reason for Discharge, West Virginia (2006), available at* http://ndas.cwla.org/data_stats/access/predefined/home.asp?MainTopicID=3&SubTopicID=27; *Expanding Resources II*, at 4.

Gay men and lesbians can be motivated, qualified adoptive parents, and can play a significant role in alleviating this backlog of children waiting for adoptive homes. Nationwide, it is estimated that approximately 65,500 children have already been adopted by gay or lesbian parents, representing over 4% of all adopted children in the United States. Gary J. Gates et al., ADOPTION AND FOSTER CARE BY GAY AND LESBIAN PARENTS IN THE UNITED STATES 7 (March 2007), *available at* http://www.urban.org/publications/411437.html. Furthermore, gay men and lesbians tend to exhibit willingness to parent a wider range of children than heterosexual couples, including older children and children

with special needs, such as behavior, emotional and learning problems. Devon Brooks & Sheryl Goldberg, *Gay and Lesbian Adoptive and Foster Care Placements: Can They Meet the Needs of Waiting Children?,* 45 SOCIAL WORK 147, 152 (2001). The Circuit Court's ruling will harm children by impeding the consideration of capable, committed adoptive families.

Finally, the Circuit Court's directive will delay the permanent placement of children and needlessly drain the State's financial resources. Achieving permanent placements for children is one of the primary goals of child welfare policy in the United States. *See* Peter J. Pecora et al., THE CHILD WELFARE CHALLENGE: POLICY, PRACTICE, AND RESEARCH 11-12 (2d. ed. 2000); Madelyn Freundlich et al., *The Meaning of Permanency in Child Welfare: Multiple Stakeholder Perspectives,* 28 CHILD AND YOUTH SERVS. REV. 741, 743 (2006); Adoption Assistance and Child Welfare Act, Pub. L. No. 104-193, 110 Stat. 2105 (1996); Adoption and Safe Families Act of 1997, Pub. L. No. 105-49, 111 Stat. 2115 (1997). West Virginia, like other states, has embraced the objective of expediently achieving permanency for children in state custody. DHHR Adoption Policy § 1.2 (2004) ("The creation of a permanent family for children in custody is the main objective for children whose parental rights have been terminated."); *id.* § 3.10 (emphasizing the need to implement practices "that are designed to make cases move quickly through the foster care system until permanency is achieved."). The Circuit Court's order that DHHR must first make an effort to place children in "traditional homes" before allowing adoption by same-sex parents would undermine the objective of expediently achieving permanent placement for children in state custody by

requiring DHHR to spend additional time searching for heterosexual married adoptive parents for these children, even where prospective gay adoptive parents have already been identified and approved as caregivers, and may be serving as foster parents already. Implementing the Circuit Court's order will also increase DHHR's expenses per child by forcing DHHR staff to undertake the time-consuming task of recruiting, evaluating, and training prospective heterosexual adoptive couples in situations where responsible homosexual parents have already been identified and trained, and have already expressed willingness to adopt a child. Instead of following a child-focused path whereby children are adopted by the same-sex foster parents that they have come to know and love, the Circuit Court's order would require DHHR to expend time and resources trying to find these children new homes, thereby diverting scarce resources from more productive uses and delaying permanent placements.

CONCLUSION

In conclusion, *amici* urge this Court to act in the best interest of B.G.C. and the many children throughout West Virginia seeking foster and/or adoptive homes, and order the DHHR Regional Adoption Unit to make a recommendation about the most suitable home for B.G.C. based on the specific facts of her case, without disfavoring potential adoptive parents – including Petitioners – on the basis of sexual orientation.

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true copy of the foregoing Motion for Leave to File Brief of *Amici Curiae* and Brief of *Amici Curiae* was served upon the following counsel via regular U.S. mail this 16th day of February, 2009:

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