

ADOPTED

AMERICAN BAR ASSOCIATION

**NATIONAL LGBT BAR ASSOCIATION
COMMISSION ON SEXUAL ORIENTATION AND GENDER IDENTITY**

REPORT TO THE HOUSE OF DELEGATES

RESOLUTION

- 1 RESOLVED, That the American Bar Association opposes laws, regulations, and rules or
- 2 practices that discriminate against LGBT individuals in the exercise of the fundamental
- 3 right to parent;
- 4
- 5 FURTHER RESOLVED, That the American Bar Association urges lawmakers in
- 6 jurisdictions where such discriminatory laws, regulations, and practices exist to promptly
- 7 repeal them and ensure the equal protection of all LGBT individuals under the law; and
- 8
- 9 FURTHER RESOLVED, That the American Bar Association urges bar associations and
- 10 attorneys to defend victims of anti-LGBT discrimination, and to recognize and support
- 11 their colleagues taking on this work.

REPORT

I. Introduction

Despite significantly increased recognition of LGBT rights in recent decades, state and federal lawmakers have attempted and often succeeded in restricting LGBT individuals' fundamental right to parent. This report will describe the current state of the law regarding LGBT parenting rights, the increased threats to these rights, and all available data on the reality of LGBT parenting.

As it stands, a patchwork of current laws and judicial decisions have incorporated LGBT parents and families into areas of family law that previously only considered different-sex married couples and their families.

In its reasoning in *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015), the Supreme Court acknowledged that LGBT individuals are parents to millions of children around the country and that these families deserve the same recognition and protection as any other family. However, since *Obergefell*, not every state has updated its laws to incorporate the reasoning and spirit of *Obergefell* and lawmakers in some states have incorrectly argued that there is ambiguity in the breadth of *Obergefell's* holding that still permits discrimination against LGBT individuals. For example, ten states now permit state-licensed child welfare agencies to refuse to place and provide services to children and families if doing so conflicts with the agency's religious or moral beliefs. These policies have acutely affected LGBT parents, who are disproportionately more likely to adopt or foster children.

Any purported ambiguity supporting these policies does not exist. The Supreme Court's decision last year in *Pavan v. Smith*, 137 S. Ct. 2075 (2017), made clear that rights afforded to different-sex parents by the state cannot be denied to LGBT parents. Notably, *Pavan* extends *Obergefell* beyond marriage to require that states afford equal recognition to same-sex parents in all the same ways that they recognize different-sex parents. However, family law in each state continues to vary greatly. Some states have fully embraced the parental rights of LGBT parents, while other states are more reticent, forcing their courts to recognize rights for LGBT parents on an ad hoc basis.

Discriminatory laws restricting LGBT individuals' right to parent fly in the face of long-standing medical, psychological, sociological, and developmental research. Experts in these fields overwhelmingly agree that sexual orientation has no bearing on an individual's ability to be a fit parent. Above all, children need love, stability, and strong relationships with committed parents. LGBT parents are as capable to meet these needs as any other parents. With tens of thousands of children in foster care or awaiting adoption, restricting the number of potential loving homes on the basis of sexual orientation is arbitrary and harmful to the most vulnerable children.

II. The Current State of the Law Regarding Parenting Rights of LGBT Individuals

Over the past forty years, states have recognized that sexual orientation should no longer create a presumption against parental fitness. As a result, different levels of government have recognized that the fundamental right to parent encompasses LGBT parents, although this protection varies greatly from jurisdiction to jurisdiction.

Married Couples

Same-sex married couples enjoy the same attendant “constellation of benefits that the States have linked to marriage” that different-sex married couples enjoy. *Obergefell v. Hodges*, 135 S. Ct. 2584, 2590 (2015). As part of its reasoning, the Supreme Court reviewed family law across the country and found a “powerful confirmation from the law itself that gays and lesbians can create loving, supportive families.” *Id.* at 2600. One of the “benefits” recognized in *Obergefell* – the fundamental right to parent – has already been reaffirmed by the Supreme Court. States are categorically prohibited from abridging parental recognition offered to different-sex married couples. *See Pavan v. Smith*, 137 S. Ct. 2075, 2078 (2017) (“As a result, same-sex parents in Arkansas lack the same right as opposite-sex parents to be listed on a child’s birth certificate, a document often used for important transactions like making medical decisions for a child or enrolling a child in school...*Obergefell* proscribes such disparate treatment.”). However, the parentage presumption flowing from marriage (that children born to a married couple during their marriage are legally the children of the two adults) is not yet uniformly applied to same-sex couples, although some states have begun to update their statutes or interpret them in gender-neutral ways.¹

Adoption

Ten states allow second-parent adoption² either by explicit authorization in the state’s adoption statute or by appellate ruling. 1 ADOPTION LAW AND PRACTICE § 3.06. Seventeen other states have counties where trial court judges have granted second-parent adoptions. *Id.* One state’s valid final judgment of adoption regarding same-sex parents must be given full faith and credit by all other states. *V.L. v. E.L.*, 136 S. Ct. 1017 (2016). It is worth noting that family law practitioners agree that adoption remains the strongest legal connection an LGBT parent can have with their child, aside from biological relationship, because in many instances one or both parents may not be biologically related to their child.³

¹ See, e.g., UNIFORM LAW COMMISSION, UNIFORM PARENTAGE ACT OF 2017 SUMMARY (2017) <http://www.uniformlaws.org/Shared/Docs/Parentage/SummaryUPA%20final.pdf>.

² “A second parent adoption (also called a co-parent adoption) is a legal procedure that allows a same-sex parent, regardless of whether they have a legally recognized relationship to the other parent, to adopt her or his partner’s biological or adoptive child without terminating the first parent’s legal status as a parent.” NATIONAL CENTER FOR LESBIAN RIGHTS, ADOPTION BY LGBT PARENTS, http://www.nclrights.org/wp-content/uploads/2013/07/2PA_state_list.pdf (last updated March 2018).

³ HUMAN RIGHTS CAMPAIGN FOUNDATION, SECOND PARENT ADOPTION, <https://www.hrc.org/resources/second-parent-adoption> (last accessed November 5, 2018).

Foster Parents

Prior to *Obergefell*, Arkansas’s supreme court had already held that prohibitions against LGBT foster parents violated the best interest of the child standard. See, e.g., *Dep’t Human Serv. & Child Welfare Agency Review Bd. v. Howard*, 238 S.W.3d 1 (Ark. 2006) (finding a promulgated rule that created a blanket exclusion of homosexuals and individuals who resided with a homosexual from becoming foster parents violated separation of powers because it did “not promote the health, safety, or welfare of foster children [required in the organic statute] but rather act[ed] to exclude a set of individuals from becoming foster parents based upon morality and bias.”). In 2006, the Missouri attorney general indicated that the state must drop its “long-standing unwritten policy of not licensing homosexuals” when a plaintiff prevailed at trial after being declared unfit for a foster care license based only on their sexual orientation. COURTNEY G. JOSLIN, SHANNON P. MINTER, & CATHERINE SAKIMURA, *LESBIAN, GAY, BISEXUAL AND TRANSGENDER FAMILY LAW* § 2:9 (2018).

Nine other states prior to *Obergefell* statutorily prohibited discrimination against sexual orientation in licensing foster parents: Massachusetts in 1990, Connecticut in 1991, Rhode Island in 1997, Nevada in 2002, District of Columbia in 2006, Oregon in 2008, California and Maryland in 2009, and Wisconsin in 2015. *LESBIAN, GAY, BISEXUAL AND TRANSGENDER FAMILY LAW* § 2:10. New Jersey and New York prohibited discrimination against LGBT foster parents by regulation as well in 1994 and 2003, respectively. *Id.*

Additionally, since *Obergefell* Nebraska’s supreme court upheld a trial court ruling that, pursuant to *Obergefell*, “the current practice of subjecting gay and lesbian individuals and couples and ‘unrelated, unmarried adults residing together’ to additional levels of review [for licensing or placement in foster or adoptive homes] than heterosexual individuals and heterosexual married couples” violates the Equal Protection and Due Process clauses of the Federal Constitution. *Stewart v. Heineman*, No. C113-0003157, 2015 WL 10373584 at *4 (Neb. Dist. Ct. 2015), *aff’d*, *Stewart v. Heineman*, 892 N.W.2d. 542 (Neb. 2017).

Custody

Family law’s common law recognition of de facto parenthood is applicable for same-sex partners to establish standing to contest custody or visitation determinations. 1 *CHILD CUSTODY AND VISITATION* § 10.05; see also, *Conover v. Conover*, 146 A.3d 433 (Md. 2016). It violates rational basis review to prohibit same-sex parents from enjoying parental rights not limited to married couples. E.g., *D.M.T. v. T.M.H.*, 129 So. 3d 320 (Fla. 2013) (finding that an assisted reproduction statute did not limit “commissioning couple” to married individuals, so it violates rational basis review to exclude only same-sex couples as “commissioning couple.”).

* * *

The policies behind these decisions consider the “best interest of the child” standard, and also safeguard a parent’s Equal Protection and Due Process rights under the Fourteenth Amendment. Nonetheless, these rights are vulnerable to attack because LGBT-inclusive interpretations of the Equal Protection and Due Process clauses are not uniformly applied

by statute, common law, or appellate decision. Instead, they arise from a patchwork of local and state attempts to include LGBT families in legal categories that were originally created solely for different-sex couples.

III. Increased Threats to LGBT Parenting

Even as “our society has come to the recognition that gay persons and gay couples cannot be treated as social outcasts or as inferior in dignity and worth,”⁴ state-sanctioned discrimination against LGBT individuals who wish to raise children has dramatically increased in recent years. LGBT individuals enjoy the same fundamental right to parent as non-LGBT individuals, yet state governments have chipped away at this right for the LGBT community.

A number of states now permit state-licensed child welfare agencies to refuse to place and provide services to children and families, including LGBT individuals and same-sex couples, if doing so conflicts with the agency’s religious or moral beliefs. The following ten states have enacted these laws (dates indicate when such laws were passed):

- North Dakota – April 2003
- Virginia – April 2012
- Michigan – September 2015
- Mississippi – April 2016
- South Dakota – March 2017
- Alabama – April 2017
- Texas – June 2017
- Oklahoma – May 2018
- Kansas – May 2018
- South Carolina – July 2018

Eight of the ten did so in the past three years, after *Obergefell*. Six of the eight did so after the 2016 election. Just this past spring, similar bills were considered, but ultimately rejected, in Colorado and Georgia. Child welfare agencies in other states have invoked these laws in seeking similar accommodations.⁵ Other threats to LGBT parents are likely to come in coming months and years because only eight states and the District of Columbia expressly prohibit discrimination based on sexual orientation or gender identity in adoption and foster care.⁶

⁴ *Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Comm’n*, 138 S. Ct. 1719, 1727 (2018)

⁵ For example, in March 2018, a religiously-affiliated child welfare agency sued the City of Philadelphia after the City indicated it would no longer make referrals to agencies that discriminated against LGBT parents. A federal district court denied the agency’s motion for a preliminary injunction in *Fulton v. City of Philadelphia*, 320 F. Supp. 3d 661 (E.D. Pa. July 13, 2018), but the agency appealed this decision to the Third Circuit Court of Appeals where it is pending.

⁶ Currently, these states are California, Maryland, Massachusetts, New Jersey, New York, Oregon, Rhode Island, and Wisconsin.

These disturbing developments are not limited to state governments. In April 2017, the Child Welfare Provider Inclusion Act was introduced to both houses of Congress.⁷ This bill sought to prohibit the federal and state governments from discriminating or taking adverse action against child welfare agencies which refuse to provide services on the basis of their sincerely held religious beliefs or moral convictions – essentially a federal version of the growing number of similar state laws. As of November 2018, the bill has not been seriously considered by a subcommittee of either chamber. Nonetheless, in July 2018, the House Appropriations Committee approved funding for the Departments of Labor, Health and Human Services, and Education with a provision known as the “Aderholt Amendment,” which contained all the same provisions as the Child Welfare Provider Inclusion Act. Fortunately, this amendment was removed from the final appropriations bill voted on by the full House of Representatives and Senate in September 2018, but it demonstrates the extent to which all levels of government have tried to undermine the dignity and equality of LGBT families.

All these laws disregard the central consideration of family law: the best interests of children. Every child deserves a stable, loving, forever family and all child welfare decisions should be made in the best interests of the child, *not* based on the personal beliefs of a child services agency or its workers. There are approximately 440,000 children in foster care nationwide, with approximately 120,000 children waiting to be adopted.⁸ By allowing child welfare agencies to make decisions upon their personal beliefs, children remain in foster care or government group homes longer because agencies arbitrarily narrow the pool of qualified foster and adoptive homes. No one wants children to languish longer in a state’s child welfare system. Allowing an agency to discriminate against LGBT parents sends a clear message – the agency’s religious and moral beliefs are superior to their core mission of finding loving, permanent homes for children.

These discriminatory laws disproportionately affect LGBT families because LGBT individuals are significantly more likely to be raising adopted or foster children.⁹ According to recent research, one in five same-sex couples (21.4%) are raising adopted children compared to just 3% of different-sex couples, and 2.9% of same-sex couples have foster

⁷ Child Welfare Provider Inclusion Act of 2017, H.R. 1881, S.811, 115th Cong. (2017).

⁸ U.S. DEP’T OF HEALTH AND HUMAN SERVS., ADMIN. FOR CHILD. AND FAMS., CHILDREN’S BUREAU, *The AFCARS Report* (Oct. 20, 2017), <https://www.acf.hhs.gov/sites/default/files/cb/afcarsreport24.pdf>.

⁹ Not only are LGBT people more likely to raise adopted or foster children, but many state-licensed agencies that engage in adoptive and foster care placement are religious organizations. This only amplifies the discriminatory effects of these laws because these religious organizations either have no restrictions on to whom they can deny services or are only specifically forbidden from considering historically protected categories such as race, ethnicity, or national origin when providing services. See, e.g., TEX. HUM. RES. CODE ANN. § 45.009(f) (prohibiting agencies from considering race, ethnicity, or national origin); S.D. CODIFIED LAWS § 26-6-42 (same). Given the lack of affirmative non-discrimination laws in many states, these state-licensed religious organizations could single out LGBT people for discrimination.

children compared to 0.4% of different-sex couples.¹⁰ This data reveals that LGBT parents are approximately seven times more likely to be raising adopted or foster children. An estimated 2 million LGBT adults are interested in adoption.¹¹ Even more prospective adoptive parents likely exist now after nationwide marriage equality because same-sex couples who are married or consider themselves married are more than twice as likely to raise children as same-sex couples who are not married.¹²

The recent increase in discriminatory laws aimed at limiting the rights of LGBT parents shows no sign of slowing down unless legal organizations push for the repeal of such laws and for the passage of affirmative protections for LGBT parents. Without such action, LGBT parents will continue to face de facto and de jure discrimination, harming children in foster care and children awaiting adoption.

IV. Research and Expert Opinions on LGBT Parenting

In light of all available data regarding the competency of LGBT parents and the needs of vulnerable children, the recent threats to the rights of LGBT parents defy logic, equity, and compassion. Virtually every organization that works with children recognizes the fitness of LGBT parents and opposes restrictions against their ability to raise, foster, and adopt children. The best interests of children obligate governments to increase the number of safe and supportive homes available for placement. LGBT parents foster and adopt at a much higher rate than the general population and can provide these loving homes.

Several decades of research have proven that same-sex and different-sex parents make equally good parents. In every measure of childhood development, children of same-sex and different-sex parents fare equally well.¹³ The sexual orientation of parents does not impact the emotional, cognitive, social, or behavioral development of children.¹⁴

¹⁰ PRESS RELEASE, SHOSHANA GOLDBERG & KERITH CONRON, WILLIAMS INSTITUTE, HOW MANY SAME-SEX COUPLES IN THE U.S. ARE RAISING CHILDREN? (2018), <https://williamsinstitute.law.ucla.edu/press/press-releases/same-sex-parenting/>.

¹¹ GARY GATES ET AL., WILLIAMS INSTITUTE, ADOPTION AND FOSTER CARE BY GAY AND LESBIAN PARENTS IN THE UNITED STATES (2007), <https://williamsinstitute.law.ucla.edu/research/parenting/adoption-and-foster-care-by-gay-and-lesbian-parents-in-the-united-states/>.

¹² CATHRYN OAKLEY, HUMAN RIGHTS CAMPAIGN FOUNDATION, DISREGARDING THE BEST INTEREST OF THE CHILD: LICENSES TO DISCRIMINATE IN CHILD WELFARE SERVICES (2017), <https://www.hrc.org/blog/hrcf-report-details-harms-of-writing-anti-lgbtq-discrimination-in-child-wel>. As of June 2017, approximately 10.2% of LGBT adults are now married to a same-sex spouse, which is up from approximately 7.9% prior to *Obergefell*. Jeffrey Jones, *In U.S., 10.2% of LGBT Adults Now Married to Same-Sex Spouse*, GALLUP (2017), https://news.gallup.com/poll/212702/lgbt-adults-married-sex-spouse.aspx?utm_source=alert&utm_medium=email&utm_content=morelink&utm_campaign=syndication

¹³ Abbie E. Goldberg, Nanette K. Gartrell & Gary Gates, Research on LGBT-Parent Families, THE WILLIAMS INST., UCLA SCH. OF L. (July 2014), <https://williamsinstitute.law.ucla.edu/wp-content/uploads/lgb-parent-families-july-2014.pdf>.

¹⁴ Ellen C. Perrin & Benjamin S. Siegel, *Technical Report: Promoting the Well-Being of Children Whose Parents Are Gay or Lesbian*, 131 *Pediatrics* e1374 (April 2013), <http://pediatrics.aappublications.org/content/pediatrics/131/4/e1374.full.pdf>; Rachel H. Farr et al., Parenting and Child Development in Adoptive Families: Does Parental Sexual Orientation Matter?, 14 *APPLIED DEVELOPMENTAL SCI.* 164, 175 (2010), <https://williamsinstitute.law.ucla.edu/wp->

Additionally, same-sex couples and different-sex couples display no differences when it comes to parenting skills, attitudes, or emotional health.¹⁵ Current research indicates that factors such as the quality of the child’s relationship with parents, the quality of the relationship between parents, and the availability of economic and socio-economic resources are far more important to a child’s development than his or her parent’s sexual orientation.¹⁶ Thus, “the optimal development for children is not based on the sexual orientation of the parents, but on stable attachments to committed and nurturing adults.”¹⁷ LGBT parents are as fit as any others to meet the needs of their children and to provide them with these stable attachments in a nurturing home environment. In short, the children of LGBT individuals “grow up as happy, healthy, and well-adjusted as the children of heterosexual parents.”¹⁸

Limiting the ability of LGBT parents to foster and adopt hurts families in a multitude of ways. It deprives foster children of a safe and stable environment to grow. It deprives those awaiting adoption of the strong familial relationship to which they are entitled, and from which they could reap innumerable economic and social benefits including social security benefits, workers’ compensation, health insurance, and child support – all made possible by a formal adoption relationship.¹⁹ Even more importantly, a permanent family, regardless of the parents’ sexual orientation, can provide them with the love, support, stability, strong relationships, and role models that experts have concluded are crucial to raising well-adjusted and healthy children. These qualities affect a child’s development far more than their parents’ sexual orientation.

The data is so clear that a number of professional associations and child advocacy organizations have made statements supporting the competency of LGBT parents and have called for their equal consideration in foster care and adoption placements. The list of organizations that have made statements supporting the capability of LGBT parents includes:

[content/uploads/Patterson-Farr-Forssell-AppliedDevScience-Jul-2010.pdf](#); Nanette Gartrell & Henny Bos, US National Longitudinal Lesbian Family Study: Psychological Adjustment of 17-Year-Old Adolescents, 126 PEDIATRICS 1, 7 (July 2010), <http://pediatrics.aappublications.org/content/126/1/28>.

¹⁵ Judith Stacey and Timothy J. Biblarz, (*How*) *Does the Sexual Orientation of Parents Matter?*, 66 AM. SOC. REV. 159 (Apr. 2001), <https://www.jstor.org/stable/2657413>; Abbie E. Goldberg & JuliAnna Z. Smith, *Predictors of Parenting Stress in Lesbian, Gay, and Heterosexual Adoptive Parents During Early Parenthood*, 28 J. FAM. PSYCHOL. 125 (Apr. 2014), <http://dx.doi.org/10.1037/a0036007>.

¹⁶ Michael E. Lamb, *Mothers, Fathers, Families, and Circumstances: Factors Affecting Children’s Adjustment*, 16 APPL. DEV. SCI. 98 (Apr. 23, 2012).

¹⁷ APA, Press Release, *Adoption and Co-Parenting of Children by Same-Sex Couples*, Release No. 02-46 (Dec. 13, 2002), <http://www.ncirights.org/wp-content/uploads/2014/07/Adoption-Policy-Statements-REVISED-04-02-2009.pdf>.

¹⁸ ACLU, *Overview of Lesbian and Gay Parenting, Adoption, and Foster Care*, <https://www.aclu.org/fact-sheet/overview-lesbian-and-gay-parenting-adoption-and-foster-care> (last visited Oct. 29, 2018).

¹⁹ Catherine E. Smith, *Equal Protection for Children of Same-Sex Parents*, 90 Wash. U. L. Rev. 1589, 1603—08 (2013). Available at: http://openscholarship.wustl.edu/law_lawreview/vol90/iss6/2; American Academy of Pediatrics, Committee on Psychosocial Aspects of Child and Family Health, *Coparent or Second-Parent Adoption by Same-Sex Parents*, 109 PEDIATRICS 339 (2002).

- the American Academy of Child and Adolescent Psychiatry (AACAP);²⁰
- the American Academy of Family Physicians (AAFP);²¹
- the American Academy of Pediatrics (AAP);²²
- the American Medical Association (AMA);²³
- the American Psychiatric Association (APA);²⁴
- the American Psychoanalytic Association (APsaA);²⁵
- the American Psychological Association (APA);²⁶
- the Child Welfare League of America (CWLA);²⁷
- the Evan B. Donaldson Adoption Institute (DAI);²⁸
- the National Adoption Center (NAC);²⁹
- the National Association of Social Workers (NASW);³⁰
- the National Foster Parent Association (NFPA);³¹ and

²⁰ AACAP, Policy Statement, *Gay, Lesbian, Bisexual, or Transgender Parents* (revised and approved by Council 2009), https://www.aacap.org/AACAP/Policy_Statements/2008/Gay_Lesbian_Bisexual_or_Transgender_Parents.aspx.

²¹ AAFP, *Children's Health* (2002) (2007), <http://www.nclrights.org/wp-content/uploads/2014/07/Adoption-Policy-Statements-REVISED-04-02-2009.pdf>.

²² Perrin & Siegel, *supra* note 13.

²³ AMA House of Delegates, Resolution 204, A-04 (2004), <http://www.nclrights.org/wp-content/uploads/2014/07/Adoption-Policy-Statements-REVISED-04-02-2009.pdf>.

²⁴ APA Press Release, *supra* note 16; Position Statement, *Adoption and Co-parenting of Children by Same-sex Couples* (approved November 2002), <http://www.nclrights.org/wp-content/uploads/2014/07/Adoption-Policy-Statements-REVISED-04-02-2009.pdf>; APA, Resource Document, *Controversies in Child Custody: Gay and Lesbian Parenting; Transracial Adoptions; Joint versus Sole Custody; and Custody Gender Issues*, (approved Dec. 1997), <http://www.nclrights.org/wp-content/uploads/2014/07/Adoption-Policy-Statements-REVISED-04-02-2009.pdf>.

²⁵ APsaA, *Position Statement, Gay and Lesbian Parenting* (adopted May 16, 2002), <http://www.nclrights.org/wp-content/uploads/2014/07/Adoption-Policy-Statements-REVISED-04-02-2009.pdf>.

²⁶ APA, *Resolution on Sexual Orientation, Parents, and Children* (adopted July 2004), Sexual Orientation, Parents, and Children.

²⁷ CWLA, *Position Statement on Parenting of Children by Lesbian, Gay, Bisexual, and Transgender Adults* (April 2015), <https://www.cwla.org/wp-content/uploads/2016/01/PositionStatementOnParentingOfChildrenbyLGBT.pdf>.

²⁸ 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?* (Mar. 2006), https://www.adoptioninstitute.org/wp-content/uploads/2013/12/2006_Expanding_Resources_for_Children-March.pdf; Evan B. Donaldson Adoption Institute, *Expanding Resources For Waiting Children II: Eliminating Legal And Practice Barriers To Gay And Lesbian Adoption From Foster Care* (Sep. 2008), https://www.adoptioninstitute.org/wp-content/uploads/2013/12/2008_09_Expanding_Resources_Legal.pdf;

²⁹ NAC, *Adoptive Parent Assessment* (approved Sep. 17, 1998), <http://www.nclrights.org/wp-content/uploads/2014/07/Adoption-Policy-Statements-REVISED-04-02-2009.pdf>.

³⁰ NASW, Policy Statement, *Lesbian, Gay and Bisexual Issues* (2005), <http://www.nclrights.org/wp-content/uploads/2014/07/Adoption-Policy-Statements-REVISED-04-02-2009.pdf>.

³¹ NFPA, *121.07 Fair & Equal Consideration of Foster & Adoptive Parents* (adopted May 2007), <http://www.nclrights.org/wp-content/uploads/2014/07/Adoption-Policy-Statements-REVISED-04-02-2009.pdf>.

- the North American Council on Adoptable Children (NACAC).³²

As the Evan B. Donaldson Adoption Institute stated, “[i]t is through a commitment to expanding adoptive family resources that we can achieve the outcomes that are federally mandated for each child in foster care: safety, well-being, and a permanent family.”³³ To pursue the best interests of children at a societal level, “children should not be deprived of the opportunity for temporary foster care or adoption by single parents or couples, regardless of their sexual orientation.”³⁴ The Supreme Court itself noted in *Obergefell*, “[m]ost States have allowed gays and lesbians to adopt...and many adopted and foster children have same-sex parents,” which the Court declared to be a “powerful confirmation from the law itself that gays and lesbians can create loving, supportive families.” 135 S. Ct. 2584, 2600.

Discriminatory barriers to fostering and adoption are particularly disturbing in light of the ever-growing number of children in the United States in need of foster homes or adoption. In 2016,³⁵ over 687,000 children entered foster care,³⁶ and on any given day, nearly 440,000 children resided in foster care.³⁷ Children remain in foster care for an average of two years.³⁸ Each year, more than 23,000 children age out of the foster care system without ever having an opportunity to be placed with a permanent family.³⁹ Children who age out of foster care face particularly daunting prospects. For example, only 6% ever attend an institution of higher learning, even though 70% of children in foster care say they would like to attend college.⁴⁰

LGBT families can provide supportive, stable homes for these children. As noted above, same-sex couples foster children at over seven times the rate of different-sex couples.⁴¹ Similarly, 21.4% of same-sex couples raise adopted children, compared to 3% of different-sex couples.⁴² Out of an estimated 705,000 same-sex couples in the U.S., about

³² NACAC, *Gay and Lesbian Adoptions and Foster Care* (passed April 9, 2005), <http://www.nclrights.org/wp-content/uploads/2014/07/Adoption-Policy-Statements-REVISED-04-02-2009.pdf>.

³³ Evan B. Donaldson Adoption Institute, 2008 Statement, *supra* note 27.

³⁴ Perrin & Siegel, *supra* note 2, at e1381.

³⁵ This is the most recent year with data available.

³⁶ U.S. DEP’T OF HEALTH AND HUMAN SERVS., ADMIN. FOR CHILD. AND FAMS., CHILDREN’S BUREAU, *Trends in Foster Care and Adoption*, <https://www.acf.hhs.gov/cb/resource/trends-in-foster-care-and-adoption> (last visited Nov. 1, 2018).

³⁷ U.S. DEP’T OF HEALTH AND HUMAN SERVS., ADMIN. FOR CHILD. AND FAMS., CHILDREN’S BUREAU, *The AFCARS Report* (Oct. 20, 2017), <https://www.acf.hhs.gov/sites/default/files/cb/afcarsreport24.pdf>.

³⁸ U.S. DEP’T OF HEALTH AND HUMAN SERVS., ADMIN. FOR CHILD. AND FAMS., CHILDREN’S BUREAU, *The AFCARS Report* (Oct. 20, 2017), <https://www.acf.hhs.gov/sites/default/files/cb/afcarsreport24.pdf>.

³⁹ National Foster Youth Institute, *51 Useful Aging Out of Foster Care Statistics | Social Race Media* (May 26, 2017), <https://www.nfyi.org/51-useful-aging-out-of-foster-care-statistics-social-race-media>.

⁴⁰ National Foster Youth Institute, *51 Useful Aging Out of Foster Care Statistics | Social Race Media* (May 26, 2017), <https://www.nfyi.org/51-useful-aging-out-of-foster-care-statistics-social-race-media>.

⁴¹ Press Release, Williams Institute, *Same-Sex Parenting in the U.S.* (July 31, 2018), <https://williamsinstitute.law.ucla.edu/press/press-releases/same-sex-parenting>.

⁴² Press Release, Williams Institute, *Same-Sex Parenting in the U.S.* (July 31, 2018), <https://williamsinstitute.law.ucla.edu/press/press-releases/same-sex-parenting>.

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114,000 couples are raising children.⁴³ Among LGBT individuals under age 50 who are living alone or with a spouse or partner, nearly half of LGBT women (48%) are raising a child under age 18 and nearly a fifth of LGBT men (20%) are doing so as well.⁴⁴ These numbers could be higher if laws were non-discriminatory. In Michigan and Virginia for example, both of which have passed laws permitting child welfare agencies to discriminate against LGBT individuals, LGBT parents are raising children at a rate lower than the national average.⁴⁵ Meanwhile, thousands of children in each of these states continue to lack the stability of a permanent family while they wait for adoption.⁴⁶

Meeting the needs of these children is not only statistically compelling, but also federally mandated. Federal law establishes specific priorities for state child-welfare systems, including increasing the number of available foster and adoptive homes.⁴⁷ State and local foster-care systems cannot, therefore, arbitrarily reduce the number of potential foster and adoptive parents. Yet, laws that allow child welfare agencies to discriminate against LGBT parents do just that. This interference with the attainment of a permanent family relationship infringes upon a “child’s fundamental constitutional right to a secure and stable family relationship.”⁴⁸

In short, experts of all disciplines relating to child welfare have overwhelmingly agreed that LGBT individuals make fit parents and that an individual’s sexual orientation has no bearing on their capabilities as a parent. Additionally, shrinking children’s chances of finding a caring home simply because potential parents are LGBT causes them unnecessary harm and violates their rights. Governments must treat LGBT parents equally to safeguard their fundamental right to parent and the fundamental rights of their children to enjoy a familial relationship.

V. Conclusion

LGBT individuals possess the same fundamental right to parent as non-LGBT individuals. By supporting an LGBT-inclusive understanding of parental rights, the ABA can stand with all families to ensure that children nationwide can grow up in loving, supportive, permanent homes without unreasonable and arbitrary interference.

⁴³ <https://williamsinstitute.law.ucla.edu/wp-content/uploads/Parenting-Among-Same-Sex-Couples.pdf>

⁴⁴ Gary Gates, *LGBT Parenting in the United States*, THE WILLIAMS INSTITUTE (2013), <https://escholarship.org/uc/item/9xs6g8xx>.

⁴⁵ Angeliki Kastanis et al., *Same-sex Couple and LGBT Demographic Data Interactive*, THE WILLIAMS INST., UCLA SCH. OF L. (May 2016), <https://williamsinstitute.law.ucla.edu/visualization/lgbt-stats/?topic=SS&area=42#density> (follow hyperlink, and then click on Michigan and Virginia in map).

⁴⁶ *Id.* In Michigan, about 12,000 children are in foster care at any given time, and about 3,500 await adoption. In Virginia, about 5,000 children are in foster care at any given time, and about 2,000 children await adoption. *Id.*

⁴⁷ Federal Child Welfare Law, 42 U.S.C. § 675(5)(A).

⁴⁸ Joseph S. Jackson & Lauren G. Fasig, *The Parentless Child’s Right to a Permanent Family*, 46 WAKE FOREST L. REV. 1, 30, 36–37 (2011).

Respectfully submitted,

Gregory Cheikhameguyaz
President, National LGBT Bar Association
January 2019

GENERAL INFORMATION FORM

Submitting Entity: National LGBT Bar Association

Submitted By: Gregory Cheikhameguyaz, President

1. Summary of Resolution.

This Resolution states the ABA's opposition to legalized discrimination against LGBT people who are or are desiring to parent children, and sets forth the ABA's call to action to legislators to repeal such laws and regulations as well as its call to bar associations and lawyers to defend against anti-LGBT discrimination.

2. Approval by Submitting Entity.

N/A

3. Has this or a similar resolution been submitted to the House or Board previously?

To the best of our knowledge and information, no similar resolution has been submitted to the House or Board previously.

4. What existing Association policies are relevant to this Resolution and how would they be affected by its adoption?

To the best of our knowledge and information, there is no existing Association policy relevant to this matter.

5. If this is a late report, what urgency exists which requires action at this meeting of the House?

N/A

6. Status of Legislation. (If applicable)

N/A

7. Brief explanation regarding plans for implementation of the policy, if adopted by the House of Delegates.

Implementation requirements for the policy will be nominal, if any. The policy will be used as a guidance document for attorneys within the profession.

8. Cost to the Association. (Both direct and indirect costs)

None.

9. Disclosure of Interest. (If applicable)

N/A

10. Referrals.

None.

11. Contact Name and Address Information. (Prior to the meeting. Please include name, address, telephone number and e-mail address)
D'Arcy Kemnitz
Executive Director
National LGBT Bar Association and Foundation
1200 18th St. NW, #700
Washington, DC 20036
(202) 637-7661 (office)
darcy@lgbtbar.org

12. Contact Name and Address Information. (Who will present the Resolution with Report to the House? Please include best contact information to use when on-site at the meeting. *Be aware that this information will be available to anyone who views the House of Delegates agenda online.*)

The LGBT Bar Delegate is John Stephens. The substitute Delegate presenting the Resolution will be D'Arcy Kemnitz.

D'Arcy Kemnitz
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EXECUTIVE SUMMARY

1. Summary of the Resolution

This Resolution states the ABA's opposition to legalized discrimination against LGBT people who are parents or are desiring to be parents, and sets forth the ABA's call to action to legislators to repeal such laws and regulations as well as its call to bar associations and lawyers to defend against anti-LGBT discrimination.

2. Summary of the Issue that the Resolution Addresses

Despite significantly increased recognition of LGBT rights, in recent years, state and federal lawmakers have attempted and often succeeded in restricting LGBT individuals' fundamental right to parent. For example, ten states permit state-licensed child welfare agencies to refuse to place and provide services to children and families if doing so conflicts with the agency's religious or moral beliefs. These policies have acutely affected LGBT individuals, who are disproportionately more likely to adopt or foster children.

In its reasoning in *Obergefell v. Hodges*, the Supreme Court acknowledged that LGBT individuals are parents to millions of children around the country and that these families deserve the same recognition and protection as any other family. Going further, in *Pavan v. Smith*, the Supreme Court ruled that states are categorically prohibited from abridging parental recognition offered to different-sex married couples. Any discriminatory law which restricts an LGBT individual's right to parent not only disregards these precedents, but also contradicts longstanding research. Decades of medical, psychological, sociological, and developmental research overwhelmingly conclude that sexual orientation has no bearing on an individual's ability to be a fit parent. This Resolution therefore reaffirms the equal parenting rights of LGBT individuals.

3. Please Explain How the Proposed Policy Position Will Address the Issue

Adoption of this Resolution would ensure that the American Bar Association, representing the American legal community at large, stands with LGBT individuals and their families against the increased threat to their ability to raise children. This ABA policy position would enable further advocacy in this area by providing authority for other organizations, legislatures, and courts to consult when confronted by LGBT parenting issues. The policy would also allow the ABA to directly advocate on behalf of LGBT families and make clear its stance that laws which permit discrimination against LGBT individuals are unconstitutional.

4. Summary of Minority Views or Opposition Internal and/or External to the ABA Which Have Been Identified

To date, none have been identified.