

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

Plaintiffs,

V.

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

Defendants.

Case No: _____

COMPLAINT AND PRAECIPE

COME NOW, Plaintiffs, by and through their attorneys, and allege as follows:

INTRODUCTION

1. Plaintiffs bring this Complaint because the Nebraska policy that categorically excludes gay and lesbian individuals and couples from serving as foster and adoptive parents to children in state custody is unconstitutional. The state policy at issue, set forth in “Administrative Memorandum – Human Services – #1-95” (“Administrative Memo #1-95” or the “Policy”), was announced by the Nebraska Department of Health and Human Services

(“HHS”)¹ in 1995 and remains in effect today. (Ex. 1.) The Policy prohibits HHS from issuing foster home licenses to or placing children with “persons who identify themselves as homosexuals” or persons who are “unrelated, unmarried adults residing together.” The Policy also has the effect of categorically banning gay and lesbian individuals and couples from adopting children from state custody because, before individuals may adopt children from state care, they must first be licensed as foster parents. Under the Policy, gay and lesbian individuals and couples are disqualified from fostering or adopting children in state custody regardless of their ability to care for a child – indeed, they are not even permitted to apply to undergo the screening process that would assess their suitability as a parent – and regardless of the needs of children. Despite the critical need for more foster and adoptive families to meet the needs of children in state care, this Policy deprives our State’s most vulnerable children of access to countless loving families – like Plaintiffs’ – who are willing and able to care for them. The blanket exclusion of gay and lesbian individuals and couples from consideration as foster and adoptive parents violates their right to equal protection and substantive due process under the Constitutions of Nebraska and the United States by discriminating against them based on their sexual orientation and intimate relationships without justification for this disfavored treatment.

NATURE OF THE ACTION

2. This is an action brought in equity against state actors, who, in their official capacity under the color of state law, are responsible for making and enforcing state policies that

¹ The Policy originally was announced by the Nebraska Department of Social Services, which was reorganized into HHS in 1996.

directly infringe Plaintiffs' constitutional rights under Article I, Section 3 of the Nebraska Constitution and the Fourteenth Amendment to the United States Constitution, wrongs which are of a continuing nature, which will cause irreparable harm, and for which Plaintiffs have no other adequate remedy at law.

JURISDICTION AND VENUE

3. Subject matter jurisdiction over this action is proper pursuant to Neb. Rev. Stat. § 24-302, which vests Nebraska District Courts with general and original jurisdiction in civil matters.

4. Personal jurisdiction over this action is proper pursuant to Neb. Rev. Stat. § 25-536(2), which vests Nebraska District Courts with personal jurisdiction over any person “[w]ho has any other contact with or maintains any other relation to this state to afford a basis for the exercise of personal jurisdiction consistent with the Constitution of the United States.”

5. Venue is proper in Lancaster County District Court pursuant to Neb. Rev. Stat. § 25-403.01(3), as venue is proper in the county in which “the transaction or some part of the transaction occurred out of which the cause of action arose.”

NEBRASKA’S ADOPTION AND FOSTER CARE POLICIES

Nebraska’s Child Placement Decisions are Individualized to Meet the Unique Needs of Each Child and Must be Made in the Best Interests of the Child.

6. The Nebraska Legislature recognizes that, when placing children for adoption or in foster care, “the health, safety, and best interests of the child” are the paramount concerns. Neb. Rev. Stat. § 43-533.

7. HHS serves as the “legal guardian of all children committed to it” and “is authorized to place such children in suitable families for adoption, foster care, or guardianship” Neb. Rev. Stat. § 43-905. Within HHS, the Division of Children and Family Services (“CFS”) is responsible for Nebraska’s child welfare, juvenile services and economic assistance plans, including HHS’s foster care and adoption program.

8. HHS requires that its policies be guided by and be in the “best interest of the child” under its care. Neb. Dep’t of Health & Human Servs., Children & Family Servs., *Out-of-Home Placement and Payment Guidebook* 8 (2012).

9. HHS recognizes that “[b]ecause each child is different, placement decisions must be individualized.” Neb. Dep’t of Health & Human Servs., Children & Family Servs., *Adoption Services Guidebook* 11 (2012). Indeed, as HHS provides, “[t]his assessment must be . . . tailored to the specific child.” *Id.* at 8.

10. HHS further recognizes that the best placement for a child and decisions about fostering and adoption “cannot be based on generalized assumptions.” *Id.*

Applicants to Foster and/or Adopt are Subjected to a Rigorous Individualized Screening Process.

11. As part of its assessment regarding placement of those children in its custody, HHS individually screens all applicants prior to any child being placed in the home of an applicant.

12. HHS requires individuals to obtain a foster home license before serving as adoptive or foster parents for children in state custody. To obtain a foster home license, potential adoptive or foster parents must complete an application, a training program, and a home study. Applicants to foster or adopt also must pass a criminal records and sexual abuse registry check. A foster home license is effective for two years and may be renewed prior to expiration.

13. HHS requires that “[a]ll adults providing foster care[:] (1) [b]e mentally and physically able to provide care and supervision; (2) [e]xercise reasonable judgment in caring for children; (3) [n]ot engage in or have a history of behaviors which would injure or endanger the health or morals of children; and (4) [p]rovide (a) [t]hree favorable character references; and (b) [h]ealth reports indicating persons are physically capable of caring for children.” 474 Neb. Admin. Code § 6-003.25A.

14. The HHS screening process will not approve applicants unless they have been determined to offer a safe, stable, healthy and loving family for a child.

The State’s Blanket Exclusion of Gay and Lesbian Individuals and Couples

15. In stark contrast to its policy of individualized assessment, following the best interest of the child, and avoidance of “generalized assumptions,” HHS expressly and categorically prohibits gay and lesbian individuals and couples from even applying to be considered to be foster or adoptive parents of any children in HHS custody.

16. On January 23, 1995, HHS issued Administrative Memo #1-95, which creates a categorical ban against licensing and placing children with gay and lesbian individuals and couples: “it is the policy of [HHS] that children will not be placed in the homes of persons who identify themselves as homosexuals. This policy also applies to the area of foster home licensure in that, effective immediately, no foster home license shall be issued to persons who identify themselves as homosexuals.” (Ex. 1.) Administrative Memo #1-95 further provides that “it is the policy of [HHS] that children will not be placed where unrelated, unmarried adults reside together. This policy also applies to the area of foster home licensure in that, effective immediately, no foster home license shall be issued to unrelated, unmarried adults residing together.” (*Id.*)

17. Gay and lesbian individuals may not marry in Nebraska. Moreover, the Nebraska Constitution prohibits recognition of marriages of same-sex couples, and thus gay and lesbian couples are deemed unmarried for purposes of the Policy even if they married in another jurisdiction.

18. Because individuals who adopt children out of state custody must first be licensed as foster parents, the Policy also effectively bars gay and lesbian individuals and couples from adopting children in state care.

19. The Policy was not based on any finding by HHS that placement of children in homes “of persons who identify themselves as homosexuals” puts children at risk because of the sexual orientation of the foster or adoptive parent, or of other persons in the prospective foster or adoptive parent’s household. Nor was it based on any finding by HHS that placement of children in homes of “unrelated, unmarried results residing together” puts children at risk because of the marital status of household members.

20. HHS issued an addendum to Administrative Memo #1-95 on March 8, 1995 (“Addendum”) clarifying that the policy “[was] not intended to affect any foster placements of children prior to the date of the Administrative Memorandum” and that “[i]f child(ren) are currently in foster care placement with an individual who is licensed at this time but unable to be re-licensed due to the policy, District Administrators may approve the continuation of the placement on a case-by-case basis.” (Ex. 1.) The Addendum also notes that Administrative Memo #1-95 “affects future foster-adoptive placements,” and that “[c]urrent adoptive placements with individuals who are known by the agency to be homosexual or who are unmarried and living with another adult, should be assessed by the worker on a case-by-case basis prior to finalization of the adoption.” (*Id.*)

21. HHS would not leave a child in foster placement or finalize an adoption with a family if HHS believed that such placement or adoption put the child at risk.

22. The Addendum would not have been issued if HHS believed or concluded that no gay or lesbian individual or couple could be a suitable foster or adoptive family.

23. The Addendum further provides that HHS staff “are not directed to ask any specific questions about an individual’s sexual orientation or marital status than is currently asked in the licensing application, home study, etc.” Only “[i]f an individual provides information during the licensing or placement process that indicates sexual preference or marital status” will the Policy be applied. (Ex. 1.)

24. In assessing suitable foster homes, HHS makes all inquiries it believes are necessary to determine whether an applicant is fit to be a foster parent.

25. As of April 1, 2013, HHS confirmed that Administrative Memo #1-95 remains in effect.

26. HHS provides a limited exception to its licensing requirements in Administrative Memo #1-95. According to Administrative Memorandum #16-2012, HHS – in both emergency and non-emergency circumstances – may place children in the home of a foster or adoptive parent who does not have an operational license for foster care, but only if the foster or adoptive parent is related to the child by blood, marriage, or adoption.

27. Although Administrative Memo #1-95 applies to adoptive and foster placements through HHS, it does not apply to adoption through private agencies or among private individuals.

28. No Nebraska law or regulation prohibits adoptions through private agencies or among private individuals because the adoptive parent is a gay or lesbian person.

THE IMPACT OF ADMINISTRATIVE MEMO #1-95 ON NEBRASKA’S CHILDREN

29. The State of Nebraska has a need for more qualified adoptive and foster parents to provide loving homes to children in its custody.

30. On July 25, 2013, HHS issued a press release addressing its efforts to reduce the number of state wards in the child welfare system. The press release quoted Defendant Thomas Pristow, Director of CFS, as stating, “[w]e continue to have a need for foster parents who are an important part of what we do. A caring home atmosphere is critical to reducing the trauma children experience when they are removed from their home.” The press release further stated that, “Pristow encouraged persons interested in foster parenting to contact []HHS.”

31. A June 15, 2013 report by Nebraska’s Foster Care Review Office (“FCRO”) (the “Report”) recognized multiple deficiencies in the foster care system and emphasized multiple areas of the foster care system “needing improvement,” including that: (1) the “[l]ength of time between removal from the home and permanency remains an issue”; (2) “[t]he rate of re-entry

into out-of-home care needs to be reduced”; and (3) “the number of placement changes need[s] to be reduced.” Foster Care Review Office, *Quarterly Report 2* (June 2013), available at <http://www.fcro.nebraska.gov/pdf/QuarterlyReports/2013/FCRO-Quarterly-Report-to-Legislature-2013-06-15.pdf>.

32. In particular, the Report noted that, as of April 1, 2013, there were 3,854 Nebraska children in out-of-home care. *Id.* at 5. The Report specified that “[o]ut-of-home care” includes relative homes, foster homes, emergency shelters, group homes, detention, [youth rehabilitation and treatment centers] or specialized facilities.” *Id.* at 5 n.1.

33. The Report provided that, as of April 1, 2013, the average number of days children had been in out-of-home care (excluding time during prior removals) was 512 days, with a median of 352 days. Additionally, of the 3,854 Nebraska children in out-of-home care as of April 1, 2013, 48% had been placed in out-of-home care for a year or longer, 23% had been in out-of-home care for two years or longer, and 11% had been in out-of-home care for three years or longer. *Id.* at 15. None of these statistics include “the months spent in foster care during prior removals,” and “[s]ince 39% of children had prior removals, it is clear that many children spend considerable time living apart from their parents.” *Id.* As the report found, “it is unacceptable for one in four children in ‘temporary’ out-of-home care to actually spend years in the system while their childhood slips away.” *Id.*

34. In addressing the type of placements available to children in out-of-home care, the Report noted that, as of April 1, 2013, 26% of children were placed in either “moderately restrictive” or “most restrictive” placements, which include group homes, boarding schools, medical facilities, psychiatric residential treatment facilities, youth rehabilitation and treatment centers, youth detention centers, and emergency shelters. *Id.* at 10. Further, the Report observed

that, although the State is seeking to implement corrective policies to reduce these numbers, as of April 1, 2013, there were sixty-six children in emergency shelter care, 42% of whom had been in shelter care for between one and two months and 17% of whom had been in shelter care for three months or longer. *Id.* at 11.

35. The Report also noted that, as of April 1, 2013, 47% of the children in out-of-home care had been through four or more placements, “often . . . due to issues within the system rather than children’s needs.” *Id.* at 9. As the Report confirmed, “[i]n some instances, the cumulative additional turmoil of changing who they live with can be temporarily or permanently harmful for children,” and further that, “[m]ost experts find that children will experience trauma from four or more placement moves” *Id.* Indeed, the FCRO has previously recognized that “[c]hildren experiencing four or more placements are likely to be permanently damaged by the instability and trauma of broken attachments.” Foster Care Review Office, *Quarterly Update to the Neb. Legislature* 4 (Sept. 2012), available at <http://www.fcro.nebraska.gov/pdf/whatsnew/2012-09-quarterly-report-to-the-legislature.pdf>.

36. In April 2011, CFS administrators received an Information Memorandum from the U.S. Department of Health and Human Services, Administration on Children, Youth and Families, which, noting the “largely untapped resource” of gay and lesbian individuals willing to serve as adoptive parents, advised agencies that have not already done so to develop mechanisms to recruit, train and provide support to these prospective adoptive parents. The Information Memorandum confirmed, “LGBT parents should be considered among the available options for States and jurisdictions to provide timely and safe placement of children in need of foster or adoptive homes.”

37. If HHS had a larger pool of approved foster and adoptive families, some children would not have to wait as long to be adopted; fewer children would have to be housed in emergency shelters for months at a time; and some children would get more appropriate placements for their needs, which would prevent placements from failing and children being subjected to the trauma of multiple placements.

38. Administrative Memo #1-95 automatically disqualifies potentially qualified foster and adoptive parents despite the shortage of foster and adoptive families available to meet the needs of children in state custody.

39. Administrative Memo # 1-95 disqualifies individuals who may be the best and sometimes only placement option for some children.

40. Administrative Memo #1-95 prevents caseworkers and other state professionals from considering gay and lesbian applicants and making placements with such applicants even if such placement may be in the best interests of a particular child.

PARTIES

PLAINTIFFS

Greg Stewart and Stillman Stewart

41. Plaintiffs Greg Stewart and Stillman Stewart are residents of Lincoln, Nebraska.

42. Greg and Stillman have been in a committed relationship together for over thirty years. They were married in 2008 in California. They are both in their fifties and are parents to five children, all of whom they adopted out of foster care in California, where the family previously resided.

43. Greg is a minister at First-Plymouth Congregational Church, United Church of Christ (“UCC”), a calling that brought the family to Nebraska in 2011. Stillman, who previously worked as a social worker and has been a stay-at-home parent for the past fourteen years, recently began working with at-risk, developmentally delayed, and behaviorally challenged children at Park Middle School in Lincoln, Nebraska.

44. Greg and Stillman have a demonstrated capacity to care for and heal children who have endured difficult early life experiences. Most of their children, who now range in age from thirteen to twenty years old, were placed with the family after experiencing years of abuse and multiple foster placements.

45. Some of the children came into Greg and Stillman’s home with severe medical, cognitive, and behavioral issues. In fact, Greg and Stillman were told that some of the children they adopted would never be able to live independently. Despite these challenges, Greg and Stillman’s children have exceeded expectations and have thrived in the stable, nurturing, and loving environment that their parents have provided.

46. One of their children, who came into the family at the age of five still in diapers, had not learned to use eating utensils and suffered from severe speech impediments. By the age of seventeen, he brought home a report card with all A’s and one B.

47. Another of their children, who has been diagnosed with autism, is now 19 and a full-time student at a regional community college.

48. Their eldest child, who had been through seventeen foster homes and suffered three failed adoptions in three different states, is now a college sophomore.

49. Now that some of Greg and Stillman’s children are grown, they feel they can open their hearts, family, and home to additional children. They are particularly interested in

caring for hard-to-place children. Their desire to welcome more children into the family was all the more strengthened after they read billboards advertising the need for more qualified foster parents in Nebraska.

50. Greg and Stillman contacted HHS in October 2012 to inquire about obtaining a foster home license. The HHS representative said the couple could not obtain a license because same-sex couples are barred from becoming licensed under HHS policy.

51. Despite Greg and Stillman's willingness and proven ability to provide outstanding care for children with significant challenges, they are categorically barred under HHS policy from even being considered as foster or adoptive parents because they are gay men and because they reside together and are not considered married under Nebraska law.

52. Greg and Stillman continue to be able and ready to apply to be foster parents and would apply but for the Policy.

Lisa Blakey and Janet Rodriguez

53. Plaintiffs Lisa Blakey and Janet Rodriguez are residents of Lincoln, Nebraska.

54. Lisa and Janet have been in a committed relationship for over eight years.

55. Lisa is 36 years old and works at the Nebraska State Department of Motor Vehicles as a support desk clerk. Janet, also 36, works as an insurance claims processor and is also completing her undergraduate degree in Communications.

56. Lisa and Janet have always wanted to raise children together, and they have a passionate desire to serve as foster parents.

57. Lisa and Janet are qualified and eager to serve as foster parents for older children, such as middle school- and high school-aged children, because they know that these children are

often harder to place. They are also willing and able and have sufficient space to foster sibling groups, who are not always able to be placed together.

58. Lisa knows the hardships that children may endure in the foster care system, as she herself spent time in foster care during middle school. Having suffered difficult foster home experiences as a youth, Lisa is all the more committed to protecting children and becoming a caring foster parent who can provide a safe and loving home to children in need.

59. Despite Lisa and Janet's ability and desire to serve as foster parents and their qualifications to do so, they are categorically barred under HHS policy from even being considered as foster or adoptive parents because they are lesbian women and because they reside together and are not permitted to marry under Nebraska law.

60. Lisa and Janet are able and ready to apply to be foster parents and would apply but for the Policy.

Todd Vesely and Joel Busch

61. Plaintiffs Todd Vesely and Joel Busch are residents of Lincoln, Nebraska.

62. Todd and Joel have been in a committed relationship for over nine years.

63. Todd is 47 years old. He is a retired member of the Marine Corps and volunteers at the American Red Cross in Lincoln, Nebraska. Joel, 49 years old, works as a store manager for a large retail chain store.

64. Both Todd and Joel come from close-knit Nebraska families and still live close to many of their family members. They regularly babysit for their nieces and nephews, who range in age from infants to teenagers, as well as for their friends' children.

65. They bought their current home with extra bedrooms with the plan to foster and adopt children. They would welcome sibling groups into their family because they think it is

important for brothers and sisters to be able to remain together. Since Todd is retired, he is prepared to be a full-time stay-at-home parent.

66. Todd and Joel began the process of applying to become foster parents in July of 2008. They followed the licensing procedures established by HHS: they completed training, underwent a home study, and submitted to and passed the required background checks.

67. After some time passed without any news or information regarding the status of their license or potential placements, Todd and Joel wrote letters to various government officials asking for information and assistance.

68. In June 2010, Todd Reckling, the Director of HHS's Division of Children and Family Services, wrote and informed Todd and Joel of HHS's policy barring licensing of unrelated adults living together.

69. Despite Todd and Joel's ability and desire to serve as foster parents and their qualifications to do so, they are categorically barred under HHS policy from even being considered as foster or adoptive parents because they are gay men and because they reside together and are not permitted to marry under Nebraska law.

70. Todd and Joel continue to be able and ready to apply to be foster parents and would reapply but for the Policy.

DEFENDANTS

71. Defendant Dave Heineman is Governor of the State of Nebraska and is responsible for enforcing and defending the laws of the State of Nebraska. Defendant Heineman ultimately is responsible for the operations and policies of HHS, and in the course of his governorship, has issued directives to HHS regarding specific policy goals and priorities to be

implemented. Defendant Heineman also appoints the HHS Chief Executive Officer and its directors. He and his successors are sued in their official capacity only.

72. Defendant Kerry Winterer is Chief Executive Officer of HHS and is responsible for managing all HHS functions and operations consistent with applicable law. In his capacity as Chief Executive Officer of HHS, Defendant Winterer implements HHS's mandate to make rules, policies, and procedures relating to foster care and adoption, and to protect the best interests of children under the care of HHS.

73. Defendant Winterer performs and is otherwise responsible for the public functions of recruiting, training, and certifying foster and adoptive parents, and providing foster and adoptive placements, care, and services for children in state custody.

74. Defendant Winterer also supervises Children & Family Services ("CFS"), which is responsible for foster care and adoption services in Nebraska, and oversees the enactment as well as approval of administrative and policy memoranda concerning foster and adoptive parents and eligibility requirements. Defendant Winterer performs the public functions noted in paragraphs 72 through 73 above using federal and state funds. Defendant Winterer and his successors in office are sued in their official capacity only.

75. Defendant Thomas Pristow is the Director of CFS and is responsible for overseeing all CFS functions and operations, as a division of HHS, consistent with applicable law. In his capacity as Director of CFS, Defendant Pristow implements CFS's mandate to make rules, policies, and procedures relating to foster care and adoption, and to protect the best interests of children under state care.

76. Defendant Pristow performs and is otherwise responsible for the public functions of recruiting, training, and certifying foster and adoptive parents, and providing foster and

adoptive placements, care, and services for children in state custody. Under Defendant Pristow's supervision, CFS has the authority to enact administrative and policy memoranda concerning foster and adoptive parents and eligibility requirements.

77. Defendant Pristow performs and is otherwise responsible for the public functions noted in paragraphs 75 through 76 above using federal and state funds. Defendant Pristow and his successors in office are sued in their official capacity only.

78. Defendants' actions referred to in this Complaint constitute actions under color of law.

**ADMINISTRATIVE MEMO # 1-95 DISCRIMINATES BASED ON
SEXUAL ORIENTATION AND BURDENS INTIMATE RELATIONSHIPS**

79. Administrative Memo #1-95 excludes a class of people from even being considered to serve as foster or adoptive parents on the sole basis of such prospective applicants' sexual orientation.

80. Administrative Memo #1-95 subjects Plaintiffs to differential treatment on the basis of their sexual orientation.

81. Administrative Memo #1-95 additionally burdens Plaintiffs' fundamental right, or otherwise constitutionally protected liberty interest, to intimate association by conditioning Plaintiffs' eligibility to be considered as a foster or adoptive parent on foregoing their intimate relationship with their partners with whom they reside. Plaintiffs' rights are unduly burdened by the categorical exclusions in the Policy banning "homosexuals" and "unrelated, unmarried adults residing together" from serving as foster or adoptive parents. Because gay and lesbian couples cannot marry or have their marriages recognized in Nebraska, they can comply with the prohibition relating to "unrelated, unmarried adults residing together" only by ceasing to reside

together with their chosen partner (although they still would be barred by the prohibition relating to “homosexuals”).

**ADMINISTRATIVE MEMO # 1-95 IS SUBJECT TO HEIGHTENED
SCRUTINY**

82. Administrative Memo # 1-95 is subject to heightened scrutiny for at least two independent reasons.

83. First, heightened scrutiny is warranted because the Policy classifies based on sexual orientation, which is a suspect class.

84. HHS’s categorical ban on gay and lesbian individuals being considered as foster or adoptive parents is state action that harms a politically unpopular minority.

85. Gay and lesbian individuals historically have experienced unequal treatment and have been subject to discrimination in Nebraska and in the United States generally because of their sexual orientation.

86. Discrimination against gay and lesbian individuals has, historically, given such individuals limited ability to protect their interests through the legislative process.

87. The majority of people in Nebraska in particular, and in the United States generally, do not identify as gay or lesbian. Gay and lesbian individuals are therefore a minority population.

88. Gay and lesbian individuals cannot protect their interests through ordinary political processes and have similar or less political power than other groups held to be suspect or quasi-suspect classes.

89. Sexual orientation is immutable in that it is central to an individual’s core identity.

90. A person's sexual orientation bears no relation to his or her ability to participate in or contribute to society.

91. The second reason Administrative Memo #1-95 is subject to heightened scrutiny is that it burdens the fundamental right, or otherwise the constitutionally protected liberty interest, to maintain intimate relationships.

ADMINISTRATIVE MEMO #1-95 FAILS ANY LEVEL OF SCRUTINY

92. The blanket exclusion of gay and lesbian individuals and couples from fostering and adopting cannot survive any level of constitutional scrutiny because it is not rationally related to the furtherance of any legitimate government interest.

93. The exclusion in Administrative Memorandum #1-95 does nothing to further the well-being or best interests of children in state care because the State's individualized screening process already serves to identify appropriate foster and adoptive parents.

94. The State's individualized screening process is effective at identifying applicants who would not be appropriate foster or adoptive parents.

95. Under the State's individualized screening process, lesbian and gay individuals and couples could be screened as effectively as other applicants.

96. Gay and lesbian individuals and couples are no less capable than heterosexual individuals and couples of being good parents and raising healthy, well-adjusted children.

97. The equal suitability of gay and heterosexual parents is a matter of scientific consensus and is recognized by the leading national professional groups dedicated to children's health and welfare, including the American Academy of Pediatrics, the American Psychological Association, the American Medical Association, the National Association of Social Workers, and the Child Welfare League of America.

98. There are gay and lesbian individuals and couples in Nebraska who can provide safe, stable, and appropriate homes for children in state care.

99. On information and belief, Defendants and/or HHS have knowingly approved gay or lesbian individuals to serve as foster or adoptive parents in this State despite the Policy.

100. On information and belief, none of Defendants nor any HHS employee is aware of any children having been removed from a foster or adoptive home because the child's health, safety, or welfare was endangered as a result of his or her foster or adoptive parents being gay or lesbian individuals or couples.

101. No harm would be caused to any child in state care by permitting gay and lesbian individuals and couples to be considered to be foster or adoptive parents and placing children with such persons if they meet the qualifications.

102. Not only does the blanket exclusion of the Policy serve no child welfare purpose, it in fact works against the best interests of children in state custody by reducing children's placement options.

103. Nebraska faces a shortage of eligible foster and adoptive families.

104. As a result of that shortage, some children in state custody have and may continue to have multiple temporary placements before a suitable permanent home is found; other children have been and may continue to be separated from their siblings; other children have been and may continue to be placed in emergency shelters or group homes; and still other children have been and may continue to be unable to be adopted at all and will instead reach the age of majority and be discharged from the foster care system without ever being part of a permanent family.

105. Administrative Memo #1-95 contributes to the shortage of adoptive and foster parents in Nebraska and thereby causes harm to children.

106. As a direct result of Administrative Memo #1-95, some children are deprived of a placement with the family that is best suited to meet their needs and some are left with no family at all.

107. As a direct result of Administrative Memo #1-95, the State of Nebraska will spend more money to care for children in state custody who would otherwise be adopted.

CLAIMS FOR RELIEF

FIRST CLAIM FOR RELIEF

(RIGHT TO EQUAL PROTECTION UNDER ARTICLE 1, SECTION 3 OF THE NEBRASKA CONSTITUTION)

108. Plaintiffs repeat and reallege paragraphs 1 through 107 as if set forth in full.

109. The Policy treats gay and lesbian individuals and couples differently and unequally than heterosexual individuals and couples by categorically excluding them from even applying and being considered to be foster or adoptive parents, and thus violates Plaintiffs' right to equal protection under the Nebraska Constitution.

110. Administrative Memo #1-95 is a facially discriminatory classification because the policy expressly prohibits gay and lesbian individuals as well as same-sex unrelated, unmarried adults who reside together from ever being considered as potential foster or adoptive parents.

111. The Policy is subject to heightened scrutiny for at least two independent reasons: (i) sexual orientation classifications are suspect; and (ii) the Policy burdens the right to intimate association protected by Plaintiffs' right to substantive due process under the Nebraska Constitution, as described in paragraphs 125 to 133 of this Complaint, which are fully incorporated herein.

112. The categorical exclusion of gay and lesbian individuals and couples required by the Policy is not narrowly tailored to further any compelling government interest, is not substantially related to achieving important government objectives, and, in fact, is not even rationally related to the furtherance of any legitimate government interest. The Policy thus fails at any level of scrutiny.

113. Defendants' enforcement, under the color of state law, of Administrative Memo #1-95's categorical prohibition against gay and lesbian individuals and couples being considered as foster or adoptive parents deprives Plaintiffs of their constitutional right to equal protection of the laws under Article I, Section 3 of the Nebraska Constitution.

114. Plaintiffs have no adequate remedy at law to redress the wrongs alleged herein, which are of a continuing nature and will cause irreparable harm.

115. Unless Defendants are enjoined, they will apply and/or cause to be applied HHS's categorical prohibition against gay and lesbian individuals and couples being considered and selected as foster or adoptive parents.

SECOND CLAIM FOR RELIEF
**(RIGHT TO EQUAL PROTECTION UNDER THE
FOURTEENTH AMENDMENT TO THE UNITED STATES
CONSTITUTION, 42 U.S.C. § 1983)**

116. Plaintiffs repeat and reallege paragraphs 1 through 107 as if set forth in full.

117. The Policy treats gay and lesbian individuals and couples differently and unequally than heterosexual individuals and couples by categorically excluding them from even applying and being considered to be foster or adoptive parents, and thus violates Plaintiffs' right to equal protection under the United States Constitution.

118. Administrative Memo #1-95 is a facially discriminatory classification because the policy expressly prohibits gay and lesbian individuals as well as same-sex unrelated, unmarried adults who reside together from ever being considered as potential foster or adoptive parents.

119. The Policy is subject to heightened scrutiny for at least two independent reasons: (i) sexual orientation classifications are suspect; and (ii) the Policy burdens the right to intimate association protected by Plaintiffs' right to substantive due process under the United States Constitution, as described in paragraphs 134 to 143 of this Complaint, which are fully incorporated herein.

120. The categorical exclusion of gay and lesbian individuals and couples required by the Policy is not narrowly tailored to further any compelling government interest, is not substantially related to achieving important government objectives, and, in fact, is not even rationally related to the furtherance of any legitimate government interest. The Policy thus fails at any level of scrutiny.

121. Defendants' enforcement, under the color of state law, of Administrative Memo #1-95's categorical prohibition against gay and lesbian individuals and couples being considered as foster or adoptive parents deprives Plaintiffs of their constitutional right to equal protection of the laws under the Fourteenth Amendment to the United States Constitution.

122. Defendants' deprivation of Plaintiffs' constitutional rights violates the Civil Rights Act, 42 U.S.C. § 1983.

123. Plaintiffs have no adequate remedy at law to redress the wrongs alleged herein, which are of a continuing nature and will cause irreparable harm.

124. Unless Defendants are enjoined, they will apply and/or cause to be applied HHS's categorical prohibition against gay and lesbian individuals and couples being considered and selected as foster or adoptive parents.

THIRD CLAIM FOR RELIEF
**(RIGHT TO DUE PROCESS UNDER ARTICLE I, SECTION
3 OF THE NEBRASKA CONSTITUTION)**

125. Plaintiffs repeat and reallege paragraphs 1 through 107 as if set forth in full.

126. The Policy categorically bans gay and lesbian individuals and couples, including those who are – or are considered – unrelated, unmarried adults residing together, from even applying and being considered to be foster or adoptive parents. The exclusion of “persons who identify themselves as homosexual” bars applicants based on the type of intimate relationships they form. And the “unrelated, unmarried adult” provision also bars gay and lesbian individuals based on the type of intimate relationships they form, as same-sex couples cannot marry or have their out-of-state marriages recognized in Nebraska.

127. Choices to enter into and maintain intimate personal relationships within one's home fall within the realm of personal liberty and privacy protected by the Due Process Clause of the Nebraska Constitution.

128. The prohibitions of the Policy relating to “persons who identify themselves as homosexuals” and “unrelated, unmarried adults” impermissibly burden Plaintiffs' substantive due process right to intimate association by conditioning their eligibility to be considered as foster or adoptive parents on foregoing such intimate, personal relationships within the scope of that right, and thereby breaking up their family, home, and life with their chosen partner.

129. The right to intimate association in a shared home is a fundamental right, or otherwise a constitutionally protected liberty interest, and burdens on this right are subject to heightened scrutiny.

130. Administrative Memo #1-95's categorical exclusion of gay and lesbian individuals and couples is not narrowly tailored to further any compelling government interest, is not substantially related to achieving important government objectives, and, in fact, is not even rationally related to the furtherance of any legitimate government interest. There is simply no valid state interest that can justify this intrusion into Plaintiffs' personal and private lives. The Policy thus fails at any level of scrutiny.

131. Defendants' enforcement against gay and lesbian individuals and couples, under the color of state law, of Administrative Memo #1-95 deprives Plaintiffs of their constitutional right to substantive due process under Article I, Section 3 of the Nebraska Constitution.

132. Plaintiffs have no adequate remedy at law to redress the wrongs alleged herein, which are of a continuing nature and will cause irreparable harm.

133. Unless Defendants are enjoined, they will apply and/or cause to be applied HHS's categorical prohibition against gay and lesbian individuals and couples being considered and selected as foster or adoptive parents.

FOURTH CLAIM FOR RELIEF
**(RIGHT TO DUE PROCESS UNDER THE FOURTEENTH
AMENDMENT TO THE UNITED STATES
CONSTITUTION, 42 U.S.C. § 1983)**

134. Plaintiffs repeat and reallege paragraphs 1 through 107 as if set forth in full.

135. The Policy categorically bans gay and lesbian individuals and couples, including those who are – or are considered – unrelated, unmarried adults residing together, from even

applying and being considered to be foster or adoptive parents. The exclusion of “persons who identify themselves as homosexual” bars applicants based on the type of intimate relationships they form. And the “unrelated, unmarried adult” provision also bars gay and lesbian individuals based on the type of intimate relationships they form, as same-sex couples cannot marry or have their out-of-state marriages recognized in Nebraska.

136. Choices to enter into and maintain intimate personal relationships within one’s home fall within the realm of personal liberty and privacy protected by the Due Process Clause of the United States Constitution.

137. The prohibitions of the Policy relating to “persons who identify themselves as homosexuals” and “unrelated, unmarried adults” impermissibly burden Plaintiffs’ substantive due process right to intimate association by conditioning their eligibility to be considered as foster or adoptive parents on foregoing such intimate, personal relationships within the scope of that right, and thereby breaking up their family, home, and life with their chosen partner.

138. The right to intimate association in a shared home is a fundamental right, or otherwise a constitutionally protected liberty interest, and burdens on this right are subject to heightened scrutiny.

139. Administrative Memo #1-95’s categorical exclusion of gay and lesbian individuals and couples is not narrowly tailored to further any compelling government interest, is not substantially related to achieving important government objectives, and, in fact, is not even rationally related to the furtherance of any legitimate government interest. There is simply no valid state interest that can justify this intrusion into Plaintiffs’ personal and private lives. The Policy thus fails at any level of scrutiny.

140. Defendants' enforcement against gay and lesbian individuals and couples, under the color of state law, of Administrative Memo #1-95 deprives Plaintiffs of their constitutional right to substantive due process under the Fourteenth Amendment to the United States Constitution.

141. Defendants' deprivation of Plaintiffs' constitutional right violates the Civil Rights Act, 42 U.S.C. § 1983.

142. Plaintiffs have no adequate remedy at law to redress the wrongs alleged herein, which are of a continuing nature and will cause irreparable harm.

143. Unless Defendants are enjoined, they will apply and/or cause to be applied HHS's categorical prohibition against gay and lesbian individuals and couples being considered and selected as foster or adoptive parents.

PRAYER FOR RELIEF

WHEREFORE, Plaintiffs pray for:

A. A declaration that HHS's Policy in Administrative Memo #1-95 violates Plaintiffs' rights to equal protection and due process under the Constitution of the State of Nebraska, the Constitution of the United States, and 42 U.S.C. § 1983, and thus is void and unenforceable.

B. An order enjoining Defendants and those acting in concert with them from enforcing Administrative Memo #1-95 and/or applying categorical restrictions against gay and lesbian individuals and couples from being considered or selected as foster or adoptive parents now or at any time in the future, notwithstanding that they reside in homes with unrelated, unmarried persons.

C. An order directing Defendants to evaluate applications of gay and lesbian individuals and couples seeking to serve as foster or adoptive parents consistently with the evaluation process applied to applicants that are not categorically excluded.

D. An order awarding Plaintiffs their costs, including their reasonable attorneys' fees.

E. An order awarding such other and further relief as the Court deems just and proper.

Dated: Lincoln, Nebraska
August 27, 2013

By: /s/ Amy A. Miller
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Attorneys for Plaintiffs

PRAECIPE

TO THE CLERK OF THE DISTRICT COURT OF LANCASTER COUNTY:

Please prepare a Summons for personal service in the above-captioned matter to be served by the Lancaster County Sheriff, upon each of the Defendants, Governor Dave Heineman, Chief Executive Officer of the Nebraska Department of Health and Human Services Kerry Winterer, and Director of the Nebraska Division of Children and Family Services Thomas Pristow, who can be served at the office of the Attorney General, Room 2115, State Capitol, Lincoln, Nebraska 68509, during usual business hours.

In addition to the service of Summons, include a copy of the following:

1. The Complaint;
2. Exhibit 1.

By: /s/ Amy A. Miller
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ADMINISTRATIVE MEMORANDUM - HUMAN SERVICES - #1-95

January 23, 1995

TO: District Administrators
Division Administrators

PLEASE SHARE WITH APPROPRIATE STAFF

FROM: Mary Dean Harvey, Director
Nebraska Department of Social Services

RE: Placement in Foster Care

It has come to my attention, through a Department review of state statute and Department policy and licensing regulations, that the issue of sexual orientation in foster parenting is not addressed. It has also come to my attention that the issue of preference for placement related to the marital status of individuals in households who provide foster care is not addressed. It is clear, however, in statute and policy that this state's direction and intent is for the placement of children in the most family-like setting when out-of-home care is necessary.

It is my decision that effective immediately, it is the policy of the Department of Social Services that children will not be placed in the homes of persons who identify themselves as homosexuals. This policy also applies to the area of foster home licensure in that, effective immediately, no foster home license shall be issued to persons who identify themselves as homosexuals.

It is also my decision that, effective immediately, it is the policy of the Department of Social Services that children will not be placed where unrelated, unmarried adults reside together. This policy also applies to the area of foster home licensure in that, effective immediately, no foster home license shall be issued to unrelated, unmarried adults residing together.

I have directed staff of the Human Services Division to immediately begin the process of drafting proposed program and licensing regulation in this area that can be brought before public hearing in a more formal manner as soon as possible.

It is my expectation that all staff will comply with the immediate direction provided. Any questions regarding my direction should be addressed to me.

CC501OA

ADDENDUM: ADMINISTRATIVE MEMORANDUM - HUMAN SERVICES - #1-95

March 8, 1995

TO: District Administrators
Division Administrators

PLEASE SHARE WITH APPROPRIATE STAFF

FROM: Christine M. Hanus, Administrator
Human Services Division

RE: Placement in Foster Care

Department staff have requested clarification of Administrative Memorandum #1-95 regarding the placement of children in foster homes and licensing of foster home applicants. This Addendum to the Administrative Memorandum will address the questions that have been raised:

DOES THE POLICY AFFECT CURRENT PLACEMENTS OR FUTURE FOSTER CARE PLACEMENTS?

The policy is "effective immediately" and is not intended to affect any foster placements of children prior to the date of the Administrative Memorandum.

If child(ren) are currently in foster care placement with an individual who is licensed at this time but unable to be re-licensed due to the policy, District Administrators may approve the continuation of the placement on a case-by-case basis.

ARE RELATIVE FOSTER HOMES INCLUDED IN THE POLICY?

It is current Department policy to encourage placement with relatives. Situations in which a relative placement is considered and the relative is known to the agency as being homosexual or is unmarried and living with another adult should be assessed by the worker on a case-by-case basis.

DOES THE POLICY AFFECT ADOPTIVE PLACEMENTS?

The policy affects future foster-adoptive placements. Current adoptive placements with individuals who are known by the agency to be homosexual or who are unmarried and living with another adult, should be assessed by the worker on a case-by-case basis prior to finalization of the adoption.

SHOULD DEPARTMENT STAFF SPECIFICALLY ASK INDIVIDUALS ABOUT THEIR SEXUAL ORIENTATION OR CONFIRM THE STATED MARITAL STATUS?

At this time, Department staff are not directed to ask any specific questions about an individual's sexual orientation or marital status than is currently asked in the licensing application, home study, etc.

March 8, 1995

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If an individual provides information during the licensing or placement process that indicates sexual preference or marital status, this information should be noted in the case file or licensing file and the current policy will be applied.

More formal policy regarding foster care placements and licensing is being drafted and a formal public hearing process will occur. The level of written documentation will be considered in the preparation of policy for public hearing.

DOES THE POLICY REQUIRE THAT NO PLACEMENT BE MADE OR LICENSE ISSUED IN A HOME IN WHICH UNRELATED ADULTS RESIDE REGARDLESS OF THE RELATIONSHIP BETWEEN THE APPLICANT AND THE OTHER ADULT(S)?

When an individual lives alone, other adults may reside in the household only under the following conditions: the individual is related to the applicant or licensee by blood or adoption; the individual is a previous foster child of the applicant or licensee; the applicant or licensee has legal guardianship of the individual; or the applicant or licensee is responsible for providing physical care to and supervision of the individual whose placement is supervised by a developmental disability agency.

ARE ANY EXCEPTIONS TO BE MADE TO THE POLICY BASED ON RELIGION, RACE, OR CULTURE?

The policy applies to all foster home applicants who are not related to the child(ren) being considered for placement. In the case of Native American children, however, the Indian Child Welfare Act placement preferences will be followed.

DOES THE POLICY APPLY TO SITUATIONS OF MARRIED FOSTER PARENTS WHO ALSO HAVE AN UNRELATED ADULT LIVING WITH THEM?

The policy is not intended to apply to situations in which the foster parents are married.

WILL THIS POLICY ALSO BE IN FORCE IN REGARD TO GROUP HOME AND CHILD CARING AGENCY STAFF?

The policy only applies to foster home placement and licensure.

If there are additional questions regarding the policy, please contact me.

PU:HH5067H