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*Via Certified Mail*

February 24, 2015

Greg McKay  
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Mark Brnovich, Attorney General  
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Dear Mr. McKay and Mr. Brnovich:

The American Civil Liberties Union of Arizona (ACLU) has been contacted by foster parents and other persons negatively impacted by the State of Arizona's recent decision to prohibit same-sex married couples from acting as joint foster parents. The Department of Child Safety's (DCS) decision to ignore federal court decisions on marriage equality and re-implement a policy that discriminates against LGBT couples harms families and children in foster care at a time when Arizona's child welfare system is in crisis. DCS policies violate the 14<sup>th</sup> Amendment of the U.S. Constitution and infringe on the fundamental rights of married same-sex couples. DCS must cease its unconstitutional and discriminatory practices. Failure to reverse course and treat same-sex married couples the same as opposite-sex married couples who want to become foster parents and adopt will result in litigation.

On February 4, 2015 the Office of Licensing and Registration emailed foster agencies throughout Arizona, announcing that DCS will no longer certify same-sex married couples as jointly licensed foster parents, allow married same-sex couples the same adoption placement preference afforded to married opposite-sex couples or certify married same-sex couples to jointly adopt foster children. The email states that "effective immediately, and pending the Supreme Court's ruling, [DCS] will revert to its previous interpretation of state law, rule and policy." According to DCS policy, "any action initiated but not finalized should revert to the previous approach; e.g. a married same-sex couple who has applied for a foster home license but is not yet licensed will be licensed as individuals."

DCS's decision to change its policy and prevent same-sex couples from jointly fostering or adopting children clearly violates existing law. In October 2014, the federal district court ruled that Arizona's ban on same-sex marriage is unconstitutional

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because it denies lesbian and gay couples equal protection under the law. *Majors v. Horne*, 14 F.Supp.3d 1313, (D. Ariz. 2014); *Connolly v. Jeanes*, 2014 WL 5320642, (D. Ariz. 2014). Those decisions applied the Ninth Circuit's reasoning in *Latta v. Otter*, declaring the bans on same-sex marriage in Nevada and Idaho unconstitutional. The Supreme Court subsequently declined to review the decision of the Ninth Circuit. *Otter v. Latta*, 135 S.Ct. 345 (2014) (*cert denied*). As a result of these decisions, Arizona same-sex couples who are legally married should be free to have a family without facing discrimination by the state.

Following the decisions in *Majors*, *Connolly* and *Latta*, DCS correctly interpreted A.R.S. § 8-103 to allow married same-sex couples to jointly adopt and foster children. In light of the Ninth Circuit and federal district court decisions interpreting Arizona law, same-sex married couples should be treated the same as opposite-sex married couples for purposes of becoming foster and adoptive parents.

Furthermore, that a law *may* change in the future does not release DCS of its duty to follow current law. Marriage equality is the law in Arizona and state agencies must uphold and follow the law. Married same-sex couples have a right to maintain their marital status and the privileges of marriage even if a subsequent change in law may one day prohibit same-sex marriage. In *Cook v. Cook*, an Arizona Appeals court held that existing marriages cannot be made "void" by subsequent changes in the law if the marriage was legal in Arizona at the time it was solemnized. *Cook v. Cook*, 209 Ariz. 487, 104 P.3d 857 (App. 2005). Arizona courts recognize that married couples have a "vested" right in marriage which cannot be destroyed. *Id.* 864-866. Similarly, when the Supreme Court agreed to stay a ruling invalidating Utah's ban on same-sex marriage, a Utah District Court held that the state could not retroactively enforce its marriage ban to divest same-sex couples of rights granted during the period same-sex couples were legally allowed to marry. *Evans v. Utah*, 21 F. Supp. 3d 1192 (D. Utah 2014); *See also Caspar v. Snyder*, 2015 WL 224741 (E.D. Mich. 2015) ("[O]nce a marriage has been solemnized pursuant to a validly issued marriage license, the authorizing state cannot withdraw the status that it has awarded."). The *Evans* court held that "[t]he State's decision to retroactively apply its marriage bans and place Plaintiffs' marriages 'on hold' infringes upon fundamental constitutional protections for the marriage relationship." *Evans* at 1210. Federal law requires the State of Arizona to interpret its laws accordingly. DCS has no legitimate reason for reversing its course and enforcing discriminatory policies.

Finally, DCS policies prevent children in foster care from being placed with loving parents at a time when Arizona's foster care system is in crisis. Recent reports indicate that "from March 2010 to September 2014, the number of children in foster care grew a jaw dropping 66 percent."<sup>1</sup> Currently, there are over 16,000 children in

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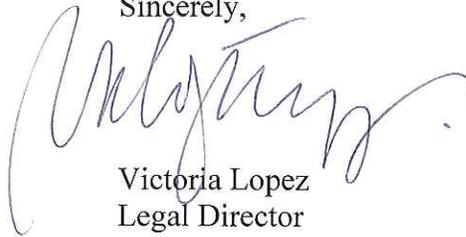
<sup>1</sup> *Finally, Arizona's foster children take a stand*, Laurie Roberts, Arizona Republic, February 3, 2015, online at <http://www.azcentral.com/story/laurieroberts/2015/02/03/foster-children-lawsuit-arizona/22804043/>

foster care in Arizona,<sup>2</sup> while the number of families willing to accept foster children is in decline.<sup>3</sup> Against this reality for so many Arizona children, it is unconscionable that DCS has chosen to implement policies that discriminate against loving families willing to open their homes to children in need. DCS policies will only further harm children the state claims it wants to protect.

DCS has a legal and ethical duty to recognize the marriages of same-sex couples seeking to foster and adopt. The ACLU requests that DCS immediately revise and implement policies that treat same-sex married couples the same as opposite-sex married couples. Failure to do so needlessly harms children and families, and places politics over the lives of children in foster care. Should you have any questions or concerns, I can be reached at 602-773-6011 or by email at [vlopez@acluaz.org](mailto:vlopez@acluaz.org).

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LIBERTIES UNION FOUNDATION  
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Sincerely,



Victoria Lopez  
Legal Director  
ACLU of Arizona

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<sup>2</sup> *Id.*

<sup>3</sup> *Arizona Foster Care Crisis Deepens*, Mary K. Reinhart, Arizona Republic, August 9, 2013, online at <http://www.azcentral.com/news/politics/articles/20130808arizona-cps-foster-care-crisis-deepens.html>