IN THE THIRD DISTRICT COURT OF APPEAL
STATE OF FLORIDA

CASE NO. 3D08-3044

FLORIDA DEPARTMENT OF CHILDREN AND FAMILIES,

Appellant,

v.

IN RE MATTER OF ADOPTION OF: X.X.G. and N.R.G.,

Appellees.

ON APPEAL FROM THE CIRCUIT COURT OF THE ELEVENTH JUDICIAL CIRCUIT IN AND FOR MIAMI-DADE COUNTY, FLORIDA

BRIEF OF *AMICI CURIAE* THE UNIVERSITY OF FLORIDA FREDRIC G. LEVIN COLLEGE OF LAW CENTER ON CHILDREN AND FAMILIES, THE UNIVERSITY OF MIAMI SCHOOL OF LAW CHILDREN AND YOUTH LAW CLINIC, THE NOVA SOUTHEASTERN UNIVERSITY LAW CENTER CHILDREN AND FAMILIES CLINIC, THE BARRY UNIVERSITY SCHOOL OF LAW CHILDREN AND FAMILIES CLINIC, AND PROFESSORS BARBARA BENNETT WOODHOUSE, MICHAEL J. DALE, TIMOTHY ARCARO, BRION BLACKWELDER, AND GERARD F. GLYNN *IN SUPPORT OF APPELLEES X.X.G. AND N.R.G.*

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IDENTITY AND INTEREST OF *AMICI CURIAE*

Amici[1] are Florida law school based clinics and centers, and professors, expert in and devoted to representing the legal rights and best interests of children, who submit this brief in support of Appellees X.X.G. and N.R.G., minor children.

SUMMARY OF ARGUMENT

The judgment of the court below should be affirmed. Under the Due Process Clause of the Fourteenth Amendment and the Florida Constitution's explicit right of privacy, children have a fundamental right to a secure and stable family relationship, because such a relationship is critical for a child's healthy cognitive, emotional, social and psychological development, and essential in order for a child to achieve "the ability independently to define [his] identity that is central to any concept of liberty." *Roberts v. U.S. Jaycees*, 468 U.S. 609, 619 (1984). Because the categorical exclusion of lesbians and gay men from adoption directly and substantially interferes with this right, it cannot pass muster unless it is narrowly tailored to achieve a compelling governmental interest. It is not: the statute fails even to rationally further the State's interest in the welfare of adoptive

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[1] *Amici* are the University of Florida Fredric G. Levin College of Law Center on Children and Families and, if the Court grants the accompanying motion for leave to join this brief, the University of Miami School of Law Children and Youth Law Clinic, the Nova Southeastern University Law Center Children and Families Law Clinic, the Barry University School of Law Children and Families Clinic, and Professors Barbara Bennett Woodhouse, Michael J. Dale, Timothy Arcaro, Brion Blackwelder, and Gerard F. Glynn.

children. First, as DCF admitted and the record confirms, "gay people and heterosexuals make equally good parents." Second, in the context of a statutory scheme requiring individual assessments, and mandating that the best interest of the adoptee child must be the court's paramount concern in all adoption cases, the categorical exclusion effectively directs the courts to *disregard* the best interests of the child in cases where the person otherwise eligible to adopt is gay. Under no conceivable set of facts could that directive promote child welfare.

The statute also violates the State's affirmative constitutional duty to protect the liberty interests and well-being of foster children, who as a matter of law are held in the State's custodial confinement. By preventing adoptions that are in a foster child's best interest, the categorical exclusion unnecessarily prolongs the foster child's custodial confinement and subjects the child to unreasonable risks of profound harm, contrary to the State's constitutional obligations.

Finally, the statute violates the equal protection rights of legally free minor children in the custody of gay caregivers. Depriving these children of the benefits of adoption – or unnecessarily disrupting the placements in which they are thriving – cannot possibly promote their best interests, and the statute cannot be sustained.

ARGUMENT

I. THE CATEGORICAL EXCLUSION VIOLATES A CHILD'S FUNDAMENTAL RIGHT TO A SECURE AND STABLE FAMILY RELATIONSHIP.

A. A Child Has a Fundamental Right to a Secure and Stable Family Relationship.

Children require a secure and stable family relationship in order to develop into autonomous, socially responsible, psychologically well-adjusted adults. Child development research overwhelmingly shows that children form strong bonds of attachment to their parents early in life, which strengthen and develop as children grow older. *See, e.g.*, John Bowlby, *Attachment* (1969). These attachment relationships do not depend on biological connection, but form with any adult who "on a continuing, day-to-day basis, through interaction, companionship, interplay, and mutuality, fulfills the child's psychological needs, as well as the child's physical needs." Joseph Goldstein, et al., *Beyond the Best Interests of the Child* 98 (2d ed. 1979). Such relationships are "vital in the formation of the person." L. Alan Sroufe, *Attachment and Development: A prospective, longitudinal study from birth to adulthood*, 7 Attachment & Hum. Dev. 349, 365 (2005). They "engage children in the human community in ways that help them define who they are, what they can become, and how and why they are important to other people." Nat'l Scientific Council on the Developing Child, *Young Children Develop in an Environment of Relationships* 1 (2004) (hereafter *Environment of Relationships*). The attachments of a secure and stable family relationship are thus critical for a child to achieve "the ability independently to define [his] identity that is central to any concept of liberty." *Roberts v. U.S. Jaycees*, 468 U.S. 609, 619 (1984).

1. The parent-child attachments of a secure and stable family relationship are critical to a child's healthy development.

Courts have long recognized that "children require secure, stable, long-term, continuous relationships with their parents or foster parents." *Lehman v. Lycoming County Children's Servs. Agency*, 458 U.S. 502, 513 (1982). Scientific research bears this out. Attachment relationships "shape the development of self-awareness, social competence, conscience, emotional growth and emotion regulation, learning and cognitive growth." Nat'l Research Council and Institute of Medicine, *From Neurons to Neighborhoods: The Science of Early Childhood Development* 265 (Jack P. Shonkoff & Deborah A. Phillips eds., 2000). They "buffer young children against the development of serious behavior problems, in part by strengthening the human connections and providing the structure and monitoring that curb violent or aggressive tendencies." *Id.* "Attachment to a primary caregiver is essential to the development of emotional security and social conscience." Am. Acad. of Pediatrics: Committee on Early Childhood, Adoption, and Dependent Care, *Developmental Issues for Young Children in Foster Care*, 106 Pediatrics 1145, 1146 (2000) (hereafter *Young Children in Foster Care*). Attachment relationships thus form "the cornerstone for healthy psychological adjustment." David M. Brodzinsky et al., *Children's Adjustment to Adoption: Developmental and Clinical Issues* 13 (1998).

A "secure parent-infant attachment" also provides "a crucial foundation for

the growth of healthy self-regard, because of its influence on the young child's developing self-representations." R.A. Thompson & R. Goodvin, *The Individual Child: Temperament, Emotion, Self and Personality*, in *Developmental Science: An Advanced Textbook* 414 (M. Bornstein & M. Lamb eds., 2005). Through such a relationship, parental values, expectations, and beliefs are transmitted in ongoing feedback about behavior, and this feedback strongly influences children's self-representations. *Id.* at 415-16. "Attachment experiences" are thus "vital in the formation of the person." Sroufe, *supra*, at 365.

Moreover, attachment relationships spur the creation of neurological pathways in the child's brain that lead to these psychological advances. They are *the* major environmental factor – the "active ingredient" in the environment – that shapes the development of the child's brain during its period of maximal growth. Nat'l Scientific Council on the Developing Child, *The Science of Early Childhood Development* 6 (2007). Thus, healthy "development of a child's brain architecture depends upon the establishment of [attachment] relationships." *Environment of Relationships*, *supra*, at 1.

Disruptions in attachment relationships – and in particular repeated disruptions – cause profound emotional and psychological harm. Disruption causes children to "not only suffer separation distress and anxiety but also setbacks in the quality of their next attachments, which will be less trustful." Goldstein,

supra, at 33. Thus, "repeated 'detaching' and 're-attaching' to people who matter … can lead to enduring problems." *Environment of Relationships*, *supra*, at 4. Ultimately, interference with children's attachment relationships can lead to "aggression, fearful relationships, academic problems in school, and … elevated psychopathology." Ana H. Marty, et al., *Supporting Secure Parent-Child Attachments: The Role of the Non-parental Caregiver*, 175 Early Childhood Dev. & Care 271, 274 (2005). *See also Braam ex rel. Braam v. Washington*, 81 P.3d 851, 854 & n.1 (Wash. 2003) (frequent movement of children in foster care "may create or exacerbate existing psychological conditions, notably reactive attachment disorder"); *LaShawn A. v. Dixon*, 762 F. Supp. 959, 986 (D.D.C. 1991) ("Prolonged stays in foster care and frequent changes in placements lead to [psychological] disorders … all too frequently.").

Because parent-child attachment relationships are so critical to a child's cognitive, emotional, social and psychological development, and because disruption of those attachment relationships (particularly repeated disruption) impairs the child's ability to form future attachments, children need "sustained, reliable relationships within the family." *Environment of Relationships*, *supra*, at 4. "Paramount in the lives of … children is their need for continuity with their primary attachment figures … ." *Young Children in Foster Care*, *supra*, at 1145.

The child's need for a secure and stable family relationship is the foundation

of the State's statutory child welfare policies. The over-arching purpose of the Florida Adoption Act is "to provide to all children who can benefit by it a permanent family life." § 63.022(3), Fla. Stat. The Act declares that "[t]he state has a compelling interest in providing stable and permanent homes for adoptive children in a prompt manner," and that "[a]doptive children have the right to permanence and stability in adoptive placements." § 63.022(1)(a),(c), Fla. Stat. Even the desire to maintain beneficial relationships with grandparents must yield to the importance of a permanent and stable adoptive placement, given the Legislature's emphasis on stability and its preference for adoption over less secure custodial arrangements. *G.S. v. T.B.*, 985 So. 2d 978, 983 (Fla. 2008).

The Legislature has further declared that foster care "often fails to meet the needs of children" in part because children are "repeatedly placed" and "lack a stable environment." §§ 409.1673(1)(a)(1), (1)(b), Fla. Stat. Accordingly, it has explicitly articulated its goals that "permanent placement with the biological or adoptive family [be] achieved as soon as possible for every child in foster care and that no child remain[] in foster care longer than 1 year." § 39.001(1)(h), Fla. Stat.

As these declarations of public policy demonstrate, the State has concluded that secure and stable family relationships are of fundamental importance to the well-being of children. That conclusion is unassailable: as the science confirms, these relationships are "vital in the formation of the person." Sroufe, *supra*, at 365.

2. A child's interest in a secure and stable family relationship is constitutionally protected.

Given the critical importance of a secure and stable family relationship to a child's healthy development and well-being, as well as its crucial role in enabling a child to form a sense of his own identity, children have a fundamental constitutional right to a secure and stable family relationship.[2]

We start from first principles. "[T]he protection of liberty under the Due Process Clause has a substantive dimension of fundamental significance in defining the rights of the person." *Lawrence v. Texas*, 539 U.S. 558, 565 (2003). The Florida Constitution also protects "the right to liberty and self-determination." *State v. J.P.*, 907 So. 2d 1101, 1115 (Fla. 2004). Its explicit right of privacy – Article I, section 23 – provides even "more protection than the federal right." *Id.*

At the very core of this protected liberty is "an autonomy of self that includes freedom of thought, belief, [and] expression." *Lawrence*, 539 U.S. at 562. "[C]entral to any concept of liberty" is "the ability independently to define one's identity." *Roberts v. U.S. Jaycees*, 468 U.S. 609, 619 (1984). "At the heart of

[2] We note this is an issue of first impression. We argue that the constitution protects children's vital interest in securing a permanent family, not that it protects their temporary foster care arrangements from disruption, as was asserted in *Smith v. Organization of Foster Families for Equality and Reform*, 431 U.S. 816, 842 (1977), and in *Lofton v. Secretary, Florida Department of Children and Families*, 358 F.3d 804, 811-15 (11th Cir. 2004). This claim also was not raised in *Cox v. D.H.R.S.*, 656 So. 2d 902 (Fla. 1995). That case was brought by two adults who did not purport to assert any claim on behalf of adoptive children.

liberty is the right to define one's own concept of existence, of meaning, of the universe, and of the mystery of human life." *Planned Parenthood of Southeastern Pa. v. Casey*, 505 U.S. 833, 851 (1992).

Because "[b]eliefs about these matters could not define the attributes of personhood were they formed under compulsion of the State," *id.*, the Supreme Court has long accorded constitutional protection to family relationships, not only safeguarding existing relationships from intrusion, *e.g., Griswold v. Connecticut*, 381 U.S. 479 (1968), but also preventing the erection of barriers to their formation, *e.g., Zablocki v. Redhail*, 434 U.S. 374 (1978). There is a "private realm of family life which the state cannot enter." *Prince v. Massachusetts,* 321 U.S. 158, 166 (1944). "The child is not the mere creature of the state; those who nurture him and direct his destiny have the right, coupled with the high duty, to recognize and prepare him for additional obligations." *Pierce v. Society of Sisters,* 268 U.S. 510, 535 (1925). "[I]n the culture and traditions of the Nation" it is families that assume a primary role in "cultivating and transmitting shared ideals and beliefs; they thereby foster diversity and act as critical buffers between the individual and the power of the State." *Roberts*, 468 U.S. at 618-19. *See also Meyer v. Nebraska*, 262 U.S. 390, 401-02 (1923) (state-imposed collective rearing of children would do violence to letter and spirit of Constitution). In short, family relationships are critical to the independent formation of one's core beliefs and ideals, and receive

constitutional protection in order to safeguard the freedom of self-definition that is "central to any concept of liberty." *Roberts*, 468 U.S. at 619.

Additionally, "[f]amily relationships, by their nature, involve deep attachments and commitments," *id.* at 619-20, and their constitutional protection "reflects the realization that individuals draw much of their emotional enrichment from close ties with others." *Id.* at 619. It is through family attachments that most of us find meaning and fulfillment. Because family relationships are so important in this respect, the right to "establish a home and bring up children" has long been deemed "essential to the orderly pursuit of happiness," *Meyer v. Nebraska*, 262 U.S. at 399.[3] *See also Grissom v. Dade County*, 293 So. 2d 59, 62 (Fla. 1974) (right to establish a family though procreation or adoption "is so basic as to be inseparable from 'the right[] … to pursue happiness'"); *Stanley v. Illinois*, 405 U.S. 645, 651-52 (1972) (describing importance of family and familial bonds); *Santosky v. Kramer*, 455 U.S. 745, 758-59 (1982) (parent-child relationship is "far more precious than any property right"); *Padgett v. Dep't of Health & Rehab. Servs.*, 577 So. 2d 565, 571 (Fla. 1991) (parent-child relationship is "sacrosanct").

On both grounds – its importance to a child's independent self-definition, and its importance to a child's emotional well-being – the child's interest in a

[3] Notably, the Florida Constitution explicitly guarantees the "inalienable right[] … to pursue happiness." Art. I, § 2, Fla. Const.

secure and stable family relationship warrants constitutional protection.[4] As explained above, an attachment relationship with a parent is critical to a child's healthy cognitive, emotional, social and psychological development, and in particular plays a vital role in helping children "define who they are, what they can become, and how and why they are important to other people." *Environment of Relationships*, *supra*, at 1. Without a parent figure to interact with and bond to, children lack an essential source of feedback they need to develop "the ability independently to define [their own] identity," *Roberts*, 468 U.S. at 619. In addition, the attachment to a parent figure that grows out of regular interaction "is essential to the development of emotional security and social conscience," *Young Children in Foster Care*, *supra*, at 1146, and "the cornerstone for healthy psychological adjustment." Brodzinsky, *supra*, at 13. Because a secure and stable family relationship is essential to protect the child's ability to form the attachments that are critically important to identity development and emotional well-being, the child's interest in a secure and stable family relationship must be deemed a fundamental, constitutionally protected right.

B. The Categorical Exclusion Directly and Substantially Interferes with a Child's Right to a Secure and Stable Family Relationship.

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[4] Of course, "[m]inors possess constitutional rights under both the federal and Florida constitutions." *State v. J.P.*, 907 So. 2d at 1110; *see also In re T.W.*, 551 So. 2d 1186, 1193 (Fla. 1989).

The categorical exclusion of lesbians and gay men from adoption directly and substantially interferes with a child's fundamental right to a secure and stable family relationship. Under Florida's statutory scheme, adoption is "the primary permanency option" for a child who cannot be reunited with his or her biological parents. § 39.621(6), Fla. Stat. Other custodial arrangements do not provide the same protection to the child's interests in "a permanent and stable home, which is the goal of the statutory scheme." *G.S. v. T.B.*, 985 So. 2d at 984 (contrasting legal guardianship with "the right to permanence and stability that is afforded by adoptions"); *see also id.* at 983 ("it is clear that the Legislature favors adoptions of legally free minor children as the preferred method for providing minor children with the benefits of a stable and permanent family life").

Certainly foster care is not an adequate substitute. As the Legislature has found – and statistics confirm[5] – children in Florida's foster care system are "repeatedly placed" and "lack a stable environment." § 409.1673(1)(b), Fla. Stat. In short, under Florida's statutory policies and actual foster care practices, adoption is uniquely effective in providing a secure and stable family relationship to children whose natural parents cannot or will not provide it.

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[5] Of the children in Florida foster care two years or longer, 65.8% have three or more placements. Even for those in foster care less than a year, 17.2% have three or more placements. *See* Children's Bureau, U.S. Dep't of Health & Human Servs., *Child Welfare Outcomes 2002-2005*, at V-87 Table 6.1 (available at http://www.acf.hhs.gov/programs/cb/pubs/cwo05/cwo05.pdf).

Accordingly, the categorical exclusion of lesbians and gay men from adoption directly and substantially interferes with the fundamental right of such children to a secure and stable family relationship by disqualifying a group of adults from adopting regardless of their ability to parent and thereby limiting children's opportunity to attain a stable family. Like the statute struck down in *Zablocki v. Redhail*, 434 U.S. 374, 387 (1978), which "absolutely prevented" marriage for some persons in arrears on child support, the categorical exclusion imposes an absolute legal bar to a child's adoption when the person otherwise eligible to adopt is gay.

Of course, not every regulation touching on adoption must pass strict scrutiny to survive. For example, regulations requiring an investigation and home study to confirm that a proposed adoption is suitable and in the child's best interest do not infringe the child's right to a secure and stable family relationship, even though they may delay the completion of adoption proceedings. The categorical exclusion is different: the legal bar it imposes is permanent, and applies even where the proposed adoption is manifestly in the child's best interest. Moreover, where, as here, the child's custodial caregivers are gay, the categorical exclusion threatens the child's existing family attachments with disruption: for foster children who will not be adopted by their foster parents, the State must seek an alternative permanent placement unless certain limited exceptions apply. *See* Final

Judgment of Adoption, at 9-10; §§39.621(6), 39.6241, Fla. Stat. (specifying adoption as "the primary permanency option" and providing for "another planned permanent living arrangement" only in limited circumstances).

C. The Statute Fails Even Rational Basis Scrutiny: It Thwarts Rather Than Furthers the State's Interest in Child Welfare.

Because the categorical exclusion directly and substantially interferes with the fundamental right of children to a secure and stable family relationship by discarding available prospective adoptive parents regardless of their ability to meet the needs of a child, strict scrutiny is required. *State v. J.P.*, 907 So. 2d at 1109-10. Thus, the categorical exclusion can be upheld only if it is necessary and narrowly tailored to achieve a compelling governmental interest. *Id.* It is not. To the contrary, it lacks even a rational connection to the State's child welfare interests.

As the Circuit Court found based on substantial record evidence – and as a scientific consensus[6] based on a voluminous body of peer-reviewed research confirms "beyond dispute," Final Judgment of Adoption, at 37 – there is no difference between gay people and heterosexuals as parents, or in the outcomes achieved by the children they rear. *See id.* at 35-37 (summarizing court's findings of fact that "sexual orientation is not a predictor of a person's ability to parent," and that a scientific consensus confirms "there are no differences in the parenting

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[6] *See generally* Br. of *Amici Curiae* Child Welfare League of Am. et al.; Br. of *Amicus Curiae* Am. Psychological Ass'n.

of homosexuals or the adjustment of their children"). Indeed, DCF *admitted* that "gay people and heterosexuals make equally good parents." *Id.* at 33 ¶ 31.

Moreover, the State's statutory scheme of individualized screening of prospective adoptive parents, coupled with the statutory directive in § 63.022(2) that judicial authority be exercised in every case to safeguard the best interests of the child to be adopted, ensures that no unfit person – gay or straight – can adopt. The only adoptions actually prevented by the categorical exclusion are adoptions that would be *judicially determined* to be in the child's best interest.[7] Read *in pari materia* with § 63.022(2), the categorical exclusion effectively states: "in every adoption, the best interest of the child should govern and be of foremost concern in the court's determination *except when the person eligible to adopt is a homosexual*." In short, the categorical exclusion directs the court to *disregard* the best interest of the child to be adopted. Under no conceivable set of facts could this legislative directive promote the best interest of adoptive children. Rather, it

[7] DCF thus relies inaptly (Appellant's Br. at 25-37) on demographic statistics showing that smoking, for example, or depression, is more prevalent among gay persons than among heterosexuals. Even if smoking – or any of the other characteristics DCF points to – were always a sufficient reason not to approve an adoption, it is irrational to treat "gay" as a proxy for "smoker" when the system of individual screening allows "smoker" to be determined directly. *See Stanley v. Illinois*, 405 U.S. at 654-57 (even if "most unmarried fathers are unsuitable and neglectful parents" state may not categorically deem them unfit, since "some are wholly suited to have custody of their children"); *Carrington v. Rash*, 380 U.S. 89, 95-96 (1965) (state may not categorically deem service members to be non-residents, when it is feasible to assess residency on an individualized basis).

necessarily works to frustrate that interest.[8] Accordingly, it cannot stand.

II. THE STATUTE VIOLATES THE STATE'S CONSTITUTIONAL DUTY TO PROTECT THE LIBERTY AND WELL-BEING OF CHILDREN IT HAS CONFINED IN FOSTER CARE.

In addition, under the Due Process Clauses of the Florida and federal constitutions, the State has an affirmative duty to protect the liberty and well-being of children confined in foster care. The categorical exclusion violates this duty by needlessly preventing adoptions that would be in the children's best interest.

First, the categorical exclusion does "violence to both letter and spirit of the Constitution" by sequestering children in State custody who could be growing up in families of their own. *Meyer v. Nebraska*, 262 U.S. at 402. As courts consistently hold,[9] children in foster care are deemed to be held in the State's custodial confinement. For those who cannot be reunited with their family of origin, the justification for that deprivation of liberty – protection of the child's

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[8] The categorical exclusion thus stands on a completely different footing than the legislative preference for adoption over less secure placements recognized and enforced in *G.S. v. T.B.*, 985 So. 2d at 983. It is one thing for the Legislature to guide the exercise of a court's discretion in determining a child's best interests by underscoring the importance of permanence and stability; it is quite another for the Legislature to instruct the court to disregard the child's best interests altogether.

[9] *Taylor v. Ledbetter,* 818 F.2d 791, 794-97 (11th Cir. 1987) (en banc); *Nicini v. Morra*, 212 F.3d 798, 808 (3d Cir. 2000) (en banc); *Norfleet ex rel. Norfleet v. Ark. Dep't of Human Servs.*, 989 F.2d 289, 293 (8th Cir.1993); *Yvonne L. v. N.M. Dep't of Human Servs.*, 959 F.2d 883, 891-93 (10th Cir.1992); *K.H. v. Morgan*, 914 F.2d 846, 848-49 (7th Cir.1990); *Meador v. Cabinet for Human Res.*, 902 F.2d 474, 476 (6th Cir. 1990); *Doe v. New York City Dept. of Soc. Servs.*, 649 F.2d 134, 141-42 (2d Cir. 1981).

welfare – ceases when an adoption that would be in the child's best interest becomes available. Because the categorical exclusion prevents adoptions that would be in the child's best interest, it unnecessarily prolongs the child's confinement in foster care, infringing the child's constitutionally protected interest in liberty. *See E.C. v. Sherman*, 2006 WL 1307641, at *37 (W.D. Mo. 2006) ("Unnecessarily prolonged confinement in government foster care invokes the substantive due process liberty interests of foster children."). Strict scrutiny is therefore required, *id.*, and the categorical exclusion cannot pass that test.

Second, by preventing adoptions that would be in the child's best interest, the categorical exclusion inflicts unnecessary and unjustified harm on children in the foster care system who have been freed for adoption, violating the State's affirmative duty of care toward those in its custody. "[W]hen the State takes a person into its custody … the Constitution imposes upon it a corresponding duty to assume some responsibility for his safety and general well-being." *DeShaney v. Winnebago Dep't of Soc. Servs.*, 489 U.S. 189, 199-200 (1989). This substantive due process right includes "the right to be free from the infliction of unnecessary harm" and "extends … to children in state-regulated foster homes." *Meador*, 902 F.2d at 476. More specifically, "foster children have a constitutional substantive due process right to be free from unreasonable risk of harm," including the risk of harm caused by repeated disruption of their placements. *Braam ex rel. Braam v.*

Washington, 81 P.3d 851, 857 (Wash. 2003); *see also LaShawn A. v. Dixon*, 762 F. Supp. 959, 992-93 (D.D.C. 1991) (holding that children in foster care "have a [substantive due process] right to reasonably safe placements" that "extends to safety from psychological and emotional harm"), *aff'd on independent state law grounds sub nom. LaShawn A. v. Kelly*, 990 F.2d 1319 (D.C. Cir. 1993).

To be sure, the Constitution is satisfied so long as the State exercises "professional judgment" in seeking to prevent harm to those in its custody. *See Youngberg v. Romeo*, 457 U.S. 307, 321-23 (1982); *Jordan v. City of Philadelphia*, 66 F. Supp. 2d. 638, 646 (E.D. Pa. 1999) ("'professional judgment' standard" of *Youngberg* is "proper duty of care owed to a foster child"); *Kara B. v. Dane County,* 555 N.W.2d 630, 637-38 (Wis. 1996) (same); *Braam*, 81 P.3d at 859 (same); *LaShawn A.*, 762 F. Supp. at 996 (same). But the exercise of professional judgment is precisely what the categorical exclusion prevents. It instructs the courts to disregard the best interests of children when the person otherwise eligible to adopt is gay, and categorically prevents adoptive placements regardless of the professional judgments of case workers, social workers, psychologists, and other child welfare professionals that a proposed adoption is in the child's best interest. Moreover, by preventing the child's adoption and prolonging the child's placement in the unstable and insecure environment of Florida's foster care system, the categorical exclusion unjustifiably subjects the child to unreasonable risks of harm

from the repeated placement disruptions that plague Florida's foster care system. Thus, the categorical exclusion violates not only the State's duty to protect the liberty of children in foster care, but also its duty to protect their well-being.

III. THE STATUTE VIOLATES THE EQUAL PROTECTION RIGHTS OF CHILDREN WHO HAVE BEEN FREED FOR ADOPTION AND ARE IN THE CUSTODY OF GAY CAREGIVERS.

In addition, the categorical exclusion violates the right of the children in this case, and others similarly situated, to the equal protection of the laws. Unlike others, children in the custody of gay caregivers cannot be adopted even if their caregivers are willing. They must forego what may be their only chance of being adopted: more than a third of the adoptions out of foster care in Florida are by the child's foster parents. Final Judgment of Adoption, at 32 ¶ 22. Even if another adoptive parent ultimately can be found, these children must suffer "emotionally devastat[ing]" disruption of their family attachments, which here would "caus[e] profound long-term negative consequences to their development." *Id.* at 8, 44.

This discriminatory treatment is utterly irrational. Having itself deemed these gay caregivers fit to parent these children, the State cannot rationally assert they are *categorically* unfit to adopt. Having declared its "compelling interest in providing stable and permanent homes for adoptive children in a prompt manner" and its purpose "to provide to all children who can benefit by it a permanent family life," §§ 63.022(1)(a),(3), Florida Statutes, and having established adoption as "the

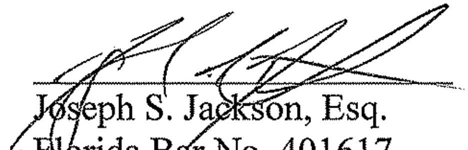
preferred method for providing [legally free] minor children with the benefits of a stable and permanent family life," *G.S. v. T.B.*, 985 So. 2d at 983, the State cannot rationally assert that preventing these fit parents from adopting promotes the welfare of these children. By categorically preventing adoptions that are manifestly in a child's best interests, the State harms an innocent class of children and "spites its own articulated goals." *Stanley v. Illinois*, 405 U.S. at 653.

This discriminatory treatment violates the right of these children to the equal protection of the laws. Children thriving in the custody of gay caregivers have done nothing to merit the burden imposed by the categorical exclusion. To impose disfavored treatment on them based on the status of their foster parents violates fundamental notions of justice and demands heightened scrutiny, because such children "lack responsibility for and control over their status." *Nancy M. v. Scanlon*, 666 F. Supp. 723, 727 (E.D. Pa. 1987). *See also Clark v. Jeter*, 486 U.S. 456, 461 (1988); *State Dep't of Health & Rehab. Servs. v. West*, 378 So. 2d 1220, 1226 (Fla. 1979). The State has no legitimate interest in condemning gay foster parents, but even if it did, "visiting this condemnation on the head of an infant is illogical and unjust." *Weber v. Aetna Casualty & Surety Co.*, 406 U.S. 164, 175 (1972). The statute does not withstand scrutiny and cannot be sustained.

CONCLUSION

For the foregoing reasons, the judgment below should be affirmed.

Respectfully submitted,



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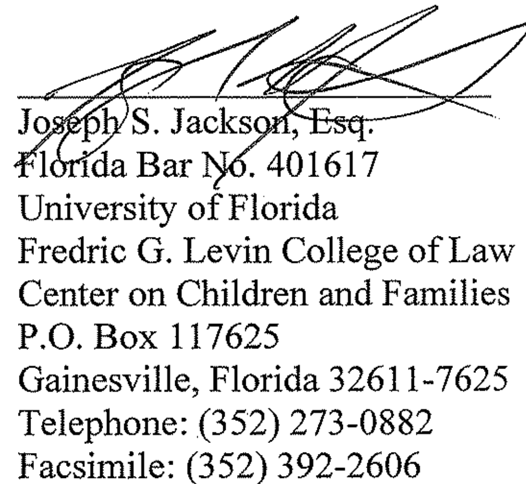

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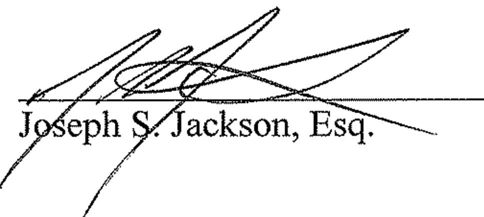

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