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IN THE SUPREME COURT OF FLORIDA

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JAMES W. COX,

Petitioner,

vs.

CASE NO. 82,967

DELORES DRY, DISTRICT ADMINISTRATOR,
DISTRICT 8, STATE OF FLORIDA, DEPARTMENT
OF HEALTH AND REHABILITATIVE SERVICES,

Respondent.

AMICUS CURIAE BRIEF
OF

CHILDREN FIRST: A JOINT PROJECT IN LAW
MEDICINE AND EDUCATION

AND

THE YOUTH LAW CENTER

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STATEMENT OF INTEREST OF AMICI CURIAE

CHILDREN FIRST: A JOINT PROJECT IN LAW, MEDICINE AND EDUCATION

CHILDREN FIRST is a joint project in law, medicine, and education funded by the Florida Bar Foundation. The following organizations comprise CHILDREN FIRST:

Central Florida Legal Services, Inc., Children First Project

Florida Legal Services, Inc., Children First Project

Florida State College of Law, Children's Advocacy Center

Legal Services of Greater Miami, Inc., Children First Project

University of Miami School of Law, Children's Law Clinic

University of Miami School of Medicine, Children First Project

CHILDREN FIRST through the Children First Project at Legal Services of Greater Miami, Inc., and Florida Legal Services, Inc. currently represents children in state custody who need therapeutic services in a federal class-action lawsuit *M.E. v. Chiles*, Case No. 90-1008-CIV-KEHOE (S.D. Fla. filed April 1990). Many of the children in the *M.E.* plaintiff class are dependent special needs children awaiting adoption who will potentially be affected by the outcome of this appeal. Many other children who are clients of the participants in CHILDREN FIRST also have much at stake in the issues raised by this case.

CHILDREN FIRST participants constantly work in various arenas to reduce the large numbers of children who are forced to remain in unstable, temporary, and often institutional settings. Too often, in spite of the advocacy of CHILDREN FIRST participants, these children never find permanent, stable family homes. Any blanket prohibition removing a significant group of people from the pool of potential adoptive parents, without a reason based on the best interest of the children awaiting adoption, threatens the rights and interests of these children.

THE YOUTH LAW CENTER

THE YOUTH LAW CENTER is a national, public interest law office, based in San Francisco, California, that works to protect the rights, health, and lives of children at risk. During the past 15 years, Youth Law Center attorneys have specialized in cases involving children in state custody, including children in the foster care system awaiting adoption. The Youth Law Center has established programs to monitor the welfare of children in foster care and has negotiated and litigated many cases to improve that system.

Despite extensive efforts to reform the foster care system and to facilitate permanent placements for foster children, thousands of children continue to languish in temporary foster care placements accross the country. The Youth Law Center opposes any arbitrary law or policy that operates to exclude potentially qualified persons from eligibility for adoption -- especially adoption of special needs children. Section 63.042(3), Florida Statutes (1992) is such a law.

SUMMARY OF ARGUMENT

Florida's blanket prohibition against adoptions by homosexuals contained in Section 63.042(3), Fla.Stat. reduces the pool of potential adoptive parents and contributes by so doing to the fact that hundreds of children languish in foster care awaiting permanent stable homes with loving adults. By so doing, the statute impinges upon the children's basic rights to life, liberty, and pursuit of happiness set forth in Article I, Section 2 of the Florida Constitution and the right to family integrity and privacy encompassed in Article 1, Section 23 of the Florida Constitution.

This brief does not attempt to reiterate the constitutional arguments asserted in the Petitioner's brief which focus on the rights of prospective adoptive parents. *Amici* adopt the Petitioner's brief for that purpose. It is the right of children to be protected from the harm that potentially flows from being consigned permanently to a series of temporary, unstable, and institutional settings, that this brief will assert.

Children's basic rights to "enjoy and defend life and liberty" and "to pursue happiness" find primary expression in a liberty interest to a permanent stable home or protection by the state in cases when that is necessary. The entire state child welfare system is designed to assist children to obtain a permanent home, preferably within the child's own biological family, but if not in a new family.

The purpose of the adoption system is to find permanent homes for children who can not return to their biological families. § 39.45(1), Fla. Stat. (1992). The Florida Legislature has expressed a clear intention that each Florida child be assured that care, guidance and control in a permanent home which will serve the best interests of the child's moral, emotional, mental and physical welfare either in the child's own home, or an adoptive home. § 39.45(2), Fla. Stat. (1992). Because the legislature has so emphatically pronounced that state policy is to protect and

promote every child's right to the security and stability of a permanent home, it has authorized a program to subsidize the adoption of special needs children. § 409.166, Fla. Stat. (1992).

Even with all these efforts, hundreds of children are trapped in limiting and harmful circumstances including unstable, temporary and institutional placements because of an inadequate pool of potential adoptive parents. Children with recognized special needs have suffered most since they are the hardest to place. Lesbian and gay youth are included in considerable number among those children waiting for adoption. They are increasingly recognized as having serious special needs themselves as they struggle to come to terms with their sexual orientation in an often hostile environment.

The blanket prohibition against homosexual adoptions serves in no way to protect children or advance their best interests. The overwhelming weight of scientific evidence indicates that gay fathers and lesbian mothers are as capable of providing safe, loving, stable homes as are other potential adoptive parents. This body of evidence is reinforced by extensive societal experience with lesbian and gay parents as the mosaic of family patterns recognized in society has expanded to include families led by lesbians and gay males. Only one other state maintains a sweeping statutory prohibition against adoption by homosexuals. Gay males and lesbians do adopt in other U.S. jurisdictions and these adoptions are recognized in Florida.

Federal and Florida constitutional law has recognized that children are presumed to have constitutional rights which must be protected by the courts unless that presumption can be overcome or the state can establish a countervailing and superior state interest for policies impinging upon those rights. The right to family integrity is one which extends to children as well as adults. There is no

countervailing and superior state interest that would justify the broad prohibition contained in Section 63.042(3) Florida Statutes.

The absolute ban on adoption by homosexuals removes from HRS the ability to consider a substantial population of otherwise eligible Florida residents as potential adoptive parents and consequentially diminishes the likelihood that a number of dependent children will achieve a permanent, stable family home. The rights and interests of these children are seriously harmed and many, especially special needs children, will be forced to remain in unstable, temporary settings to their detriment.

ARGUMENT

I. THE BLANKET PROHIBITION AGAINST ADOPTIONS BY HOMOSEXUALS IS CONTRARY TO THE BEST INTERESTS OF CHILDREN AWAITING ADOPTION

A permanent home is critical to childhood development.¹ It is for that reason that a child's basic rights guaranteed in Article I, Section 2 of the Florida Constitution must include the right to such a permanent home:

Basic Rights.--All natural persons are equal before the law and have inalienable rights, among which are the right to enjoy and defend life and liberty, to pursue happiness, to be rewarded for industry, and to acquire, possess and protect property... Art. I, § 2, Fla. Const.

Denying a child this permanency should only be allowed in the interest of protecting the safety of the child or advancing some other overriding state consideration. No such consideration has been advanced. Certainly, the individual child's best interests should be weighed against the alternative of isolation and permanent institutional living facing many children awaiting adoption.

A. Florida's Child Welfare and Adoption System are basically designed to assist children find permanency in stable, family homes.

The purpose of Florida's adoption statute is clearly set forth in its statement of legislative intent: "to protect and promote the well-being of persons being adopted and their birth and adoptive parents and to provide to all children who can benefit by it a permanent family life" § 63.022(1), Fla. Stat. (1992). The intent section goes on to enunciate clearly the basic safeguards which are to be utilized to insure that all the rights are protected and promoted. These safeguards conclude with the admonition contained in § 63.022(2)(l), Fla. Stat. (1992), to the courts which oversee the system:

¹ See, e.g., J. Goldstein, A. Freud & A Solnik, **Beyond the Best Interests of the Child** 31-34 (1973) ("Continuity of relationships, surroundings, and environmental influence are essential for a child's normal development.")

In all matters which come before the court pursuant to this act, the court shall enter orders as it deems necessary and suitable to promote and protect the best interests of the person to be adopted.

This best interest mandate continues logically from the mandates of the Juvenile Justice Act which regulates the placement of children in foster care and the rules which surround surrender of custody by natural parents. One of the purposes of the Juvenile Justice Act is articulated as follows:

To preserve and strengthen the child's family ties whenever possible, removing him from the custody of his parents only when his welfare or the safety and protection of the public cannot be adequately safeguarded without such removal; and, when the child is removed from his own family to secure for him custody, care, and discipline as nearly as possible equivalent to that which should have been given by his parents; and to assure, in all cases in which a child must be permanently removed from the custody of his parents, that the child be placed in an approved family home, and be made a member of the family by adoption.

§ 39.001(2)(e), Fla.Stat (1992). The same theme of the importance of family to the wellbeing of a child is reiterated in § 39.002(1) Fla. Stat. (1992):

GENERAL PROTECTIONS FOR CHILDREN. -- It is a purpose of the Legislature that the children of this state be provided with the following protections:

- (a) Protection from abuse, neglect, and exploitation.
- (b) A permanent and stable home.
- (c) A safe and nurturing environment which will preserve a sense of personal dignity and integrity.
- (d) Adequate nutrition, shelter, and clothing.
- (e) Effective treatment to address physical, social, and emotional needs, regardless of geographical location.
- (f) Equal opportunity and access to quality and effective education, which will meet the individual needs of each child, and to recreation and other community resources to develop individual abilities.
- (g) Access to preventive services.
- (h) An independent, trained advocate, when intervention is necessary and a skilled guardian or caretaker in a safe environment when alternative placement is necessary.

The intent language adopted for the foster care section underscores the crucial importance to children of the permanent home:

39.45 Legislative intent.--

- (1) The Legislature finds that 7 out of 10 children placed in foster care do not return to their biological families after the first year

and that permanent homes could be found for many of these children if their status were reviewed periodically and they were found eligible for adoption.

(2) It is the intent of the Legislature that each child be assured the care, guidance, and control in a permanent home which will serve the best interests of the child's moral, emotional, mental, and physical welfare and that such home preferably be the child's own home or, if that is not possible, an adoptive home...

§ 39.45, Fla.Stat. (1992). It is this same intent and the recognition that some children will have a more difficult time than others in locating an appropriate permanent family home, that led to the establishment of a subsidized adoptions program for a special group of "special needs children" :

It is the intent of the Legislature to protect and promote every child's right to the security and stability of a permanent family home. The Legislature intends to make available to prospective adoptive parents financial aid which will enable them to adopt a child in foster care who, because of his special needs, has proven difficult to place in an adoptive home... § 409.166 Fla. Stat. (1992)

Florida courts like those around the country have also been consistently guided in their analysis of children's issues, including adoption and custody, by the best interests of the child. See *Sulman v. Sulman*, 510 So. 2d 908, 909 (Fla. 4th DCA 1987); *Bernstein v. Bernstein*, 498 So. 2d 1270, 1272 (Fla. 4th DCA 1986). Since the best interest standard is based on fundamental rights of children, the sweeping prohibition contained in §63.042(3) Fla.Stat. (1992), in order to withstand this Court's scrutiny, would either have to be based on an attempt to protect children and their best interest or be designed to advance some other countervailing and superior state interest, neither of which are true in fact.

B. There is an insufficient pool of potential adoptive parents to assure that all children waiting adoption will be placed.

In spite of the legislatures intentions and the efforts of HRS, there were 1380 children in Florida who were in HRS custody or under HRS supervision awaiting adoption at the end of 1993, according to the *Adoption and Related Services Monthly Statistical Report for December, 1993*, issued by the Department of Health

and Rehabilitative Services. Only 113 children were placed for adoption the preceeding month, while 148 children were added to the rosters. The number of perspective adoptive parents approved by the department but waiting placement totaled 303.² Each month similar numbers appear, logging the sad truth of too few perspective adoptive families for the children who need to find permanence in order to obtain their basic rights.

C. Special needs children awaiting adoption are particularly impacted by policies limiting potential adoptive homes.

Many of the children counted in the 1380 who were waiting as this year began for adoptive homes are special needs children as defined in Section 409.166, Florida Statutes (1992).³ To the extent placement can be made for those children, it takes approximately four (4) years to find adoptive homes. Those who are never placed with families, are consigned to remain in the child welfare system until they reach majority.

These facts lead to the inescapable conclusion that there are hundreds of children, including special needs and HIV+ children, who need permanent stable family homes with loving parents, but who will never receive such homes. There is strong evidence that the sweeping prohibition contained in section 63.042(3), Fla.Stat. (1992) removes gay people who are willing and capable of providing these children the joy of a family and care of a parent from the pool of potential adoptive

²Department of Health and Rehabilitative Services, *Adoption and Related Services Monthly Statistical Report for December, 1993*, The report is included in the Appendix to this brief.

³"Special needs child" is technically used to describe a child whose permanent custody has been awarded to the department and who has either bonded with the foster parent or is considered less likely to be adopted because of age (over 8 years old), mental retardation, an emotional or physical handicap, racial background (of black or mixed race parentage), or family composition (a member of a sibling group). § 409.166, Fla. Stat. (1992).

parents. The Ohio case of *In re: Adoption of Charles B.*, 552 N.E. 2d 884 (Ohio 1990) (hereinafter "*Charles B.*") underscores the harm such special needs children may suffer as a result of the sweeping reach of Florida's prohibition against adoption by homosexuals.

The *Charles B.* case is illustrative of the situation facing the thousand special needs children awaiting adoption in Florida. Charles B. suffered from leukemia, possible brain damage from fetal alcohol syndrome, a low I.Q. and a speech disorder. Charles was placed in foster care at three years old and was in at least four different foster homes by the time he was eight years old. The Department of Human Services attempted to place Charles with adoptive parents. The Department was unsuccessful. Mr. B., a gay man, was appointed by the Department as Charles' counselor. Their professional relationship eventually developed into a close personal relationship. Mr. B. filed a petition to adopt Charles. The Department challenged the adoption.

The trial court in *Charles B.* granted the adoption, finding that the adoption of Charles by Mr. B. was in the best interest of Charles. The Supreme Court of Ohio affirmed the trial court's decision, holding that "the test to be used in any adoption is the 'best interest of the child' standard." *Id.* at 888 (emphasis in original). This determination, the court expressed, "must be judged on a case-by-case basis." In Charles' case, his special needs required an adoptive parent with stability, flexibility and the willingness and ability to provide special services to Charles. Mr. B. was determined to be qualified for the difficult, but loving challenge before him.

Florida's absolute ban on adoption by homosexuals would have made Charles' adoption by Mr. B. impossible. Charles would have likely become another unwanted statistic, shuffling from one foster home to another, or even worse, could have died in state institution, without the love and care of an adoptive parent.

D. **Gay and lesbian children are among the special needs children in need of adoptive homes.**

There are many other children in state custody with special needs which may diminish their possibility of finding a permanent stable home besides those officially recognized as "Special Needs Children" for adoption subsidy purposes. One group of children, increasingly recognized to have special needs are gay and lesbian children.⁴ It is frequently estimated that approximately 10% of the adult population is homosexual.⁵ Any estimate of the number of children is harder to ascertain because youth are frequently in the process of developing awareness of their sexuality. It has, nonetheless, been accepted as reasonable to use the estimate of 10% for those youth whose primary sexual orientation is gay male, lesbian, or bisexual.⁶ Some studies have indicated that the mean age for awareness of a gay male sexual orientation is 14 years old and of lesbian orientation 16-19.⁷ Sexual orientation is likely to be formed by adolescence, even if the youth is not yet sexually active.⁸ In 1991 the Child Welfare League of America (CWLA) Institute for the Advancement of Child Welfare Practice and the Hetrick-Martin Institute convened

⁴Almost all gay and lesbian youth would officially qualify as special needs children under the definition in § 409.166, Fla.Stat. (1992) because it is with adolescence (and past the age of 8) that sexual orientation manifests itself or becomes known.

⁵Bozett, *Gay Fathers: A Review of the Literature in Homosexuality and the Family* 138 (F. Bozett ed. 1989).

⁶P. Gibson, *Gay Male and Lesbian Youth Suicide, Report of the Secretary's Task Force on Youth Suicide*, (U.S. Department of Health & Human Services 1989), 3-115. This work contains one of the most informative discussions of the special problems encountered by lesbian and gay youth. It is included in the Appendix to this brief.

⁷M.I. Saghir, E.Robin, and B. Walbian, *Male and Female Homosexuality* (1973); G. Remafedi, *Male Homosexuality: The Adolescent Perspective, Pediatrics* 79 (1987): 326-330.

⁸Gibson, *supra* note 6, p. 3-114.

a colloquium entitled *Serving Gay and Lesbian Youth: The Role of Child Welfare Agencies*, the first national meeting focusing on the needs of these children as a special needs group and urged agencies serving children and youth to develop programming and resources for gay and lesbian youth.⁹

The problems faced by Lesbian and Gay youth are in some ways unique and have led to the recognition of their special needs. Lesbian and gay youth are more likely to be rejected by their families, subjected to physical and verbal abuse within the family, rejected by their peers, denied role models, subjected to physical violence. Because of the constant barrage of prejudice and threats, many develop low self esteem. Some refuse to accept their own sexuality and most attempt to hide their orientation from their peers. This can lead to serious emotional problems. Many gay and lesbian youth are at higher risk of substance abuse, dropping out of school or turning to unsafe sexual practices than their heterosexual peers. Perhaps most alarming is the fact that approximately 30% of lesbian and gay youth report actually attempting suicide.¹⁰ Many gay and lesbian youth are forced from their family homes because of their sexual orientation and find themselves homeless.¹¹ Various youth runaway centers in major urban centers have reported anywhere from 25% to 60% of their clients are gay, lesbian, or bi-sexual and it has been estimated

⁹M. McManus, Ed., *Serving Lesbian and Gay Youth, Focal Point, The Bulletin of the Research and Training Center on Family Support and Children's Mental Health*, Vol. 5, No. 2 (1991), p. 2. A copy of the relevant portions of *Focal Point* is included in the Appendix.

¹⁰Gibson, *supra* note 6, 3-111, ff.

¹¹R. Savin-Williams, *Theoretical Perspectives Accounting for Adolescent Homosexuality, Journal of Adolescent Health Care* 9 (1988):95-104.

that these children may comprise as many as 25% of all the children living on the streets.¹²

Many group homes and other facilities serving young people attempt to screen out gays and lesbians. Sexual orientation has been cited as one of the possible reasons for inability to adjust to foster home situations and for disruption of adoptions. Foster parents of whatever sexual orientation would require training to be able to help gay male, lesbian, and bisexual youth through their difficult time of adjustment.¹³ Although there may be some heterosexual potential adoptive parents willing and able to assist these youth, the blanket prohibition against homosexuals adopting can not be in the best interest of gay and lesbian youth and may consign many of them to remain in the child welfare system.

There would have to be a very strong countervailing and superior state interest to justify a policy which by arbitrarily reducing the pool of potential adoptive parents allows children like Charles B., special needs children of all kinds, including gay and lesbian children, or any of the unplaced children to remain wards of foster care or other institutional systems, rather than becoming the child of a loving, caring parent.

II. THE STATUTE PROHIBITING HOMOSEXUAL ADOPTIONS DOES NOTHING TO PROTECT CHILDREN

- A. Lesbian and Gay parented families are part of the changing mosaic of families in the U.S. and Florida, notwithstanding the § 63.042(3) prohibition.**

¹²Gibson, *supra* note 6, 3-115; Orion Center, *Survey of Street Youth* (Seattle, WA: Orion Center, 1986); F. Kunreuther, *The Hetrick-Martin Institute: Services for Yourth*, McManus, *supra*, 10.

¹³McManus, *supra* note 9, 3.

It is becoming a cliché that the family which was once considered normal in which children lived in the same house with their married mother and father, is rapidly becoming merely one of several different forms which families take. In 1991 some 30.9 % of Florida's children lived in single-parent families. That compared with 25.1 % of children nationally.¹⁴ National estimates indicate that there are over two million lesbian mothers in the country.¹⁵ Estimates for gay natural fathers range from 1.1 million to 2.3 million and the numbers of children of gay or lesbian parents nationally could range between 6 and 14 million children.¹⁶

Only one other state maintains a statutory blanket prohibition against homosexual adoptions. In other U.S. jurisdictions, gays and lesbians are presumably accepted as adoptive parents although it is only in the instance of cases such as *Charles B., supra* that sexual orientation of prospective adoptive parents would become public knowledge. These adoptions, like all others afforded full faith and credit are recognized in Florida should the family choose to move here. Because of all these factors there is extensive societal experience which has afforded the basis for numerous studies on the impact of gay parenting.

B. The social science literature indicates that lesbian mothers and gay fathers have parenting skills comparable to those of heterosexual parents.

Although lesbians and gay men historically have been discriminated against in family law issues involving children,¹⁷ there is no evidence to support the conclusion

¹⁴Annie E. Casey Foundation, **KIDS COUNT DATA BOOK State Profiles of Child Well-Being** (1994) 51.

¹⁵DiLapi, *Lesbian Mothers and the Motherhood Hierarchy*, in **Homosexuality and the Family** 103 (Bozett ed. 1989).

¹⁶Bozett, *supra* note 5, 138.

¹⁷See Editors of the Harvard Law Review, **Sexual Orientation and the Law** 119-32 (1989).

that as a group they do not make good parents. To the contrary, an enormous amount of psychological research demonstrates the "normality" of children of lesbian and gay households.¹⁸ Indeed, the belief held by some that lesbians and gay men are unfit parents is grounded not in facts, but in false stereotypes and unfounded fears. Social science researchers have found that anti-gay prejudice manifests the same social and psychological dynamics as racial and other ethnic prejudice.¹⁹

The social science literature does not indicate that lesbians and gay men are likely to have traits that would diminish their effectiveness as parents. Research over three decades has established conclusively that homosexual orientation is not related to psychological adjustment or maladjustment.²⁰ In general, lesbians and gay men are as highly diverse a group as are heterosexuals and are indistinguishable from the heterosexual majority with respect to the nonsexual aspects of their lives.²¹ Lesbians and gay men are employed productively in all occupations and professions²²

¹⁸See, e.g., Pennington, *Children of Lesbian Mothers*, in **Gay and Lesbian Parents** 58 (1987).

¹⁹ See, e.g., G. M. Herek, *Stigma, Prejudice and Violence Against Lesbians and Gay Men* [hereinafter *Stigma*], in **Homosexuality Research Implications for Public Policy**, at 60-80 (1991); M. M. Bierly, *Prejudice Towards Contemporary Out Groups as a Generalized Attitude*, 15 **J. of Applied Soc. Psychology**, 189, 189-99 (1985); G. M. Herek, *Religious Orientation and Prejudice: A Comparison of Racial and Sexual Attitudes*, 13 **Personality and Soc. Psychology Bull** 34 (1987).

²⁰See J. C. Gonsiorek, *The Empirical Basis for the Demise of the Illness Model of Homosexuality*, in **Research Implications**, supra n. 7, at 115-136; J. C. Gonsiorek, *Results of Psychological Testing on Homosexuality*, in **Homosexual Behavior: A Modern Reappraisal** 296-311 (Judd Marmor ed., 1980); M. Hart, *Psychological Adjustment of Nonpatient Homosexuals: Critical Review of the Research Literature*, 39 **J. Clinical Psychiatry** 604 (1978).

²¹A. Bell & M. Weinberg, **Homosexualities: A Study of Diversity Among Men & Women** 229-231 (1978).

²²*Id.*

and have an overall potential to contribute to society similar to that of heterosexuals.²³

Indeed, the research suggests that lesbian mothers have parenting skills that are equivalent to or better than those of heterosexual parents.²⁴ For example, the research demonstrates a "remarkable absence of distinguishing features between the life-styles, child-rearing practices, and general demographic data of..." lesbian mothers and heterosexual mothers.²⁵ One study found lesbian and heterosexual mothers to be similar in maternal interest, current lifestyles, and child rearing practices.²⁶ Another concluded that the majority of the lesbian mothers studied saw themselves as intimately involved in parenting and that the lesbian mothers as a group appeared more concerned for their children's long-range development than the heterosexual mothers as a group.²⁷

²³See, e.g., Bell, *supra* note 21, at 141-48 ("for the majority of our homosexual respondents, male and female, the fact that they happened to be homosexual had little to do with their experience at work or the satisfaction they derived from them").

²⁴Flaks et al. have found that lesbian mothers score significantly higher than heterosexual parents on the Parent Awareness Skills Survey ("PASS"), which measures the sensitivity and effectiveness with which a parent responds to typical childcare situations. D. Flaks, **Lesbians Choosing Motherhood: A Comparative Study of Couples and Their Children**, (1993).

²⁵B. Hoeffler, *Children's Acquisition of Sex-Role Behavior in Lesbian-Mother Families*, 51 **Am. J. Orthopsychiatry** 536, 537 (1981); M. Kirkpatrick, *Lesbian Mothers and Their Children: A Comparative Study*, 51 **Am. J. Orthopsychiatry** 545 (1981).

²⁶Kirkpatrick, *supra* note 25, at 546. See also *id.* at 549 ("the lesbian mothers tended to be more concerned with providing male figures for their children than were the comparison mothers").

²⁷J. A. Miller, *The Child's Home Environment For Lesbian vs. Heterosexual Mothers: A Neglected Area of Research*, 7 **J. Homosexuality** 49-56 (1981).

Also, there is no social science evidence that even suggests that lesbian and gay parents are more likely to sexually abuse their children, or to allow them to be molested by others. A. N. Groth,

Similarly a comparative study of gay male and heterosexual fathers found no significant differences in involvement or intimacy with their children, but found that gay fathers tended to be more strict, more responsive to children's needs, and to provide reasons for appropriate behavior to children more consistently than nongay fathers.²⁸ In another study comparing gay and heterosexual fathers, both groups endorsed active caretaking as the model. No difference was found in parental problem solving dimensions, in the degree of emphasis the two groups of fathers placed on recreation with their children, or in their efforts to encourage autonomy. The gay fathers tended to be more endorsing of parental nurturance but less endorsing of economic providing than their nongay peers.²⁹

Relevant social science literature has also consistently found that the children raised by lesbian mothers or gay fathers do not differ significantly from those raised by heterosexual parents.³⁰

Patterns of Sexual Assault Against Children and Adolescents, in **Sexual Assault of Children and Adolescents** 4-5 (1978) ("[T]he belief that homosexuals are particularly attracted to children is completely unsupported by our data."); see also, G.M. Herek, *Myths About Sexual Orientation: A Lawyer's Guide to Social Science Research*, 1 **Law & Sexuality** 133, 156 [hereinafter *Myths*] (reviewing the literature relating to adult sexual orientation and molestation of children and concluding that gay men are not more likely than heterosexual men to molest children).

²⁸Bigner and Jacobsen, *Parenting Behaviors of Homosexual and Heterosexual Fathers* at 173 in **Homosexuality and the Family** (Bozett ed 1989).

²⁹Bozett, *supra* note 5, 137 contains a survey of various studies of gay fathers, some comparative and others simply surveys of behavior and attitudes relevant to parenting. See also Bigner and Jacobsen, *The Value of Children to Gay and Heterosexual Fathers* at 163 in **Homosexuality and the Family** (Bozett ed 1989).

³⁰ This literature is reviewed comprehensively in C. J. Patterson, *Children of Lesbian and Gay Parents*, 63 **Child Development** 1025 (1992) [hereinafter *Children of Lesbian and Gay Parents*], and G. M. Herek, *Myths*, *supra* note 27, at 257-61.

Scientific studies investigating the psychological effects on children of being raised by a lesbian or gay parent have concluded unanimously that there are no significant differences in the psychological health of these children and children raised by a heterosexual parent. In fact, "experts agree that a child brought up in the tranquil home of a homosexual parent is better off than one growing up in a heterosexual home marked by domestic turmoil and lack of affection."³¹

Studies comparing the level of psychological disturbance of children raised by a divorced lesbian mother and children raised by a divorced heterosexual mother indicate that there is no significant difference between the two groups.³² There appear to be no statistically significant differences between the two groups for the

The research results have been consistent regardless of the geographic region within the United States where the children were raised. *See, e.g.,* R. Green, *Lesbian Mothers and Their Children: A Comparison with Solo Parent Heterosexual Mothers and Their Children*, 15 **Archives of Sexual Behavior** 167 (1986) (parents and children studied were concentrated in rural and urban areas in Connecticut, Florida, Illinois, Massachusetts, Minnesota, New Jersey, New York, Ohio, Pennsylvania, and Wisconsin); Flaks, *supra* note 24 (parents and children studied were from the Pennsylvania area); S. Huggins, *A Comparative Study of Self-Esteem of Adolescent Children of Divorced Lesbian Mothers and Divorced Heterosexual Mothers*, in **Homosexuality and the Family** 123 (F. Bozett, ed. 1989) (parents and children studied were from southern California); J. A. Miller, *supra* note 27 (parents and children studied were from a "large western mountain city").

At least one court has found that the available literature provides persuasive evidence that children raised in a gay or lesbian household are not disadvantaged relative to children raised in a heterosexual household. *In re: Adoption of Evan*, 583 N.Y.S. 2d 997, 1001 n.1 (Sur. 1992).

³¹*State v. Cox* 627 So. 2d 1210, at 1222, appending *Seebol v. Farie*, 16 Fla. Weekly 52 (16th Cir. Ct., March 15, 1991) (citing, Note, *The Avowed Lesbian Mother and Her Right to Child Custody: A Constitutional Challenge That Can No Longer Be Denied*, 12 **San Diego L. Rev.** 799, 861 (1975); *Benzio v. Patenaude*, 410 N.E. 2d 1207, 1215 (Mass. 1980)).

³²*See, e.g.,* Kirkpatrick, *supra* note 25, at 545-51; S. Golombok, *Children in Lesbian and Single-Parent Households: Psychosexual and Psychiatric Appraisal*, 24 **J. Child Psychol. & Psych.** 551 (1983).

presence of such behavioral and emotional problems as hyperactivity, unsociability, emotional difficulty and conduct problems.³³ One study that traced such behavioral issues through to adulthood found no differences between individuals raised by a lesbian mother and those raised by a heterosexual mother.³⁴

Two of the more recent studies in this area have focused on children who have been raised since birth by a lesbian mother and who have never lived in a heterosexual household. In one study the children of the lesbian mothers did not differ on social competence or behavioral problems compared with children from the general population.³⁵ Another study found no differences in overall cognitive and behavioral functioning, social competence, school performance, or developmental progress between children raised by a lesbian mother and her same-sex partner and children raised by married heterosexual-parent families.³⁶

Several studies have examined the self-esteem and self-concepts of children raised by a lesbian mother and those raised by a heterosexual mother. A study of adolescents found no differences in self-esteem or self-concept between children of divorced mothers living with a same-sex partner and divorced mothers living with an opposite sex partner. The self-esteem and self-concept of both groups were within

³³Golombok, *supra* note 32, at 565, 570.

³⁴J. Gottman, *Children of Gay and Lesbian Parents*, in **Homosexuality and Family Relations** 177-96 (F.W. Bozett, ed., 1990). Indeed, for the characteristic of "well-being," which measures the individual's sense of feeling secure in the world and in relationships, adult daughters of lesbians tended to have fewer worries and complaints and were freer of doubts and disillusionment; the adult daughters raised by heterosexual mothers exhibited more awkwardness, cautiousness and apathy. *Id.* at 189-90.

³⁵C. J. Patterson, *Children of the Baby Boom: Behavioral Adjustment, Self-Concepts, and Sex-Role Identity* (1993) [hereinafter *Baby Boom*].

³⁶Flaks, *supra* note 24, at 16-20, 24.

the normal range.³⁷ Moreover, a study of children raised from birth by a lesbian mother in a lesbian household found no difference between those children and children raised by a heterosexual mother on self-concept scales that measure aggression, sociability, or desire to be the center of attention.³⁸ This same study found that children raised by a lesbian mother reported greater symptoms of stress but also greater feelings of joy, contentedness, and comfort with themselves than children raised by a heterosexual mother.³⁹

Moreover, the available evidence suggests that there is no difference in the overall level of intellectual development of children raised by a lesbian mother as compared with children raised by a heterosexual mother.⁴⁰ Finally, there is no evidence that a parent's sexual orientation influences the sexual identity of a child.⁴¹

Given the results of all these studies, the conclusion drawn by one team of researchers rings particularly true: "Agencies *should* consider a parent's sexual and emotional adjustment, along with all other factors, in determining the suitability of a particular home for a particular child. When *every* placement in *every* lesbian or

³⁷Huggins, *supra* note 29, at 132-35.

³⁸*Baby Boom*, *supra* note 35, at 17.

³⁹*Id.* at 18, 20.

⁴⁰Green, *supra* note 30, at 167-84.

⁴¹Susoeff, *Assessing Children's Best Interests When a Parent is Gay or Lesbian: Toward a Rational Custody Standard*, 32 UCLA L. Rev. 852, 882 (1985); See also *Benzio v. Patenaude*, 410 N.E. 2d 1207, 1216 (Mass. 1980).

gay family is judged to be traumatizing for every child, however, prejudice has eclipsed concern for children's best interest." [emphasis in original]⁴²

III. BASIC RIGHTS OF CHILDREN RECOGNIZED BY FEDERAL AND FLORIDA COURTS REQUIRE REJECTION OF THE BLANKET PROHIBITION OF ADOPTIONS BY HOMOSEXUALS

A. Federal Constitutional Law.

It has long since been recognized that children are persons under the law and have constitutional rights. *In Re: Gault*, 387 U. S. 1, 18 L.Ed.2d 527, 87 S. Ct. 1428 (1967). Specific rights recognized for children have included the right to free exercise of religion *Board of Education v. Barnette*, 319 U.S. 624, 87 L.Ed.2d 1628, 63 S.Ct 1178 (1943); the right to equal protection in school settings, *Brown v. Board of Education*, 347 U. S. 483 (1954); the right to free speech, *Tinker v. Des Moines School District*, 393 U. S. 503, 21 L.Ed.2d 731, 89 S.Ct. 733 (1969); and the right to privacy, *Planned Parenthood v. Danforth*, 428 U.S. 53, 96 S.Ct. 2831, 49 L.Ed.2d 788 (1976), *Eisenstadt v. Baird*, 405 U. S. 453 (1968). Federal courts have recognized that, as a matter of substantive due process, children have the right to freedom from harm and safety when in state custody, *Taylor v. Ledbetter*, 818 F. 2d 791 (11th Cir. 1987), and the right to necessary care, *L.J. v. Massinga*, 838 F. 2d 118 (4th Cir. 1988), cert. denied 109 S. Ct. 816 (1989).

The United States Supreme Court has often examined the "family unit" and its changing meaning. Its decisions acknowledge that the institution of the family is deeply rooted in this nation's history and tradition, and recognize that the strong constitutional protection of the sanctity of the family is not confined within an arbitrary boundary drawn at the limits of the nuclear family (composed of two

⁴²W. Ricketts & R. Achtenberg, *Adoption and foster parenting for lesbians and gay men: Creating new traditions in family*, in *Homosexuality and Family Relations* 83-118 (F. Bozett & M. Sussman ed. 1990) as cited in McManus, *supra*, 3.

parents and their natural children). *Moore v. City of East Cleveland*, 431 U. S. 494, 503, 52 L.Ed.2d 531, 97 S.Ct. 1932 (1977). Rather, the bonds of family life are more accurately defined by the emotional attachments that derive from daily association and from the role it plays in promoting child development. Biological relationships are not the exclusive determinative of the existence of a family. *Smith v. Organization of Foster Families for Education and Reform*, 431 U. S. 816, 844, 97 S.Ct. 2094, 53 L.Ed.2d 14 (1977). The right to family privacy and integrity, moreover, has been held to be a right shared by both children and adults. *Santosky v. Kramer*, 455 U. S. 745, 761, 71 L.Ed.2d 599, 102 S.Ct. 1388 (1982).

Non-traditional families have been accorded constitutional protection. In *Stanley v. Illinois*, 405 U. S. 645, 31 L.Ed.2d 551, 92 S.Ct. 1208 (1972), the United States Supreme Court found that a state statute that distinguished and burdened all unwed fathers was constitutionally repugnant. 405 U. S. at 649. The articulated purpose of the Illinois statute examined by the Court was to protect the moral, emotional, mental and physical welfare of minors through juvenile dependency procedures.⁴³ The Court found that these were legitimate state interests, but concluded that if, under such a statute, the state separated children from the custody of fit parents, it registered no gain toward its declared goals. 405 U. S. 653-54.

Similarly the Court declared unconstitutional a state statute that denied illegitimate children the benefit of a wrongful death action for the death of their mother, emphasizing that such children cannot be denied the same rights as other children because their parents were unmarried. Familial bonds in such cases are often as warm, enduring, and important as those arising within a more traditional

⁴³Similar to §§ 39.001, 39.002, and 39.45, Fla. Stat. (1992)

family unit. *Levy v. Louisiana*, 391 U. S. 68, 71-72, (1968). Because children have the right to equal protection of the laws, and limitations of this right by drawing lines arbitrarily are prohibited. *Glonn v. American Guarantee and Liability Insurance Co.*, 391 U. S. 73, 75-76 (1968).

So too, in this case, this Court cannot let stand blanket Florida statutory prohibitions directed at categories of individuals who might be motivated to parent Florida's dependent children, based on a narrow definition of what constitutes an adequate family unit. Such a statutory prohibition is arbitrary and denies children the ability to form warm, enduring bonds of family affiliation, well recognized as important constitutional concerns. To allow such a prohibition would have the effect of consigning significant numbers of dependent children to the instability of foster care drift or to institutional placement by reducing the likelihood of a permanent adoptive family.

B. Florida constitutional law.

In Florida, children are persons under the law and have constitutional rights, including the right to privacy. *In the Interest of T. W.*, 551 So. 2d 1186, 1186 (Fla. 1989). Beyond simply recognizing that children have constitutional rights, this Court has raised this right to the stature of a presumption, shifting the burden of rebutting the presumption to the party attempting to limit a child's rights. *In the Interest of T. W.*, *supra* at 1193.

Although the Supreme Court of Florida has strongly upheld the right of natural parents to family integrity, it has equally strongly articulated that family integrity and privacy is a reciprocal right, as important to a child as it is to a parent. *Padgett v. Dept. of HRS*, 577 So. 2d 565, 572 (Fla. 1991). The state has a compelling interest in protecting all its citizens, especially its youth, from suffering harm.

Padgett, supra at 570. Florida's children are "simply too important" to "forsake the welfare of our youth", the Court warned.

If the state attempts to limit the right to family integrity and privacy, the state must show a countervailing and superior state interest. *Franklin v. White Egret Condominium*, 358 So. 2d 1084 (4th DCA, 1977).

Under Florida law, the burden falls upon the Respondent defending the statute from constitutional challenge to rebut the presumption that children will be benefited by allowing an individualized decision based on the child's best interest, including possible adoption by homosexuals. In addition, Respondent has the burden of showing some countervailing and superior state interest in limiting the potential state pool of eligible adopted parents and impinging thereby on the child's right to an permanent stable home.

Contrary to this long standing and universal state policy that children are entitled to permanent family homes, Section 63.042(3), Florida Statutes, limits the ability of Florida's dependent children to attain such permanent homes because it eliminates an entire category of potential adoptive parents who might provide such mandated permanence and stability for children.

The State of Florida can demonstrate no countervailing and superior state interest in limiting the pool of potential adoptive parents.

This record is devoid of any evidence that lesbians or gay men cannot be good, caring parents. To the contrary, the overwhelming evidence supports the fact that gay people can be and are good parents.⁴⁴

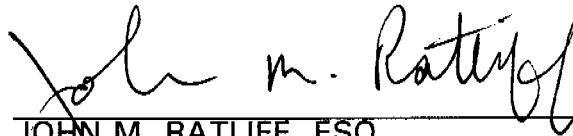
⁴⁴See discussion of social science studies *supra*, beginning on page 14.

Thus, the elimination of an entire group of available parents because of irrational presumptions cannot be upheld.⁴⁵ Instead, the adoption procedure under Florida's existing statutory framework, utilizing a case-by-case determination, would ensure that the child's, as well as the parent's, well being is protected. The state should not be permitted to deny children a home by legislative fiat based upon unfounded fears and bias. As the court in *Charles B.* concluded, the State must protect the best interests of the individual child by utilizing a case-by-case analysis of his or her unique needs and the unique abilities of the adoptive parent.

CONCLUSION

For the foregoing reasons, *Amici* respectfully request that the Court reverse the opinion of the District Court of Appeal and affirm the decision of the trial court.

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⁴⁵*Stanley v. Illinois*, 405 U.S. 645, 658 (1972); *Vance v. Bradley*, 440 U.S. 93, 111 (1979).

CERTIFICATE OF SERVICE

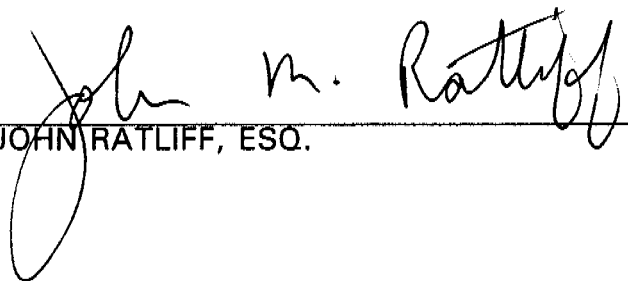
I hereby certify that a copy of this AMICUS CURIAE BRIEF OF CHILDREN FIRST: A JOINT PROJECT IN LAW, MEDICINE AND EDUCATION AND THE YOUTH LAW CENTER was placed in the U.S. mail to the parties listed below at the indicated addresses on the 16th day of May, 1994.

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