

# ONCE BORN, TWICE ORPHANED: CHILDREN'S CONSTITUTIONAL CASE AGAINST SAME-SEX ADOPTION BANS

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## INTRODUCTION

In the 2012 state elections, Maine, Maryland, and Washington voters elected to legalize same-sex marriage,<sup>1</sup> increasing the number of jurisdictions recognizing same-sex marriage to ten.<sup>2</sup> Proponents of same-sex marriage are encouraged by the 2012 election results, which signal greater support for same-sex marriage among the general population.<sup>3</sup> As the political climate warms to laws recognizing same-

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<sup>1</sup> Adam Liptak, *States' Votes for Gay Marriage are Timely, With Justices Ready to Weigh Cases*, N.Y. TIMES, Nov. 8, 2012, at P7; *Where State Laws Stand*, FREEDOM TO MARRY, <http://www.freedomtomarry.org/pages/where-state-laws-stand> (last visited Apr. 30, 2013). These three states, which previously allowed domestic partnerships between gay couples, are the first to approve same-sex marriage by direct democratic processes. See Liptak, *supra*.

<sup>2</sup> *Where State Laws Stand*, *supra* note 1. Connecticut, District of Columbia, Iowa, Maine (effective 12/29/2012), Maryland (effective 1/1/13), Massachusetts, New Hampshire, New York, Washington (effective 12/6/12), and Vermont allow gay same-sex marriage. *Id.*; see *Maine*, FREEDOM TO MARRY, <http://www.freedomtomarry.org/states/entry/c/maine> (last visited Apr. 30, 2013); *Maryland*, FREEDOM TO MARRY, <http://www.freedomtomarry.org/states/entry/c/maryland> (last visited Apr. 30, 2013); *Washington*, FREEDOM TO MARRY, <http://www.freedomtomarry.org/states/entry/c/washington> (last visited Apr. 30, 2013). Colorado, Delaware, Hawaii, Illinois, New Jersey, and Rhode Island recognize civil unions. *Where State Laws Stand*, *supra* note 1. California, Nevada, and Oregon offer broad domestic partnership recognition to gay and lesbian couples. *Id.* Wisconsin offers partial legal protection to relationships between gay and lesbian couples. *Id.* Two states, New Mexico and Rhode Island, recognize same-sex marriages effectuated in other states. *Id.*

<sup>3</sup> See Molly Ball, *The Marriage Plot: Inside This Year's Epic Campaign for Gay Equality*, ATLANTIC (Dec. 11, 2012, 7:05 AM), <http://www.theatlantic.com/politics/archive/2012/12/the-marriage-plot-inside-this-years-epic-campaign-for-gay-equality/265865/>. But see Martha Waggoner, *Amendment One, North Carolina Gay Marriage Ban, Passes Vote*, HUFFINGTON POST (May 8, 2012, 11:49 PM), [http://www.huffingtonpost.com/2012/05/08/amendment-one-north-carolina\\_n\\_1501308.html](http://www.huffingtonpost.com/2012/05/08/amendment-one-north-carolina_n_1501308.html) (describing North Carolina's approval of a constitutional amendment banning same-sex marriage). North Carolina is not alone. Twenty states have amended their state constitutions to deprive same-sex relationships (e.g., civil unions and domestic partnerships) of legal protection and recognition: Alabama,

sex relationships, one might expect to see an increase in legislation permitting same-sex adoption, particularly in light of the growing number of children available for adoption.<sup>4</sup> Unfortunately, the forecast is less optimistic for orphans whose prospects for permanent placement are compromised by an increase in state laws that limit or proscribe adoption by gay and lesbian couples and individuals.

The jurisprudential landscape for same-sex adoption is a patchwork of laws, policies, and practices across states that dictate whether orphans can be placed with gay and lesbian parents who satisfy every legitimate parental fitness requirement, or whether they will be confined to foster homes or state institutions until they age out of the child welfare system.<sup>5</sup> While many state laws are silent as to the eligibility of gay and lesbian couples and individuals to adopt,<sup>6</sup> many adoption agencies continue to discriminate against them in the adoption process.<sup>7</sup> In states where same-sex marriage is prohibited, eligibility to adopt is often limited to married couples, thereby excluding same-sex couples.<sup>8</sup> Other states have enacted legislation that bans second-parent adoptions by a same-sex partner through other

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Arkansas, Florida, Georgia, Idaho, Kansas, Kentucky, Louisiana, Michigan, Nebraska, North Carolina, North Dakota, Ohio, Oklahoma, South Carolina, South Dakota, Texas, Utah, Virginia, and Wisconsin. *Where State Laws Stand*, *supra* note 1. Additionally, ten states have amended their state constitution to prohibit same-sex marriage: Alaska, Arizona, California, Colorado, Missouri, Mississippi, Montana, Nevada, Oregon, and Tennessee. *Id.* Additionally, thirty-five states have enacted laws or statutes prohibiting gay and lesbian couples from marrying within their borders: Alabama, Alaska, Arizona, Arkansas, California, Colorado, Delaware, Florida, Georgia, Hawaii, Idaho, Illinois, Indiana, Kansas, Kentucky, Louisiana, Michigan, Minnesota, Missouri, Mississippi, Montana, North Carolina, North Dakota, Ohio, Oklahoma, Pennsylvania, South Carolina, South Dakota, Tennessee, Texas, Utah, Virginia, West Virginia, Wisconsin, and Wyoming. *Id.*

<sup>4</sup> DAVID M. BRODZINSKY, EVAN B. DONALDSON ADOPTION INST., EXPANDING RESOURCES FOR CHILDREN III: RESEARCH-BASED BEST PRACTICES IN ADOPTION BY GAYS AND LESBIANS 5 (2011), available at [http://www.adoptioninstitute.org/publications/2011\\_10\\_Expanding\\_Resources\\_BestPractices.pdf](http://www.adoptioninstitute.org/publications/2011_10_Expanding_Resources_BestPractices.pdf).

<sup>5</sup> BRODZINSKY, *supra* note 4, at 6 (“[B]anning or hindering lesbians and gay adults from fostering or adopting will reduce the number of permanent and nurturing homes for children in need.”).

<sup>6</sup> EVAN B. DONALDSON ADOPTION INST., EXPANDING RESOURCES FOR WAITING CHILDREN II: ELIMINATING LEGAL AND PRACTICE BARRIERS TO GAY AND LESBIAN ADOPTION FROM FOSTER CARE 10 (2008), [http://www.adoptioninstitute.org/publications/2008\\_09\\_Expanding\\_Resources\\_Legal.pdf](http://www.adoptioninstitute.org/publications/2008_09_Expanding_Resources_Legal.pdf) (“In most states, the status of gays and lesbians to foster and adopt remains ambiguous, neither expressly permitted nor expressly forbidden.”).

<sup>7</sup> BRODZINSKY, *supra* note 4, at 12. The authors of the report found that “in some states and parts of the country, homophobic attitudes and practices of individual judges, attorneys, mental health and adoption professionals sometimes inhibit or prevent child placements with lesbians and gay men.” *Id.*

<sup>8</sup> See, e.g., LA. CHILD. CODE ANN. art. 1198 (2011); UTAH CODE ANN. § 78B-6-117 (West 2012).

means.<sup>9</sup> Ironically, despite an increase in legislation prohibiting placements with gay and lesbian adoptive parents, there has been a significant increase in adoptions by gay couples and individuals.<sup>10</sup>

While second-parent adoptions are mostly an ancillary matter, some discussion is warranted here. These second-parent adoptions are subject to and targeted by gay adoption bans in many jurisdictions.<sup>11</sup> The Human Rights Campaign provides a list of seventeen jurisdictions—Arkansas, California, Colorado, Connecticut, District of Columbia, Illinois, Indiana, Iowa, Maine, Massachusetts, Nevada, New Hampshire, New Jersey, New York, Oregon, Vermont, and Washington that allow same-sex couples to adopt jointly.<sup>12</sup> In a separate list, the Human Rights Campaign indicates that nineteen jurisdictions—Arkansas, California, Connecticut, Delaware, District of Columbia, Hawaii, Illinois, Maine, Maryland, Massachusetts, Nevada, New Hampshire, New Jersey, New York, Oregon, Pennsylvania, Rhode Island, Vermont, and Washington allow for second parent adoptions.<sup>13</sup> The National Center for Lesbian Rights asserts that second parent adoptions are allowed in California, Colorado, Connecticut, Delaware, District of Columbia, Hawaii, Illinois, Indiana, Iowa, Maine, Massachusetts, Nevada, New Hampshire, New Jersey, New York, Oregon, Pennsylvania, Rhode Island, Vermont, and Washington.<sup>14</sup> The variations among these lists demonstrate that the law regarding same-sex adoption is complicated and that reasonable minds may differ on how to interpret adoption statutes.<sup>15</sup> This ambiguity may cause frustration for parents looking to adopt, children awaiting

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<sup>9</sup> *Parenting Laws: Second Parent Adoption*, HUMAN RIGHTS CAMPAIGN, [http://www.hrc.org/files/assets/resources/parenting\\_laws\\_2nd.pdf](http://www.hrc.org/files/assets/resources/parenting_laws_2nd.pdf) (last updated Dec. 14, 2012).

<sup>10</sup> Sabrina Tavernise, *Adoptions Rise by Same-Sex Couples, Despite Legal Barriers*, N.Y. TIMES, June 14, 2011, at A11.

<sup>11</sup> BRODZINSKY, *supra* note 4, at 12; *see Parenting Laws: Joint Adoption*, HUMAN RIGHTS CAMPAIGN, [http://www.hrc.org/files/assets/resources/parenting\\_laws\\_maps.pdf](http://www.hrc.org/files/assets/resources/parenting_laws_maps.pdf) (last updated Apr. 12, 2011).

<sup>12</sup> *Parenting Laws: Joint Adoption*, *supra* note 11.

<sup>13</sup> *See Parenting Laws: Second Parent Adoption*, *supra* note 9.

<sup>14</sup> *Adoption By Lesbian, Gay, and Bisexual Parents: An Overview of Current Law*, NAT'L CENTER FOR LESBIAN RTS. 4 (2008), <http://www.nclrights.org/wp-content/uploads/2013/07/adptn0204.pdf>. This article also notes that Washington and Maryland recently passed legislation that enables same-sex couples to marry. *Id.*

<sup>15</sup> *See* Jane S. Schacter, *Constructing Families in a Democracy: Courts, Legislatures and Second-Parent Adoption*, 75 CHI-KENT L. REV. 933, 940–42 (2000) (noting that courts apply differing approaches to statutory interpretation in second-parent adoption cases and that the ambiguity of adoption statutes demonstrates “legislative delegation of decision-making power in individual cases to judges”); Krista Stone-Manista, *Parents in Illinois are Parents in Oklahoma Too: An Argument for Interstate Recognition of Same-Sex Adoptions*, 19 LAW & SEXUALITY 137, 139 (2010) (indicating the substantial uncertainty of the “legal rights of homosexual couples who wish jointly to adopt and raise a child”).

adoption, and lawyers attempting to advise them.<sup>16</sup> Thus, same-sex couples' attempts to adopt may be thwarted both by explicit restrictions and the inherent vagueness within the laws of each state.

Notwithstanding the difficulties mentioned, there have been clear victories for orphans in Florida and Arkansas, where courts have invalidated gay-adoption bans as unconstitutional.<sup>17</sup> The Obama Administration supports passing legislation to include gays and lesbians in the pool of prospective adoptive parents.<sup>18</sup> In 2011, in response to the supply-demand crisis in child welfare systems across the nation, U.S. Department of Health and Human Services (HHS) Commissioner Bryan Samuels issued a memorandum in which he encouraged states to consider "LGBT parents . . . among the available options . . . to provide timely and safe placement of children in need of foster or adoptive homes."<sup>19</sup> Importantly, recent national polls report increased support for same-sex adoption among the general population.<sup>20</sup> Despite these steps toward placing greater numbers of orphans in

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<sup>16</sup> James Healy, *Band-Aid Solutions: New York's Piecemeal Attempt to Address Legal Issues Created By DOMA in Conjunction With Advances in Surrogacy*, 31 PACE L. REV. 691, 696–98 (2011).

State law for same-sex adoption is even less consistent than for same-sex marriage. . . . Most . . . states are unclear about whether, as a matter of law, same-sex couples can jointly adopt. The statutes are ambiguous in that they do not explicitly prohibit the practice and often the courts have not ruled definitively. If a state does not specifically allow same-sex couples to adopt, and the state does not allow for same-sex marriage, then the right of joint custody or visitation would depend on the local court's determination. As recently as 2007, appellate courts in only twenty states addressed the issue of whether same-sex, non-genetic, partners have some form of parental custody or visitations rights. Those courts used a wide range of standards to determine those partners' rights.

*Id.*

<sup>17</sup> Ark. Dep't of Human Servs. v. Cole, 380 S.W.3d 429, 443 (Ark. 2011); Fla. Dep't of Children & Families v. Adoption of X.X.G., 45 So. 3d 79, 91–92 (Fla. Dist. Ct. App. 2010).

<sup>18</sup> *Presidential Proclamation—National Adoption Month 2011*, THE WHITE HOUSE (Nov. 1, 2011), <http://www.whitehouse.gov/the-press-office/2011/11/01/presidential-proclamation-national-adoption-month-2011>. For an example of proposed legislation, see Every Child Deserves a Family Act, H.R. 3827, 111th Cong. (2009).

<sup>19</sup> Memorandum from Bryan Samuels, Comm'r of the U.S. Dep't of Health & Human Servs. Admin. on Children, Youth, and Families, to State, Tribal, and Other Agencies that Administer Fed. Child Welfare Funds Under Fed. Title IV-E (Apr. 6, 2011), *available at* <http://www.nrcyd.ou.edu/publication-db/documents/acyf-cb-im-11-03.pdf>.

<sup>20</sup> PEW RESEARCH CENTER, *THE PEW FORUM ON RELIGION & PUBLIC LIFE, TWO-THIRDS OF DEMOCRATS NOW SUPPORT GAY MARRIAGE 7* (2012), *available at* [http://www.pewforum.org/uploadedFiles/Topics/Issues/Politics\\_and\\_Elections/Democrats%20Gay%20Marriage%20Support-full.pdf](http://www.pewforum.org/uploadedFiles/Topics/Issues/Politics_and_Elections/Democrats%20Gay%20Marriage%20Support-full.pdf). This study found, for the first time, that a majority of

permanent homes, there have also been several steps backward—namely, the enactment and judicial enforcement of discriminatory practices by adoption agencies against same-sex couples that, in effect, often result in a placement ban. These discriminatory practices violate children’s constitutional rights<sup>21</sup> by categorically limiting access to adoption, which is considered to be the most beneficial placement option for orphans.<sup>22</sup>

In 2011, Arizona enacted a law mandating state and private adoption agencies grant heterosexual married couples a preference in placement decisions.<sup>23</sup> In 2011, the Fifth Circuit confirmed the constitutionality of a Louisiana state registrar’s refusal to issue a new birth certificate to a Louisiana-born child adopted in New York by a gay couple, in deference to the state’s public policy of not allowing joint adoptions by unmarried couples.<sup>24</sup> In 2012, Virginia joined North Dakota and became the second state to enact adoption legislation containing a “conscience clause,” permitting private adoption agencies to consider religious and moral beliefs as determining factors in placement decisions.<sup>25</sup> Statements made by state legislators, as well as interest groups, in Virginia and the impact of the North Dakota law indicate that the agencies’ discretion was meant to be used to prevent gays and lesbians from adopting.<sup>26</sup> In 2012, North Carolina enacted a law banning

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people surveyed (52%) favor allowing gay men and lesbians to adopt children. *Id.* This represents an increase from 46% in 2008 and 38% in 1999. *Id.*

<sup>21</sup> *In re Adoption of John & James Doe*, 2008 WL 5006172, at \*25 (Fla. Cir. Ct. Nov. 25, 2008), *aff’d sub nom.* Fla. Dep’t of Children and Families v. Adoption of X.X.G. and N.R.G., 45 So. 3d 79 (Fla. Dist. Ct. App. 2010) (concluding that the Florida same-sex adoption ban “violates the Children’s rights by burdening liberty interests by unduly restraining them in State custody on one hand and simultaneously operating to deny them a permanent adoptive placement that is in their best interests on the other”).

<sup>22</sup> BRODZINSKY, *supra* note 4, at 5. The authors summarized:

[S]ocietal stigmas relating to adoption by lesbians and gay men remain, as do institutional barriers. These impediments do not further the best interests of children; indeed, they prevent or delay permanency for many, undermining their long-term psychosocial and academic adjustment. With over 100,000 children continuing to linger in foster care, despite being legally freed for adoption, every effort must be made to find timely and permanent placements for them . . . .

*Id.*

<sup>23</sup> ARIZ. REV. STAT. ANN. § 8-103(c) (2012) (“If all relevant factors are equal and the choice is between a married man and woman certified to adopt and a single adult certified to adopt, placement preference shall be with a married man and woman.”).

<sup>24</sup> *Adar v. Smith*, 639 F.3d 146, 161 (5th Cir. 2011).

<sup>25</sup> VA. CODE ANN. § 63.2-1709.3 (2012); N.D. CENT. CODE § 50-12-07.1 (2011).

<sup>26</sup> See Anita Kumar, *Virginia Adding “Conscience Clause” to Adoption Laws*, WASH. POST (Feb. 7, 2012), [http://articles.washingtonpost.com/2012-02-07/local/35443355\\_1\\_adoption-laws-adoptive-parents-private-adoption-agencies](http://articles.washingtonpost.com/2012-02-07/local/35443355_1_adoption-laws-adoptive-parents-private-adoption-agencies). According to this article, Delegate David L. Englin said, “Let’s just speak the truth and tell it like it is . . . [t]his legislation is about ensuring that foster placement agencies that do not want to place children . . . with

adoptions by unmarried couples and second parents, which prohibits gays and lesbians from adopting their partners' children.<sup>27</sup>

The practical, and often intended, consequence of these legislative bans is to confine greater numbers of waiting children to extended temporary or institutional care.<sup>28</sup> For placement bans to withstand a children's rights-centered constitutional challenge, states must establish that children's best interests are better served by limiting their access to permanent placement than by placement with gay and lesbian parents.<sup>29</sup> Justifications for the enactment of legal barriers to adoption by gays and lesbians find no support in the growing body of credible social science research reporting no negative outcomes for children placed with gay and lesbian parents.<sup>30</sup> Furthermore, the American Psychological Association concluded that

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same-sex couples are able to do that." *Id.*; see also Reilly Moore, *Virginia "Conscience Clause" Allows Discrimination in Adoption*, AM. INDEP. (Apr. 25, 2012, 11:54 AM), <http://americanindependent.com/215582/virginia-conscience-clause-allows-discrimination-in-adoption> ("The conscience clause represents another example of recent legislation that has left some gays and lesbians feeling unwelcome in their home state.").

<sup>27</sup> N.C. GEN. STAT. § 48-2-301(c) (2012).

<sup>28</sup> BRODZINSKY, *supra* note 4, at 48–49 ("Tens of thousands of children in the child welfare system are legally freed for adoption each year, but remain in foster care because of insufficient numbers of families available to adopt them . . . Removing legal and community-based barriers to LGBT adoption, and allowing these adults to be assessed and certified as suitable parents in the same way as heterosexual applicants, will hasten achieving permanency for thousands of these 'waiting' children.").

<sup>29</sup> *Lofton v. Sec'y of the Dep't of Children & Family Servs.*, 358 F.3d 804, 824–25 (11th Cir. 2004) ("[W]e must ask not whether the latest in social science research and professional opinion support the decision of the Florida legislature, but whether that evidence is so well established and so far beyond dispute that it would be irrational for the Florida legislature to believe that the interests of its children are best served by not permitting homosexual adoption."); see also *In re Adoption of Doe*, 2008 WL 5006172, at \*25 (Fla. Cir. Ct. Nov. 25, 2008), *aff'd sub nom.* *Fla. Dep't of Children & Families v. Adoption of X.X.G. and N.R.G.*, 45 So. 3d 79 (Fla. Dist. Ct. App. 2010) (concluding that the Florida same-sex adoption ban "violates the Children's rights by burdening liberty interests by unduly restraining them in State custody on one hand and simultaneously operating to deny them a permanent adoptive placement that is in their best interests on the other").

<sup>30</sup> See EVAN B. DONALDSON ADOPTION INST., *supra* note 6, at 14 ("Research shows that children fare just as well with gay and lesbian parents when compared with children raised by heterosexuals. . . . No significant differences have been found, for instance, between children of lesbian mothers and heterosexual mothers on a range of measures of social and psychological adjustment such as anxiety, depression and self-esteem; or behavior problems, social relationships or emotional difficulty. Children also fare similarly in school performance and cognitive ability . . .") (emphasis omitted); Mary L. Bonauto, *Civil Marriage as a Locus of Civil Rights Struggles*, 30 HUM. RTS. 3, 7 (2003) (noting that "thirty-five years of studies showing that children of gay and lesbian parents are normal and healthy on every measure of child development"); Michael S. Wald, *Same-Sex Couple Marriage: A Family Policy Perspective*, 9 VA. J. SOC. POL'Y & L. 291, 321 (2001) (stating

there is no scientific data reflecting a link between sexual orientation and effective parenting.<sup>31</sup> There is, however, research documenting the harms associated with extended foster and institutionalized care experienced by children for whom no permanent placements are secured.<sup>32</sup> The supply and demand realities of the child welfare system, marked by a surplus of orphans and too few prospective adoptive parents, means that for many waiting children<sup>33</sup> their only options may be placement with gay and lesbian couples and individuals or extended foster or institutionalized care (i.e., non-placement). For instance, some studies show that same-sex couples are more likely to adopt children with “developmental and/or mental health problems” than their heterosexual counterparts.<sup>34</sup> For waiting children, many of whom have been designated as special needs, this is hardly a Hobbesian choice.<sup>35</sup>

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that “all of the evidence shows that children raised by gay parents develop just as well as children raised by heterosexual couples”).

<sup>31</sup> See *Sexual Orientation, Parents, & Children*, AM. PSYCHOLOGICAL ASS’N (July 2004), <http://www.apa.org/about/policy/parenting.aspx> (“There is no scientific basis for concluding that lesbian mothers or gay fathers are unfit parents on the basis of their sexual orientation . . .”).

<sup>32</sup> EVAN B. DONALDSON ADOPTION INST., *supra* note 6, at 11. As to children who never receive permanent placement before leaving the foster and institutionalized care system, the authors noted:

These youths, lacking permanent families to help them transition into adulthood, are at heightened risk of negative outcomes: emotional adjustment problems, poor educational results and employment prospects, and inadequate housing and homelessness; furthermore, they are more likely to become involved with the criminal justice system. These negative outcomes take a huge toll on the young people themselves, and they translate into significant societal costs as adult public services—including mental health, substance abuse, housing, and criminal justice—must address their needs.

*Id.* (internal citations omitted).

<sup>33</sup> U.S. DEP’T OF HEALTH & HUMAN SERVS., CHILDREN’S BUREAU, ADMIN. FOR CHILD., YOUTH & FAMILIES, NO. 19, THE AFCARS REPORT 4 (2012), *available at* <http://www.acf.hhs.gov/sites/default/files/cb/afcarsreport19.pdf>. The U.S. Department of Health and Human Services defines waiting children as “children who have a goal of adoption and/or whose parents’ parental rights have been terminated.” *Id.* at 4 n.3.

<sup>34</sup> See BRODZINSKY, *supra* note 4, at 16.

<sup>35</sup> BRYAN A. GARNER, A DICTIONARY OF MODERN LEGAL USAGE 404 (2d ed. 1995). A Hobson’s choice is “no choice at all—either taking what is offered or taking nothing at all.” *Id.*; BRODZINSKY, *supra* note 4, at 48. The authors recommended: “Given that so many children live in institutionalized or temporary settings—and are in need of safe, permanent families—greater efforts should be directed toward removing the legal, political and cultural barriers to LGBT adoption that continue to exist in many states . . .” *Id.*

The focus of this Article is placement bans that categorically prohibit<sup>36</sup> gay and lesbian couples and individuals from adopting children who are in state custody. This demographic represents the highest number of children legally available for adoption.<sup>37</sup> These children, who are subject to states' *parens patriae* power, are particularly vulnerable to the state's exercise of its authority in ways that frustrate the goal of adoption—the preferred placement option.

Part I of this Article presents the realities of the child welfare system and examines how adoption bans impair orphans' best interests by delaying or foreclosing their access to permanent homes. Part I also compares empirical research reporting outcomes for children placed with gay and lesbian parents with outcomes for children who are not placed in permanent homes and who age out of foster care. Part II examines whether the best-interests-of-the-child standard governing placement decisions limits exercise of the State's *parens patriae* duty to action that expands, rather than restricts, orphans' access to permanent homes. Part III explores the constitutional basis of children's due process right to freedom from state action that categorically limits permanent placement options. This Part also analyzes the applicable level of constitutional scrutiny and discusses whether states' enactment of these bans pursues or achieves ends that satisfy the State's duty to protect children in its role as *parens patriae*.

#### I. THE CHILD WELFARE SYSTEM: THE *REAL* DEAL

Many states frame placement bans as child protective measures shielding children from the inherent harms of parenting by gays and lesbians.<sup>38</sup> This analytic sleight of hand distorts the placement options available to waiting children, ignores child welfare realities and credible social science research, and obscures the bans' harmful impact. States' framing of placement bans as protective measures provides advocates with a non-discriminatory justification for supporting them and influences courts' consideration of the purpose and effect of these laws, which, in turn, informs determinations as to their constitutionality.<sup>39</sup> The true effect of these

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<sup>36</sup> "Categorically prohibit" is used to describe bans on the adoption of children by same-sex couples because of their same-sex status. See Barbara Bennett Woodhouse, *Waiting for Loving: The Child's Fundamental Right to Adoption*, 34 CAP. U. L. REV. 297, 318 (2005) (referring to gay adoption bans as "[c]ategorical bans" because of their generalized exclusion of gay and lesbian prospective adoptive parents).

<sup>37</sup> BRODZINSKY, *supra* note 4, at 10 ("The highest number of adoptions by Americans today is of children from foster care.").

<sup>38</sup> See Lewis A. Silverman, *Suffer the Little Children: Justifying Same-Sex Marriage from the Perspective of a Child of the Union*, 102 W. VA. L. REV. 411, 426–27 (1999).

<sup>39</sup> See, e.g., *Lofton v. Sec'y of the Dep't of Children & Family Servs.*, 358 F.3d 804, 823–24 (11th Cir. 2004). In *Lofton*, the Eleventh Circuit reasoned that

[T]he legislature could rationally act on the theory that not placing adoptees in homosexual households increases the probability that these children eventually will be placed with married-couple families, thus furthering the state's goal of

bans on waiting children must be determined within the context of child welfare realities and informed by reliable data on outcomes for children adopted by gays and lesbians. In *Lochner v. New York*,<sup>40</sup> the United States Supreme Court explained, “The purpose of a statute must be determined from the natural and legal effect of the language employed . . . .”<sup>41</sup> The Court further explained that the constitutionality of statutes “must be determined from the natural effect of such statutes when put into operation, and not from their proclaimed purpose.”<sup>42</sup> Accordingly, the constitutionality of placement bans must be determined according to their practical impact on foster children waiting for permanent homes.

Each year, the number of children entering the foster care system exceeds the number of children placed in permanent homes, creating a surplus of waiting children and reflecting a deficit of prospective adoptive parents.<sup>43</sup> National data compiled by the HHS, Administration for Children and Families shows that there were more than 104,000 children waiting to be adopted in 2011.<sup>44</sup> Fewer than half of those children were adopted.<sup>45</sup> Also, the number of children aging out of foster care<sup>46</sup> continues to rise, increasing 64% since 1999.<sup>47</sup> In 2007, the Williams

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optimal placement. . . . Florida’s current foster care backlog does not render the statute irrational.

*Id.* at 823.

<sup>40</sup> 198 U.S. 45 (1905).

<sup>41</sup> *Id.* at 64.

<sup>42</sup> *Id.*

<sup>43</sup> See U.S. DEP’T OF HEALTH & HUMAN SERVS., CHILDREN’S BUREAU, ADMIN. FOR CHILD., YOUTH & FAMILIES, CHILD TRENDS DATA SNAPSHOT: FOSTER CARE DATA SNAPSHOT 1 (2011), available at [https://www.childwelfare.gov/systemwide/statistics/child\\_welfare\\_foster.cfm#data](https://www.childwelfare.gov/systemwide/statistics/child_welfare_foster.cfm#data). These statistical publications are typically updated only every two years or more because of the time required for compilation, analysis and publication of data.

<sup>44</sup> U.S. DEP’T HEALTH & HUMAN SERVS., *supra* note 33, at 1.

<sup>45</sup> *Id.*

<sup>46</sup> Elizabeth Thornton & Betsy Gwin, *High-Quality Legal Representation for Parents in Child Welfare Cases Results in Improved Outcomes for Families and Potential Cost Savings*, 46 FAM. L.Q. 139, 150–51 n.43 (2012). Aging out is typically defined as “leaving foster care because the youth reaches the age of majority or some other age-related criterion.” *Id.*

<sup>47</sup> MCCOY-ROTH ET AL., FOSTERING CONNECTIONS RES. CTR., NUMBER OF YOUTH AGING OUT OF FOSTER CARE CONTINUES TO RISE; INCREASING 64 PERCENT SINCE 1999 1 (2010), available at [http://www.ilrinc.com/images/uploads/Jan\\_2010\\_stats\\_on\\_aging\\_out.pdf](http://www.ilrinc.com/images/uploads/Jan_2010_stats_on_aging_out.pdf). The authors of EVAN B. DONALDSON ADOPTION INST., *supra* note 6, at 11, noted:

For many . . . boys and girls, the waiting never ends. Each year, for the last four years for which data are available, from 20,000 to over 26,000 youths exited foster care through “emancipation”—that is, they left the child welfare system without formal support or permanent families. . . . The number of youths “aging out,” in fact, has increased over the past five years.

Institute at UCLA released what is widely regarded as the most comprehensive compilation of research, data, and statistics on foster and adoption by gay and lesbian parents in the United States.<sup>48</sup> According to the report, “[g]ay and lesbian parents [were] raising four percent of all adopted children” translating to roughly 65,500 children.<sup>49</sup> The report estimates that 9,000 to 14,000 children would be adversely impacted by categorical placement bans if implemented nationally.<sup>50</sup>

Despite the supply and demand realities of the child welfare system and the adverse impact of placement bans on orphans, states continue to defend these laws as child protective measures.<sup>51</sup> This characterization and the assumption about the parental fitness of gays and lesbians that underwrites it is against the great weight of empirical evidence that children reared by homosexual parents do just as well as children raised by heterosexuals on a range of measures of social, emotional, and psychological adjustment.<sup>52</sup> Virtually every scientific study reaches the same conclusion—children with parents in a same-sex relationship experience positive outcomes.<sup>53</sup> Advocates for placement bans have failed to present credible evidence that placing children with gay and lesbian couples and individuals harms the

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*Id.* (citations omitted).

<sup>48</sup> GARY J. GATES ET AL., WILLIAMS INST., ADOPTION AND FOSTER CARE BY GAY AND LESBIAN PARENTS IN THE UNITED STATES (2007). The Williams Report was based on data drawn from the U.S. Census for the year 2000, data reported by the National Survey of Family Growth in 2002, and the Adoption and Foster Care Analysis and Reporting System of 2004. *Id.* at executive summary.

<sup>49</sup> *Id.*; BRODZINSKY, *supra* note 4, at 15.

<sup>50</sup> GATES ET AL., *supra* note 48, at executive summary.

<sup>51</sup> See, e.g., Ark. Dep’t of Human Servs. v. Cole, 380 S.W.3d 429, 438 (Ark. 2011). The Arkansas Supreme Court criticized the Arkansas placement ban as providing “for no such individualized consideration or case-by-case analysis in adoption or foster-care cases” and rejected the state’s “bald assumption that in *all* cases where adoption or foster care is the issue it is always against the best interest of the child to be placed in a home where an individual is cohabiting with a sexual partner outside of marriage.” *Id.*

<sup>52</sup> See, e.g., Bonauto, *supra* note 30, at 7 (stating that “thirty-five years of studies show[] that children of gay and lesbian parents are normal and healthy on every measure of child development”); Wald, *supra* note 30, at 321 (observing that “all of the evidence shows that children raised by gay parents develop just as well as children raised by heterosexual couples”).

<sup>53</sup> BRODZINSKY, *supra* note 4, at 14 (“[V]irtually every major U.S. medical, mental health, legal and child welfare organization concerned with the well-being of children and families has indicated its support for gay/lesbian parenting and adoption. These include, but are not limited to, the American Medical Association, American Academy of Pediatrics, American Psychiatric Association, American Psychological Association, American Bar Association, Child Welfare League of America, National Association of Social Workers, North American Council on Adoptable Children and Evan B. Donaldson Adoption Institute.”). *But see Homosexual Parenting: Is It Time For Change?*, AM. C. PEDIATRICIANS (Mar. 2012), <http://www.acped.org/Homosexual-Parenting-Is-It-Time-For-A-Change.html>. One professional organization, the American College of Pediatricians, has issued a statement unresponsive of gay, lesbian and bisexual parenting. *Id.*

child's best interests.<sup>54</sup> In *Doe*, the judge deciding the constitutionality of the Florida placement ban heard extensive testimony from both sides on the effects of placement with gay and lesbian adoptive parents on children's welfare and interests.<sup>55</sup> The judge considered the body of evidence that clearly established that sexual orientation is not a predictor of parental fitness and found no differences in parenting by gays and lesbians, or in adjustment outcomes for their children.<sup>56</sup> She concluded, "[B]ased on the robust nature of the evidence available in the field, this Court is satisfied that the issue is so far beyond dispute that it would be irrational to hold otherwise; the best interest[s] of children are not preserved by prohibiting homosexual adoption."<sup>57</sup>

A 2011 report by the Evan B. Donaldson Adoption Institute, a highly regarded research institute devoted to improving adoption policy and practice, summarized recent research regarding outcomes for children adopted by gay and lesbian parents. It found no differences in the capacity of same-sex couples to provide competent parenting or in the quality of their parenting. The report also documented no meaningful differences in psychological adjustment outcomes for children based on the sexual orientation of their parents.<sup>58</sup>

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<sup>54</sup> See, e.g., *Cole*, 380 S.W.3d at 432; *Perry v. Schwarzenegger*, 704 F. Supp. 2d 921, 968 (N.D. Cal. 2010); *In re Adoption of Doe*, 2008 WL 5006172, at \*20 (Fla. Cir. Ct. Nov. 25, 2008), *aff'd sub nom.* Fla. Dep't of Children & Families v. Adoption of X.X.G. and N.R.G., 45 So. 3d 79 (Fla. Dist. Ct. App. 2010).

<sup>55</sup> *Doe*, 2008 WL 5006172, at \*5-15.

<sup>56</sup> The judge summarized her review of the relevant research and literature as follows,

Based on the evidence presented from experts all over this country and abroad, it is clear that sexual orientation is not a predictor of a person's ability to parent. . . . The most important factor in ensuring a well adjusted child is the quality of parenting. . . . The quality and breadth of research available, as well as the results of the studies performed about gay parenting and children of gay parents, is robust and has provided the basis for a consensus in the field. Many well renowned, regarded and respected professionals have reduced methodologically sound longitudinal and cross-sectional studies into hundreds of reports. . . . The studies and reports are published in many well respected peer reviewed journals including the Journal of Child Development, the Journal of Family Psychology, the Journal of Child Psychology, and the Journal of Child Psychiatry. . . . In addition to the volume, the body of research is broad. . . . These reports and studies find that there are no differences in the parenting of homosexuals or the adjustment of their children. . . .

*Id.* at 20.

<sup>57</sup> *Id.*

<sup>58</sup> [R]esearch has challenged the stereotype of gays and lesbians as individuals who lack the ability, relationship stability and/or moral values to adequately raise children. Reviews of nearly a quarter-century of research on parenting by non-heterosexual adults is extraordinarily consistent in indicating that they are just as competent and well-adjusted as their heterosexual counterparts and that

In contrast to the dearth of evidentiary support for the contention that children's best interests are compromised by placement with gay and lesbian parents, there is a substantial body of evidence reporting long term harm resulting from extended temporary and institutional care, including poverty, homelessness, incarceration, poor academic performance, low graduation rates, and early parenthood.<sup>59</sup> Children in the general population continue to depend on their families after reaching the age of majority—with more than half of 18-24 year olds continuing to live at home.<sup>60</sup> A 2008 study published by the Evan B. Donaldson Adoption Institute reported,

[Foster care] youths, lacking permanent families to help them transition into adulthood, are at heightened risk of negative outcomes: emotional adjustment problems, poor educational results and employment prospects, and inadequate housing and homelessness; furthermore, they are more likely to become involved with the criminal justice system. . . . These negative outcomes take a huge toll on the young people themselves, and they translate into significant societal costs as adult public services—including mental health, substance abuse, housing, and criminal justice—must address their needs.<sup>61</sup>

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the children in their households show no meaningful differences in psychological adjustment from those who grow up with straight parents. . . . Specifically, research has found no differences in psychological adjustment in adopted children of lesbian, gay and heterosexual parents. . . . In addition, quality of parenting behavior has not been found to differ among lesbian, gay and heterosexual adoptive parents.

BRODZINSKY, *supra* note 4, at 13 (citations omitted); *see also* Nanette Gartrell et al., *Adolescents with Lesbian Mothers Describe Their Own Lives*, 59 J. HOMOSEXUALITY 1211, 1212–22 (2012) (The researchers conducted a longitudinal study over three decades of children of lesbian parents and reported positive outcomes for children. They found that “[s]tudies have consistently shown that young children with LG parents fare as well in psychosocial development as do those with heterosexual parents, and that child wellbeing is more likely influenced by the quality of family relationships than the sexual orientation of the parents.” (citations omitted)).

<sup>59</sup> EVAN B. DONALDSON ADOPTION INST., *supra* note 6, at 4 (“Research shows that the 25,000 youths who ‘age out’ of foster care each year are at high risk for a host of negative outcomes . . .”); GATES ET AL., *supra* note 48, at 17–18 (reporting negative outcomes for foster youth moved between placements, foster youth in congregate care settings, and foster youth who age out of the foster care system); *see generally* Michele Benedetto, *An Ounce of Prevention: A Foster Youth’s Substantive Due Process Right to Proper Preparation for Emancipation*, 9 U.C. DAVIS J. JUV. L. & POL’Y 381(2005) (providing comprehensive data regarding outcomes for foster care youth across several indicators).

<sup>60</sup> EVAN B. DONALDSON ADOPTION INST., *supra* note 6, at 11.

<sup>61</sup> EVAN B. DONALDSON ADOPTION INST., *supra* note 6, at 11 (citations omitted).

These documented harms will be exacerbated by fiscal cuts to state child welfare services that further challenge efforts to secure the optimal placement for waiting children—adoptive homes.<sup>62</sup>

## II. THE BEST-INTERESTS-OF-THE-CHILD STANDARD AND THE PRIMACY OF PERMANENCY

Collectively, federal and state adoption legislation, paired with the best-interests-of-the-child standard<sup>63</sup>—focus on safeguarding children’s emotional, mental, social, and physical well-being.<sup>64</sup> Federal law expresses a clear preference for permanent placement of orphans over extended temporary or institutional care, and recent enactments incentivize state efforts to secure adoptive homes for waiting children. The first significant piece of Congressional child welfare legislation, the Adoption Assistance and Child Welfare Act of 1980, codified the primacy of permanency over temporary and institutionalized care.<sup>65</sup> However, it identified reunification as the principal means of achieving that end.<sup>66</sup> The Adoption and Safe Families Act of 1997 (ASFA), enacted in response to the rising

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<sup>62</sup> BRODZINSKY, *supra* note 4, at 48 (acknowledging “an economic incentive for supporting LGBT adoption—namely, that it is less expensive than requiring states to recruit, train, and support additional heterosexual foster parents for those youngsters who require continued out-of-home care, as well as less expensive than having children reside in temporary and/or congregate care facilities”). The authors recognized the “argument that society benefits financially (as well as in many other ways) when ‘waiting’ children move into loving, permanent families should be a powerful one, especially during tough economic times.” *Id.*

<sup>63</sup> *Quilloin v. Walcott*, 434 U.S. 246, 255 (1978) (“Whatever might be required in other situations, we cannot say that the State was required in this situation to find anything more than that the adoption . . . [was] in the ‘best interests of the child.’”); *see also In re Adoption of Doe*, 2008 WL 5006172, at \*24–25 (Fla. Cir. Ct. Nov. 25, 2008) (“Both the state and federal governments recognize the critical nature of adoption to the well-being of children who cannot be raised by their biological parents.”).

<sup>64</sup> *See* Kevin B. Frankel, *The Fourteenth Amendment Due Process Right to Family Integrity Applied to Custody Cases Involving Extended Family Members*, 40 COLUM. J.L. & SOC. PROBS. 301, 305 (2007) (“A host of factors are sometimes cited by courts trying to determine the best interests of a child. . . . This approach typically requires an examination of factors relating to a child’s safety, happiness, and physical, mental, and moral welfare.”).

<sup>65</sup> *See* Adoption Assistance and Child Welfare Act of 1980, Pub. L. No. 96-272, 94 Stat. 500 (1980).

<sup>66</sup> *See id.* § 71(a)(15) (requiring that “reasonable efforts will be made . . . to make it possible for the child to return to his home”); CHILD WELFARE INFORMATION GATEWAY, U.S. DEP’T OF HEALTH & HUMAN SERVS., SUPPORTING REUNIFICATION AND PREVENTING REENTRY INTO OUT-OF-HOME CARE 1 (2012), *available at* [https://www.childwelfare.gov/pubs/issue\\_briefs/srpr.pdf](https://www.childwelfare.gov/pubs/issue_briefs/srpr.pdf). “[R]eunification” is traditionally defined as “reuniting children and youth in foster care with their families and reinstating custody to their parents or guardians. . . .” *Id.*

tide of waiting children, prioritizes children's health, safety, and permanency.<sup>67</sup> In contrast to its predecessor, the ASFA identifies adoption as the most effective means of mitigating the substantial harm caused by extended stays in foster and congregate care, while still prioritizing reunification where possible.<sup>68</sup> It is also worth noting that prior to the passage of ASFA, Congress enacted the Howard M. Metzenbaum Multiethnic Placement Act of 1994 (MEPA)<sup>69</sup> for the purpose of "decreasing the length of time that children wait to be adopted,"<sup>70</sup> in recognition of the harms associated with delayed or denied placement.<sup>71</sup>

State laws and regulations have mirrored Congressional enactments acknowledging the importance of permanency and addressing concerns about the consequences of non-placement.<sup>72</sup> Adoption laws and the best-interests standard

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<sup>67</sup> See 42 U.S.C. §§ 671(a)(15), 673(b)(d), 675(5)(E) (2006 & Supp. V 2011).

<sup>68</sup> See *id.* § 671(a)(15)(C) (recognizing that if reunification is not possible, reasonable efforts should be made to place the child in a permanent situation). In a prior article, I commented on ASFA:

ASFA requires states to conduct a "permanency hearing" within thirty days of the separation of the child from her parents, relieving the state of its obligation to make additional efforts at reunification. . . . ASFA also seeks to limit the amount of time a child spends in foster care by directing states to move to terminate parental rights after a child has been in foster care for fifteen of twenty-two months. Additionally, ASFA incentivizes adoption by awarding states monetary bonuses for each adoption above an established baseline. Notwithstanding legitimate criticisms of ASFA as contributing to the overrepresentation of Black orphans in the child welfare system, it is clear that ASFA emphasizes and facilitates permanent placement and essentially codifies the primacy of permanency.

Tanya M. Washington, *Throwing Black Babies out with the Bathwater: A Child-Centered Challenge to Same-Sex Adoption Bans*, 6 HASTINGS RACE & POVERTY L.J. 1, 20 (2008) (internal citations omitted).

<sup>69</sup> Howard M. Metzenbaum Multiethnic Placement Act of 1994, Pub. L. No. 103-382 §§ 551-55, 108 Stat. 3518, 4056-58.

<sup>70</sup> *Id.* at § 552(b)(1); Washington, *supra* note 6868, at 48 ("Despite a tradition of race-matching (i.e., placing children with parents of the same race), strong opposition to transracial placements, and social science data documenting some harm caused by transracial placements, Congress determined the harm of non-placement to outweigh any harm caused by transracial placement.").

<sup>71</sup> See Elizabeth Bartholet, *Where Do Black Children Belong? The Politics of Race Matching in Adoption*, 139 U. PA. L. REV. 1163, 1185 (1991) (explaining race matching "policies have a severe impact on minority children, often causing serious delays in or permanent denial of adoptive placement").

<sup>72</sup> See Ark. Dep't of Human Servs. v. Cole, 380 S.W.3d 429, 438 (Ark. 2011) (noting that Arkansas law advocates "the public policy of promoting a stable environment for children") (quoting *Alphin v. Alphin*, 219 S.W.3d 160, 165 (Ark. 2005)); *In re Adoption of Doe*, 2008 WL 5006172, at \*22 (Fla. Cir. Ct. Nov. 25, 2008). The court found that

acknowledge the primacy of permanency because it provides the stability, security, and family structure necessary for the healthy development of a child.<sup>73</sup> Characterizing this conclusion as axiomatic, Chief Justice Rehnquist observed,

A stable, loving homelife [sic] is essential to a child's physical, emotional, and spiritual well-being. It requires no citation of authority to assert that children who are abused in their youth generally face extraordinary problems developing into responsible, productive citizens. The same can be said of children who, though not physically or emotionally abused, are passed from one foster home to another with no constancy of love, trust, or discipline.<sup>74</sup>

Neither foster care nor legal guardianship, as the Eleventh Circuit recognized in *Lofton v. Secretary of the Department of Children & Family Services*,<sup>75</sup> have "the societal, cultural, and legal significance [of] . . . adoptive parenthood, which is the legal equivalent of natural parenthood."<sup>76</sup> In that same opinion, the court emphasized, "[I]n the adoption context, the state's overriding interest is the best interests of the children whom it is seeking to place with adoptive families."<sup>77</sup>

There is a lack of credible research evincing negative outcomes for orphans placed in adoptive homes with gay and lesbian parents. This fact, combined with the mounting evidence of negative outcomes for children who remain in foster or institutionalized care, indicate that placement bans do not serve an orphan's best interests because they condemn orphans to the most harmful placement option: remaining in either foster or institutionalized care.<sup>78</sup> Placement bans exacerbate

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"Florida's statutory framework is explicit that dependent children have the right to permanency and stability in adoptive placements. The law is also explicit that there is a compelling state interest in providing such permanent, adoptive placement as rapidly as possible." *Id.* (citation omitted).

<sup>73</sup> *Encouraging Adoption: Hearing Before the Subcomm. on Human Res. of the Comm. on Ways and Means*, 105th Cong. 112 (1997) ("Permanency has a variety of connotations including the notion of stability with respect to the home where a child lives and his or her relationship to their caregivers. In the strictest sense, however, permanency refers to that place where the legal relationship between a child and a caregiver is the most secure.") (statement of Fred H. Wulczyn, Ph.D., University of Chicago); Complaint at 42, *Fisher-Borne v. Smith*, No. 1:12-cv-589, 2012 WL 2135593 (M.D. N.C. June 13, 2012) ("The State of North Carolina provides an adoption subsidy to support parents who adopt children from foster care. Other states provide similar incentives to encourage adoption . . . because of a policy determination that permanent placements with families are better for children than remaining in the custody of the state.").

<sup>74</sup> *Santosky v. Kramer*, 455 U.S. 745, 788–89 (1982) (Rehnquist, J., dissenting).

<sup>75</sup> 358 F.3d 804 (11th Cir. 2004).

<sup>76</sup> *Id.* at 824.

<sup>77</sup> *Id.* at 810.

<sup>78</sup> See Mark Strasser, *Rebellion in the Eleventh Circuit: On Lawrence, Lofton, and the Best Interests of Children*, 40 TULSA L. REV. 421, 440 (2005) ("The *Lofton* court reasoned

existing challenges to finding permanent adoptive placements, such as a surplus of waiting children,<sup>79</sup> a shortage of prospective adoptive parents,<sup>80</sup> and significant budget cuts to state child welfare programs and services.<sup>81</sup> Placement bans dispense with the required, fact-specific determination of whether a particular placement serves a child's mental, physical, social, and emotional needs.<sup>82</sup> They categorically exclude gays and lesbians from the pool of prospective parents, thereby subverting the best interests of children by eschewing permanency and its attributes in favor of non-placement and its associated harms.

### III. THE STATE'S DUTY AND THE ORPHAN'S ENTITLEMENT

The State's duty to act in furtherance of the child's best interests should define and limit the exercise of its *parens patriae* authority—the “goal [of which] is to provide the child with a permanent home.”<sup>83</sup> The best-interests standard and the State's fiduciary duty should be interpreted to impose an obligation upon the State to make reasonable efforts to increase orphans' access to adoption, and to prohibit state action that frustrates permanent placement, increasing the risk of non-placement.<sup>84</sup> The State's *parens patriae* authority should be limited by the purpose that triggers its exercise—the protection and enforcement of the child's best interests. As to the scope and substance of the State's fiduciary obligation to children within its care and custody, *In re Adoption of Doe*<sup>85</sup> is particularly instructive:

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that ‘the legislature could rationally act on the theory that not placing adoptees in homosexual households increases the probability that these children eventually will be placed with married-couple families, thus furthering the state's goal of optimal placement.’ Yet such a policy virtually assures that some of these children will never be adopted, a result which simply cannot be viewed as promoting their interests.”)

<sup>79</sup> See U.S. DEP'T OF HEALTH & HUMAN SERVS., *supra* note 33, at 4–5.

<sup>80</sup> See EVAN B. DONALDSON ADOPTION INST., *supra* note 6, at 4, 10 (noting that there exists an “increasingly urgent, nearly universal professional consensus that the pool of potential adoptive parents must be expanded to keep pace with the growing number of children in foster care who are legally free for adoption”).

<sup>81</sup> See *id.* at 11–12; NAT'L ASS'N OF CHILD CARE RES. & REFERRAL AGENCIES, STATE BUDGET CUTS: AMERICA'S KIDS PAY THE PRICE 3 (2011), [http://www.naccrra.org/sites/default/files/publications/naccrra\\_publications/2012/2011\\_budcutsnov4.pdf](http://www.naccrra.org/sites/default/files/publications/naccrra_publications/2012/2011_budcutsnov4.pdf) (“The state budgets that began shrinking in 2007 signaled the early warning signs of the magnitude of the recession's impact on children's programs. Since then, state after state has made annual deep budget cuts. Children have paid an enormous price. Many states began their new fiscal years with additional cuts that will make it even more difficult to prepare children for success.”).

<sup>82</sup> See Woodhouse, *supra* note 36, at 327 (“Every child deserves an individualized assessment of his or her best interests.”).

<sup>83</sup> Santosky v. Kramer, 455 U.S. 745, 766 (1982).

<sup>84</sup> See EVAN B. DONALDSON ADOPTION INST., *supra* note 6, at 10, 21.

<sup>85</sup> 2008 WL 5006172 (Fla. Cir. Ct. Nov. 25, 2008).

A law such as the blanket ban on adoptions by homosexuals infringes on the foster child's right to be free from undue restraint and to be expeditiously placed in an adoptive home that serves the child's best permanency interests. Indeed a law that subverts judicial process and imposes on the court the burden of taking action harmful to the child should be immediately suspect because the injury it imposes contradicts the legislative purpose and constitutional basis of the child's having been taken into custody by the State in the first place. . . . The very premise of . . . dependency law following termination of parental rights must be consistent with the *parens patriae* responsibility of the state to achieve adoption for foster children unless their best interests are demonstrably shown to be otherwise.<sup>86</sup>

The United States Supreme Court has observed, “[T]he protection that foster children have is simply the requirement of state law that decisions about their placement be determined in the light of their best interests.”<sup>87</sup> Professor Barbara Woodhouse, a zealous advocate for the rights of waiting children, expresses the entitlement of children in state custody as an affirmative, fundamental right to be adopted.<sup>88</sup> Highlighting the constitutional relevance of such a right, Professor Woodhouse explains,

If adoption is a fundamental right, then any law or policy that creates categorical barriers based on criteria such as the potential adoptive parent's marital status, sexual orientation, age, religion, race, or ethnicity is presumptively unconstitutional. Such laws must be given the same strict scrutiny and critical examination of means and ends as other laws that place categorical burdens on entry into and recognition of fundamental family relationships.”<sup>89</sup>

Though other courts have rejected the argument that foster children possess an affirmative right to be adopted,<sup>90</sup> the *Doe* court embraced Professor Woodhouse's characterization of foster children's rights, holding that “the substance of state and federal decisions . . . declare a child's constitutional right to a true home, and in the case of a foster child, to a permanent adoptive home. . . . The declared foster child's right to an adoptive home when the child is available for adoption is a

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<sup>86</sup> *Id.* at \*22, 24.

<sup>87</sup> *Smith v. Org. of Foster Families for Equality & Reform*, 431 U.S. 816, 860 (1977).

<sup>88</sup> Woodhouse, *supra* note 36, at 319–21.

<sup>89</sup> *Id.* at 321.

<sup>90</sup> *See, e.g., Lofton v. Sec'y of the Dep't of Children & Family Servs.*, 358 F.3d 804, 811 (11th Cir. 2004); *Mullins v. Oregon*, 57 F.3d 789, 794 (9th Cir. 1995); *Griffith v. Johnston*, 899 F.2d 1427, 1437 (5th Cir. 1990); *Lindley v. Sullivan*, 889 F.2d 124, 131–321 (7th Cir. 1989); *Georgina G. v. Terry M. (In re Angel Lace M.)*, 516 N.W.2d 678, 685–86 (Wis. 1994).

fundamental right.”<sup>91</sup> In addition, the *Doe* court recognized, albeit implicitly, that children possess a constitutionally protected negative liberty interest, which it described as “a child’s fundamental right to be free from unnecessary restraint.”<sup>92</sup> Children’s negative liberty claim could have been more forcefully expressed as an interest in freedom from state action that categorically and unjustifiably limits their access to adoption.<sup>93</sup>

These affirmative constitutional rights and negative liberty interest arguments offer complementary and alternative grounds for a constitutional challenge to placement bans; however, the negative liberty interest argument does have some analytic advantages.

The negative liberty interest argument . . . does not depend upon a “right to be adopted.” . . . [T]he affirmative rights argument may be frustrated by the dearth of available permanent placements because, in light of “supply-demand” realities, one can argue that the State cannot be burdened with an obligation to place every (or any) child. The negative liberty interest argument, however, is focused on state action that frustrates the *pursuit* of permanency in breach of the State’s fiduciary duty to orphans, even if the goal of permanency cannot be achieved due to child welfare realities.<sup>94</sup>

Foster children are entitled to fiduciary care by the State that furthers their best interests.<sup>95</sup> This should be understood to entitle those children to be free from state

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<sup>91</sup> *Doe*, 2008 WL 5006172, at \*22, 24.

<sup>92</sup> *Id.* at \*22.

<sup>93</sup> An orphan’s negative right to be free from state placement action that impairs her liberty interest in permanency is distinguishable from the affirmative right to be placed in an adoptive home. (citation omitted) . . . An orphan’s *interest* in being permanently placed does not generate an enforceable, affirmative *right* to be adopted, but it should be considered to generate a negative right to be free from categorical placement bans that limit permanent placement options.

Tanya Washington, *Throwing Black Babies Out With the Bathwater: A Child-Centered Challenge to Same-Sex Adoption Bans*, 6 HASTINGS RACE & POVERTY L.J. 1, 31 (2009) (citations omitted).

<sup>94</sup> Tanya Washington, *Suffer Not the Little Children: Prioritizing Children’s Rights in Constitutional Challenges to “Same-Sex Adoption Bans,”* 39 CAP. U. L. REV. 231, 248–49 (2011) (emphasis added) (citations omitted).

<sup>95</sup> See *Lindley*, 889 F.2d at 128–32 (recognizing in dicta that an adopted child would likely have standing to bring an action challenging the denial of insurance benefits to the adopted parents even though the court recognized no right to be adopted); Note, *Avoiding Another Eldorado: Balancing Parental Liberty and the Risk of Error With Governmental Interest in the Well-Being of Children in Complex Cases of Child Removal*, 51 WM. & MARY L. REV. 1197, 1201 (2009) (arguing for a lower standard for temporary, emergency

action that forecloses, rather than facilitates, their permanent placement in adoptive homes. Placement bans infringe this liberty interest by limiting children's access to permanent adoptive homes in favor of the less preferred and harmful option of non-placement. This categorical foreclosure triggers a children's rights-centered substantive due process challenge to these laws. This Article will now turn to the details of this constitutional claim.

#### A. Orphans' Constitutional Claim

Despite the direct and adverse impact of these bans on children, until very recently, challenges to placement bans have centered on how these laws tread upon the individual rights of prospective adoptive parents in violation of equal protection and substantive due process rights. Notwithstanding the moral and legal force of equal-rights-based arguments, claims based upon the individual rights of prospective adoptive parents have not proven successful.<sup>96</sup> Therefore, it is important to advance challenges to placement bans that center on the negative effects of these laws on children's interests, welfare, and constitutional rights.<sup>97</sup> Naming children as plaintiffs mitigates, but does not eliminate, the concern that children's interests are not acknowledged as giving rise to children's constitutional claims against these bans. Even in cases advancing children's constitutional challenges, advocates and judges tend to characterize or regard children's claims as co-extensive with prospective parents' claims.

Though the Florida court in *Doe* expressly characterized children's right to permanency as "fundamental,"<sup>98</sup> it treated their substantive due process and equal protection challenges to Florida's adoption ban as "co-extensive" with their prospective parents' constitutional claims.<sup>99</sup> Despite adjudicating the children's right to permanency as fundamental, the court identified rational basis review as

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child removal in complex cases that balances the traditional parental liberty interest, the importance of removal to the child, and the government's *parens patriae* interest).

<sup>96</sup> Washington, *supra* note 68, at 6 ("The individual rights argument is challenged by two legal realities: 1) courts have not recognized a constitutional right to adopt; and 2) federal courts have not interpreted the suspect class designation to include gay and lesbian individuals.") (citations omitted).

<sup>97</sup> *See id.* (noting that, for orphans, placement bans "limit permanent placement opportunities . . . increasing their likelihood of experiencing harms associated with extended temporary and institutional care"); BRODZINSKY, *supra* note 4, at 48 ("[R]ational arguments based only on social science research data highlighting the strengths of LGBT families and their children are unlikely to be sufficiently persuasive in changing many people's opinions [about adoption by gays and lesbians] . . . [T]he needs of children who do not have permanent families, rather than the rights of adults, must be paramount as a matter of ethics and best practice.") (citations omitted).

<sup>98</sup> *Doe*, 2008 WL 5006172, at \*24 ("The declared foster child's right to an adoptive home when the child is available for adoption is a fundamental right.").

<sup>99</sup> *See id.* at \*22 ("Under Florida law, a child's rights are co-extensive with an adult's rights . . .").

the applicable constitutional test.<sup>100</sup> In 2010, the North Carolina Supreme Court categorically invalidated second-parent adoptions, thereby prohibiting the establishment of a filial relationship between a child and a non-biological parent in a same-sex relationship.<sup>101</sup> Other courts have also treated children's constitutional rights as co-extensive with the adoptive parents' claims or have ultimately disregarded the children's constitutional claim by ruling only on the adoptive parent's constitutional claim. In another North Carolina case in 2012, a plaintiffs' class of six same-sex families, including children, challenged North Carolina's second parent adoption ban.<sup>102</sup> The complaint challenges the state's adoption law as contravening the best interests of children by depriving them of "the numerous financial, psychological, [and] social benefits" inherent in the filial relationship, and asserts independent equal protection challenges on behalf of the prospective adoptive parents and their children.<sup>103</sup> Despite the distinct nature of the liberty interests infringed by the adoption ban, however, the complaint advances the substantive due process challenges of the parents and children as a single claim.<sup>104</sup> In 2011, the Arkansas Supreme Court unanimously struck down a 2008 voter approved initiative, Act 1, which prohibited unmarried individuals who were living as domestic partners from adopting children or serving as foster parents.<sup>105</sup> The plaintiffs in the Arkansas case included the biological children of parents desiring to direct the adoption of their children to parents categorically excluded by the

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<sup>100</sup> *Id.* at \*27 ("This matter does not involve a fundamental right or a suspect class and is thus reviewed under the rational basis test.").

<sup>101</sup> *Boseman v. Jarrell*, 704 S.E.2d 494, 502 (N.C. 2010). In *Boseman*, a lesbian couple, living together as domestic partners, made collective efforts to have a child with the express intent of being parents to the child. *Id.* at 497. Their son, born to one of the women via artificial insemination by a donor selected by both women, was adopted by the non-biological mother pursuant to an order by a North Carolina adoption court. *Id.* Four years after the child's birth, the couple separated and the biological mother contested the adoption order and the parental rights of her former partner. *Id.* at 498. A North Carolina trial court's enforcement of the adoption order and award of joint custody to both parents was upheld by the North Carolina Court of Appeals. *Id.* However, the North Carolina Supreme Court determined that, under controlling North Carolina statutes, a non-biological parent's filial relationship can only be recognized if the child's relationship with the biological parent is terminated, thereby categorically prohibiting second-parent adoptions by non-biological parents in same-sex couples. *Id.* at 499–502. The Court ruled, "The Court of Appeals erred in determining that the adoption decree at issue in this case is valid. We hold that the decree is void *ab initio* and that plaintiff is not a legally recognized parent of the minor child." *Id.* at 505. Though the best interests of the child at issue were at the heart of the case, a fact that even the North Carolina Supreme Court acknowledged, the child advanced no claim to the continued parent-child relationship. *Id.*

<sup>102</sup> Complaint at 1–3, *Fisher-Borne v. Smith*, No. 1:12-cv-589, 2012 WL 2135593 (M.D. N.C. June 13, 2012).

<sup>103</sup> *Id.* at 2–3, 47–50.

<sup>104</sup> *Id.* at 52–53.

<sup>105</sup> *Ark. Dep't of Human Servs. v. Cole*, 380 S.W.3d 429, 443 (Ark. 2011).

ban.<sup>106</sup> The complaint pled independent equal protection and substantive due process claims on behalf of those children.<sup>107</sup> Nevertheless, the court's reasoning for invalidating the ban centered on infringement of parental interests. The court opined, "Because we affirm the circuit court on Count 10 regarding privacy rights under the Arkansas Constitution, we will not address the remaining arguments on cross-appeal because to do so would be to issue an advisory opinion."<sup>108</sup>

In late 2012, a lesbian couple in a thirteen-year partnership filed a lawsuit challenging Michigan's adoption law, which precluded them from adopting each other's children, whom they were both parenting.<sup>109</sup> The federal judge presiding over the case encouraged the plaintiffs to amend their complaint to include a challenge to Michigan's constitutional amendment banning same-sex marriage and civil unions.<sup>110</sup> The federal judge opted to stay his decision in the case pending the Supreme Court's rulings regarding same-sex marriage in *United States v. Windsor* and *Hollingsworth v. Perry*.<sup>111</sup> The affected children are plaintiffs, but it is unclear whether their claims will advance independent of their parents' claims.

The proliferation of cases with children named as plaintiffs signals awareness of the impact of these bans on children's interests. The outcomes in some of these cases reflect legal victories that serve children's best interests by removing legislative and judicial obstacles to permanent placement. To improve outcomes for children, advocates and judges should acknowledge children's distinct liberty interests as grounding substantive due process and equal protection challenges to placement bans independent of parental claims. Failing to do so is not without constitutional consequence. By advancing and analyzing children's challenges as co-extensive with adults' equality-based claims, children's rights are sidelined and the constitutional calculus is subverted. The ends—invalidation of bans that restrict children's access to what is likely the best possible placement option—do not justify the means, focusing on the impact of these bans on prospective parents and treating children's rights as ancillary or derivative in the analysis. Children's

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<sup>106</sup> *Id.* at 432.

<sup>107</sup> *Id.* The complaint provided in pertinent part, "Act 1 deprives children of the right of access to the available, suitable, and appropriate homes in violation of the Due Process Clause of the United States Constitution," and "Act 1 deprives children of the right to be adopted by those individuals chosen by their parents in violation of the Equal Protection Clause of the United States Constitution." *Id.*

<sup>108</sup> *Id.* at 442.

<sup>109</sup> Complaint at 2–6, *DeBoer v. Snyder*, No. 2:12-10285 (E.D. Mich. Jan. 23, 2012).

<sup>110</sup> Emma Margolin, *Lesbian Couple Takes on Michigan's Same-Sex Marriage Ban*, MSNBC (Mar. 6, 2013, 10:23 PM), <http://tv.msnbc.com/2013/03/06/lesbian-couple-takes-on-michigans-same-sex-marriage-ban/>.

<sup>111</sup> Randi Shaffer, *Judge Delays Decision on Michigan Same-Sex Marriage Ban, Mt. Pleasant Residents React*, MORNING SUN (Mar. 8, 2013, 7:25 AM), [http://www.themorning-sun.com/article/20130307/NEWS01/130309645/judge-delays-decision-on-michigan-same-sex-marriage-ban-mt-pleasant-residents-react#full\\_story](http://www.themorning-sun.com/article/20130307/NEWS01/130309645/judge-delays-decision-on-michigan-same-sex-marriage-ban-mt-pleasant-residents-react#full_story); *Filings in the Defense of Marriage Act and California's Proposition 8 Cases*, SUPREME CT. OF THE U.S., <http://www.supremecourt.gov/docket/DOMP8.aspx> (last updated Apr. 14, 2013).

challenges, centered as they are on guarantees secured by the best-interests-of-the-child standard, may trigger a heightened level of constitutional scrutiny, to which the discrimination against gay and lesbian prospective parents are arguably not entitled.<sup>112</sup>

There is a strong argument that the negative liberty interest infringed by placement bans is fundamental<sup>113</sup> and deserving of the most exacting constitutional scrutiny—strict scrutiny review; however, this designation is not necessary for a children’s rights-centered challenge to be successful. Rational basis review, the applicable test for state action that infringes on a non-fundamental right, examines whether state action is rationally related to a legitimate governmental interest.<sup>114</sup> Even under this deferential standard of constitutional review, which presumes that state action furthers a legitimate governmental goal, the Supreme Court has held that certain liberty interests “may not be interfered with . . . by legislative action which is arbitrary or without reasonable relation to some purpose within the competency of the state to effect.”<sup>115</sup> The Supreme Court has also emphasized that where a law “seems inexplicable by anything but animus toward the class it affects[,] it lacks a rational relationship to legitimate state interests.”<sup>116</sup> Whether placement bans are rationally related to a legitimate governmental goal must be determined in full view of the harmful consequences of further diminishing the shallow pool of prospective adoptive parents and with a consideration of the speculative harm that may be caused by placement with gay or lesbian parents versus the documented harms resulting from non-placement.

To pass constitutional muster, the state must establish, not merely assert, that placement bans serve ends that promote the best interests of children and satisfy the state’s fiduciary duty to foster children. Researchers have found positive outcomes for children in adoptive homes with gay and lesbian parents and negative outcomes for children who languish in foster or congregate care. The data accordingly suggest that placement

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<sup>112</sup> See *supra* notes 83–95 and accompanying text.

<sup>113</sup> Washington, *supra* note 68, at 44. This article found that

[i]n the foster care context, a liberty interest in freedom from state action that favors harmful placements and categorically forecloses the permanency that serves orphans’ best interests should be considered fundamental in character because “from the waiting child’s perspective, being adopted means having a ‘real’ home and a ‘real’ family. Foreclosing . . . adoption as an option . . . clearly deprives them of something of great value.”

*Id.*

<sup>114</sup> *Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 440–43 (1985) (concluding that an infringement on non-fundamental rights “requires only a rational means to serve a legitimate end”).

<sup>115</sup> *Meyer v. Nebraska*, 262 U.S. 390, 399–400 (1923).

<sup>116</sup> *Romer v. Evans*, 517 U.S. 620, 632 (1996).

bans limit children's access to adoption for no apparent benefit, while simultaneously condemning those waiting children to a more harmful placement option, namely foster care or group homes.<sup>117</sup> This legislative choice violates children's liberty interest in freedom from state action that limits their access to the placement option that best serves their interests. It constitutes a breach of the state's fiduciary duty under *parens patriae* to place orphans in adoptive homes. As the court held in *Doe*, Florida's placement ban was "diametrically contrary to the permanency goal" and indeed, [t]he challenged statute, in precluding otherwise qualified homosexuals from adopting available children, does not promote the interests of children and in effect, causes harm to the children it is meant to protect.<sup>118</sup>

The constitutionality of placement bans must be determined according to "the natural effect of such statutes when put into operation, and not from their proclaimed purpose."<sup>119</sup> The proclaimed purpose of these bans is to protect children from the harms of parenting by same-sex parents; however, research confirms that the effect of the laws is to limit children's access to permanent homes. This results in thousands of foster children being confined to extended temporary and institutional care and the attendant harms of these placements.<sup>120</sup>

Assessing whether an available placement for a waiting child serves that child's best interests requires an examination of her specific needs and the capacity of a prospective parent to meet those needs.<sup>121</sup> The best-interests standard and the state's fiduciary duty as *parens patriae* require that states make reasonable efforts to increase orphans' access to the optimal placement option, rather than act to limit access to adoptive homes.<sup>122</sup> Existing supply-demand realities, the state's fiduciary duty, and the best-interests-of-the-child standard all demand that state action be designed to increase the likelihood of permanent placement of orphans with competent adoptive parents, rather than frustrating orphans' chances of being

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<sup>117</sup> EVAN B. DONALDSON ADOPTION INST., *supra* note 6, at 12 (stating, "The experiences of boys and girls who continue to wait in foster care—and the experiences of youths who age out without a permanent family to support them—make clear that more adoptive parents are critically needed. It is through a commitment to expanding adoptive family resources that we can achieve the outcomes that are federally mandated for each child in foster care: safety, well being, and a permanent family.").

<sup>118</sup> *In re Adoption of Doe*, 2008 WL 5006172, at \*24–25 (Fla. Cir. Ct. Nov. 25, 2008).

<sup>119</sup> *Lochner v. New York*, 198 U.S. 45, 64 (1905).

<sup>120</sup> EVAN B. DONALDSON ADOPTION INST., *supra* note 6, at 6 (concluding that "[s]tate laws excluding gay and lesbian prospective adopters can negatively affect the pool of adoptive families waiting for children" and that "[c]hildren are disadvantaged when state laws do not permit joint and second parent adoption"); *see supra* notes 97, 117 and accompanying text.

<sup>121</sup> *See supra* note 87 and accompanying text.

<sup>122</sup> *See supra* notes 77, 113 and accompanying text.

adopted.<sup>123</sup> Placement bans categorically limit orphans' access to adoptive homes without the benefit of the fact-specific inquiry to which children should be entitled under the best-interests standard and the Constitution. Accordingly, the bans are unconstitutional because they are not rationally related to the state's only legitimate goal, which, in its capacity as *parens patriae*, is to place waiting children in available adoptive homes.

#### CONCLUSION

The gay adoption debate has been focused on how placement bans deprive qualified gay and lesbian prospective parents of the opportunity to adopt children who are not likely to be permanently placed. Litigants challenging placement bans have focused primarily on the rights of prospective parents. States have defended these bans in ways that obscure the fact that they violate children's rights by depriving them of the placement option that best serves their interests. Supply and demand realities, the best-interests-of-the-child standard, and the documented harms associated with non-placement demand state action that facilitates rather than frustrates the possibility of adoption. Confining thousands of orphans to extended temporary and institutional care where they will never experience the benefits of a stable, secure, and permanent home constitutes a breach of the state's fiduciary obligation to the children within its care and custody and a violation of children's liberty interest in freedom from state action that contravenes their best interests. Adoption is the chief aspiration for waiting children in foster care and the pursuit of a permanent placement for each orphan is the state's fiduciary and constitutional duty. To remove children from their homes and parents because they have been abused or neglected only to subject them to state care that limits their access to permanent homes is a tragedy of errors. To justify doing so in the name of children and their best interests is indefensible.

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<sup>123</sup> See *supra* note 84 and accompanying text.