UNITED STATES COURT OF APPEALS
ELEVENTH CIRCUIT
Case No.: 01-16723-DD

STEVEN LOFTON; DOUGLAS E. HOUGHTON, JR.; JOHN DOE and JOHN ROE, minor children, by and through their next friend, TIMOTHY ARCARO; WAYNE LARUE SMITH and DANIEL SKAHEN,	)
Plaintiffs,	)
-v-	)
KATHLEEN A. KEARNEY, Secretary of Florida's Department of Children and Families; and CHARLES AUSLANDER, District Administrator of District XI of Florida's Department of Children and Families,	)
Defendants.	)

APPELLANTS' BRIEF

Docket No. 01-16723-D
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Certificate of Interested Persons and Corporate Disclosure Statement

Under F.R.A.P. 26-1 and 11th Cir. R. 26-1, appellants certify that the following is a complete list of all trial judges, all attorneys, persons, associations of persons, firms, partnerships, or corporations that have an interest in the outcome of this appeal:

American Civil Liberties Union Foundation

American Civil Liberties Union Foundation of Florida, Inc.

Charles Auslander

Robin Blanton

Samuel Chavers

Children First Project of Nova Southeastern University

Matthew Coles

Leslie Cooper

Department of Children and Families

John Doe (foster child of Steven Lofton)

James Esseks

Douglas E. Houghton, Jr.

Kathleen A. Kearney

United States District Judge James Lawrence King

Kozlowski Law Firm

Steven Robert Kozlowski

Steven Lofton

Randall Marshall

Moss, Henderson, Blanton, Lanier, Kretschmer & Murphy, P.A.

John Roe (child under guardianship of Douglas E. Houghton, Jr.)

Elizabeth F. Schwartz

Daniel Skahen

Wayne LaRue Smith

Casey Walker

Christina A. Zawisza

_____

Leslie Cooper

STATEMENT ABOUT ORAL ARGUMENT

Plaintiffs request oral argument because the case involves complicated and important issues of constitutional law.

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JURISDICTION

This action was brought under 42 U.S.C. § 1983. The District court had jurisdiction under 28 U.S.C. §§ 1331 and 1343.

This Court has jurisdiction under 28 U.S.C. § 1291. This is an appeal of the final decision of the District court granting summary judgment to the defendants and dismissing all of plaintiffs' claims.

The District court entered final judgment on August 30, 2001. Plaintiffs timely moved under Fed. R. Civ. P. 59 to Alter or Amend the Judgment. That motion was denied on October 29, 2001. Plaintiffs timely filed a notice of appeal on November 26, 2001.

ISSUES

I. Equal Protection

A. Does the equal protection clause of the federal Constitution allow the State of Florida to ban lesbians and gay men from adopting in order to express the State's "disapproval" of gay people?

B. Does the equal protection clause allow the State of Florida to ban lesbians and gay men (and only lesbians and gay men) from adopting if the established facts show the ban can not rationally be thought to serve the best interests of children?

II. Due Process

A. Are the relationships of foster parents and guardians with the children they raise ever entitled to protection under the due process clause and the first amendment?

B. May the State of Florida refuse to give parents and children the rights the Constitution gives them unless the adults adopt the children, and then refuse to allow the adults to adopt because they are gay?

STATEMENT OF THE CASE

A. Nature of the Case.

This is a challenge under 42 U.S.C. § 1983 to a Florida law that categorically excludes eligible lesbians and gay men and only lesbians and gay men from being considered as potential adoptive parents. Fla. Stat. § 63.042(3) says:

> No person eligible to adopt under this statute may adopt if that person is a homosexual.

The plaintiffs include Steven Lofton and the 10-year-old boy he has raised from infancy (the Loftons), Doug Houghton and the ten-year-old boy he has raised since he was four (the Houghtons) and a couple who want to adopt (Smith and Skahen). Lofton, Houghton, Smith and Skahen are all gay.[1] Tab A, Record ("R")-124-Joint Pretrial Stipulation ("Stipulation"), at ¶¶ 26, 28, 34.[2]

The defendants are officials of the State of Florida responsible for enforcing the law the plaintiff families are challenging. They are sued in their official capacity. R-52-Amended Complaint, ¶¶ 36, 37.

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[1] The original complaint also included Brenda and Gregory Bradley and Angela Gilmore. Brenda Bradley is Wayne Smith's sister. She and her husband named Smith as guardian of their daughter, and they wanted him to adopt her in the event of their deaths. R-1-Complaint, ¶¶ 28-30. Angela Gilmore is a lesbian who said she wanted to adopt. R-1-Complaint, ¶¶ 22-23. They left the case on procedural rulings, as explained below.

[2] A Copy of the parties' Joint Pretrial Stipulation is at Tab A (It is in the record at R-124).

The plaintiffs charge that Florida's law violates the right to equal protection of lesbians and gay men who seek to adopt, and children raised by lesbian and gay caregivers who cannot be adopted by them. The Loftons and the Houghtons say also that they have constitutionally protected family relationships and that Florida law treats them as if they did not, in violation of the due process clause and the first amendment. R-52-Amended Complaint, ¶¶ 74, 86.

B. Proceedings and dispositions in the court below.

The plaintiff families filed a complaint seeking a declaration that Fla. Stat. § 63.042(3) violates the equal protection clause, and as to the Loftons and Houghtons, the due process clause as well. The complaint also asked for permanent injunctions. R-1-Complaint.

The State of Florida moved to dismiss the complaint under Fed.R.Civ.P. 12(b)(6), arguing that the families lacked standing and that the complaint failed to state claims for relief. R-24-Motion to Dismiss Complaint. The district court granted the State's motion in part, holding that all the plaintiffs except Lofton lacked standing because they had not submitted adoption applications. The court dismissed their claims, without prejudice to refiling. R-49-Order. After Houghton, Smith and Skahen unsuccessfully attempted to adopt, they filed an

Amended Complaint. R-52-Amended Complaint.[3] The State again moved to dismiss, again asserting lack of standing and failure to state claims for relief. R-55-Motion to Dismiss First Amended Complaint. The district court denied that motion as applied to the claims of Lofton, Houghton, Smith, Skahen, and the children John Doe and John Roe. R-76-Order.[4]

After discovery, the State moved for summary judgment. R-117. The State argued that none of the plaintiffs had standing. The State also argued that, as a matter of law, banning lesbians and gay men from applying to adopt could rationally be thought to advance two State interests: 1) expressing its disapproval of homosexuality, and 2) the best interests of children. R-117-Defendants' Motion for Summary Judgment ("MSJ"), at 12-20. Finally, the State argued that there is no fundamental right to adopt, and even if the Loftons and the Houghtons did have constitutionally protected family relationships, those relationships were not harmed by the adoption ban. R-117-MSJ, at 7-10.

The plaintiffs responded, objecting to some of the evidence offered by the State and offering their own. R-128-Objections; R-129-Response; Tab B, R-130-

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[3] Angela Gilmore did not apply to adopt, so she did not join the amended complaint.

[4] The Court dismissed the Bradleys for lack of standing.

Plaintiffs' Concise Statement of Material Facts ("Plaintiffs' Statement").[5] Plaintiffs argued that expressing disapproval of gay people is not a legitimate justification for discrimination. They said that in light of the facts established in the Joint Pretrial Stipulation and the other facts they offered in support of their opposition, no one could think uniquely banning lesbians and gay men from the pool of prospective adoptive parents could serve the best interests of children or any legitimate interest. Finally, the Loftons and the Houghtons agreed there is no right to adopt. However, they said, they would be able to show at trial that they had constitutionally protected relationships and that the State was treating them as if they did not, very much to their detriment. R-129-Response by Adult Plaintiffs, at 15-17; R-125-Response by Doe and Roe, at 1-2.

The district court granted the motion, dismissing plaintiffs' claims and entering a final judgment. R-143-Final Summary Judgment; R-142-Order Granting Final Summary Judgment ("SJ Order"). The court ruled that plaintiffs did have standing. On the equal protection claim, the court agreed that it was not proper for the State to express disapproval of lesbians and gay men through discrimination. However, the court said the families had not shown that it is not possible to think the ban would promote the best interests of children. As for the due process claim, the court held as a matter of law that Lofton as a foster parent

[5] A copy of Plaintiffs' Statement of Material Facts, required by S.D.Fla. Local Rule 7.5, is attached at Tab B.

and Houghton as a guardian could not establish constitutionally protected family relationships with the children they are raising. R-142-SJ Order, at 10-11.

Plaintiffs filed a Motion to Alter or Amend the Judgment under Fed. R. Civ. P. 59. R-144. They urged that the State had not argued that the Loftons and the Houghtons would be unable to show constitutionally protected relationships. Thus, plaintiffs had submitted neither legal arguments nor facts to show that they can prove protected relationships. They asked the court to accept their arguments and evidence in support of them.[6] They also argued that they had evidently not clearly explained their equal protection argument, and sought to clarify. The court denied the motion. R-155-Order.

Plaintiffs filed a timely notice of appeal. R-158. The State then filed a notice of cross appeal, R-160, which plaintiffs moved to dismiss.

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[6] Plaintiffs do not rely upon any of that evidence in support of their appeal of the equal protection ruling. They rely on it in one part of their appeal of the due process ruling (section II.B.2) to demonstrate what facts they would have offered had they been on notice there was any question about the permanency of their relationships.

C. Statement of facts

1. The families

a. The Loftons

In 1998, the Children's Home Society, the agency that placed foster children with Steven Lofton, created an award for outstanding foster parent of the year. The Society not only gave that first award to Steven Lofton and his partner, Roger Croteau, the Society named the honor the "Lofton-Croteau" award. Tab B, R-130-Plaintiffs' Statement, at 9.

When the Children's Home Society gave the award to Lofton, he had been a licensed foster parent for ten years. Over the years, he acted as a foster parent to 8 children who either had HIV or AIDS. Because caring for children with HIV is so demanding, the State of Florida insisted that Lofton give up his career as a pediatric AIDS nurse, and devote full time to the children. Tab A, R-124-Stipulation, ¶ 30; Tab B, R-130- Plaintiffs' Statement, at 8-9.

Although some of the children Lofton took care of were with him in temporary placements, four, all of whom he took in as infants, were not. Franke and Tracy are now 14.[7] Ginger died of AIDS in 1994, when she was six. The fourth child is John Doe, one of the plaintiffs in this case. John will be 11 in April. Tab B, R-130-Plaintiffs' Statement at 9. When John came to live with Steven and

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[7] These are the ages of the children now, adjusted from Plaintiffs' Statement, at 9, for the passage of time.

Roger at the age of two months, he was a very sick baby. At birth, he tested positive for HIV, and he had both cocaine and marijuana in his system. But John is also lucky. His tests for HIV later turned negative, and he remains negative. Tab A, R-124-Stipulation, ¶ 31; Tab B, R-130-Plaintiffs' Statement, at 9.

John, Franke and Tracy think of themselves as brothers and sister. They have lived virtually their entire lives with each other, and with Steven and Roger who are the only parents they have ever known. Tab A, R-124-Stipulation, ¶ 29; R-52-Amended Complaint, ¶ 8.

The State of Florida agrees that John and Steven have "significant emotional ties." Tab A, R-124-Stipulation, ¶ 36. Steven Lofton describes what that means better than anyone else could:

> John is my son. I am committed to caring for him and providing for all his needs. I have been his parent in every way. For example, every day, I wake him up in the morning and help him get dressed and ready to go to school; I help him with his homework when he comes home from school; we have a family dinner together every night, cooked by Roger; and we spend our evenings engaged in a variety of family activities. I take care of John when he is sick. I make sure all his vaccinations are up to date. I am a parent volunteer in John's class once a week and an active P.T.S.A. member. I try to expand his horizons by taking him on trips. I encourage him to pursue the positive, healthy activities that he enjoys, such as swim team and drama. I provide a child-friendly home. I include John's friends in our family, inviting them over for dinner and having them join us on family outings to the beach or park. Roger and I teach John household responsibilities such as yard work, car maintenance and cooking. I discipline him appropriately when he misbehaves. I hug and comfort him when he is upset. I teach

> him manners, respect and other values that I consider important. I make sure he is safe. He calls me "Dad."

R-145-Notice of Filing of Original Affidavits and Exhibits in Support of Plaintiffs' Motion to Alter or Amend the Judgment ("Rule 59 Exhibits"), Declaration of Steven K. Lofton ("Lofton Decl."), ¶ 11.

John became free for adoption in 1994, when he was three years old and his parents' parental rights were terminated. The State asked Lofton if he wanted to adopt John. He did, and he filed an adoption application. Some of the State caseworkers and supervisors and the District Administrator for the area wanted Lofton to adopt John. John's attorney *ad litem,* who has long represented him in his dependency case, also supports the adoption because Lofton has provided a nurturing environment for John, and John has thrived in his care. Nevertheless, Lofton's application was denied because of Fla. Stat. § 63.042(3). Tab A, R-124-Stipulation, ¶¶ 32-34; R-114-Defendants' Concise Statement of Material Facts ("Defendants' Statement"), Exh. 1, Lofton Dep., at 54-56, 60-61, 80-84; *Id.*, Exh. 12, Deposition of Timothy Arcaro, at 38-40; R-77-Answer to Amended Complaint, ¶ 11.

On June 21, 2001—after John had been with Lofton ten years—John's State caseworker called Lofton and told him she was looking for someone else to adopt John. She asked Lofton if he knew anyone who might be interested. Lofton's lawyer immediately asked for the State's assurance that John would not be

removed from his family until this case was over. The State refused, saying only that John would not be taken away until the State found someone else to adopt him. R-130-Plaintiffs' Statement, ¶ 19-21; Tab A, R-124-Stipulation, ¶ 40, 41.

b. The Houghtons

Doug Houghton is a critical care nurse, one who takes care of the sickest patients in a hospital. In 1994, he was working at a pediatric clinic where he began seeing John Roe, one of the plaintiffs in this case, as a patient. R-112/113-Deposition of Douglas E. Houghton, Jr., filed under seal ("Houghton Dep."), at 9-11,17-19; R-52-Amended Complaint, ¶ 18.

Shortly before Christmas, 1995, when John was just shy of four, his biological father told Houghton that he was unable to take care of his son, and asked Houghton to take him in. Houghton agreed, and he has been raising John ever since. R-112/113-Houghton Dep., at 21-22, 37; R-142-SJ Order, at 3; R-52-Amended Complaint, ¶ 20.

So that he could arrange for schooling, Houghton became John's legal guardian in March 1996. John's biological father has agreed to give up his legal status as a parent so that Houghton can adopt John. John's biological mother is dead. R-124-Stipulation, ¶ 27; R-142-SJ Order, at 3; R-112/113-Houghton Dep., at 24-26.

According to the district court, Houghton and John have a "deeply loving and interdependent relationship." It is, the court found, as close as the relationship between biological parents and their children. R-142-SJ Order, at 9.[8]

Houghton had a favorable adoption home study in May 2000, but the evaluator concluded that by law, Houghton would not qualify to adopt John because Houghton is gay. Tab A, R-124-Stipulation, ¶ 28.

c. The Smith/Skahen family

Wayne Smith and Daniel Skahen have lived together in a committed relationship for over 8 years. Smith, who is 45, is a lawyer in private practice. Skahen, 34, is a real estate broker. R-52-Amended Complaint, ¶ 27.

Smith and Skahen's home was licensed by the State of Florida as a Family Foster Home in January 2000. They received their license after completing a ten-week course and being recommended for licensing by a State case worker who conducted a home study. Since they received their foster care license, Smith and Skahen have provided foster care for various children. R-52-Amended Complaint, ¶ 28-29; R-142-SJ Order, at 4.

Smith and Skahen want to adopt. They applied, but they were denied because they are gay. R-124-Stipulation, ¶ 26; R-52-Amended Complaint, ¶ 30.

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[8] The district court made the same findings about Lofton and John Doe. *Id.*

2. Adoption in Florida

One of the primary purposes of Florida's adoption law is to provide all children who can benefit by it a permanent family life. However, there are not enough adoptive parents to take care of all the Florida children who need homes. Florida gives primary consideration to married couples and allows adoption by singles. Even though singles account for a quarter of adoptions in the State, over 3,400 children who are eligible for adoption are without homes. Many wait for years. 36% of children in State custody in Florida are in foster care for more than four years; almost 80% wait more than two years. Tab A, R-124-Stipulation, ¶ 14-16; R-114-Defendants' Statement, Exh. 13, DCF Adoption Manual, at 5-2, par. 2(a).

Like most states, Florida has a system for evaluating adoption applications on a case-by-case basis, to make sure that any individual adoption is in the best interests of the child. *See* Fla. Stat., ch. 63; *see also id.* § 63.142(4) (best interest standard). However, unlike any other state, Florida's law says that no person who is otherwise eligible to adopt may adopt if the person is lesbian or gay. Fla. Stat. § 63.042(3). No other group is categorically prohibited from adopting.[9]

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[9] Those convicted of certain violent felonies are not allowed to adopt children eligible for federal adoption assistance (Fla. Stat. § 435.045). This is required by the federal Adoption and Safe Families Act. R-131-Exhibits to Plaintiffs' Response to Motion for Summary Judgment, 2nd Declaration of Leslie Cooper, Exh. A, Deposition of Linda Radigan , at 94-95. But those felons are not categorically excluded from adopting other children. *Id.*

The State of Florida licenses lesbians and gay men as foster parents. The State Department of Children and Families ("DCF") also places children in long-term care with lesbian and gay foster parents. Tab A, R-124-Stipulation, ¶¶ 6, 7, 8, 29, 31.

Florida law allows lesbians and gay men to become guardians of children. DCF places children in the care of lesbian and gay guardians. And when it does that, it ceases any supervision of the family. Tab A, R-124-Stipulation, ¶¶ 9, 10, 11.

The State of Florida does not know of a single child who is now in foster care because of any harm associated with the lesbian or gay orientation of parents or caregivers. High ranking State child welfare officials are "unaware of any harms to children associated with having lesbian or gay parents." According to those officials there is "no child welfare basis for excluding lesbians and gay men from adopting." Tab A, R-124-Stipulation, ¶ 5; Tab B, Plaintiffs' Statement, ¶¶ 7, 8.

Substance abusers and people who engage in domestic violence pose serious physical and emotional dangers to children. The State is well aware of this. Parental substance abuse is so damaging to children that it plays a role in over half of the cases in which children are removed from their families in Florida. But while lesbians and gay men are categorically excluded from adopting, substance

abusers and people who engage in domestic violence are not. Tab A, R-124-Stipulation, ¶¶ 1, 3; R-130-Plaintiffs' Statement, ¶¶ 1,2.

When Fla. Stat. § 63.042(3) was enacted in 1977, the sponsor of the bill, Sen. Peterson, explained the purpose of the law: to send a message to lesbians and gay men that "we're really tired of you. We wish you'd go back into the closet." Tab A, R-130-Plaintiffs' Statement, ¶ 13.

D. Standard of review

Because summary judgment was entered against the plaintiffs, the facts here must be considered in the light most favorable to them. *Borg-Warner Leasing v. Doyle,* 733 F.2d 833, 835 (11th Cir. 1984). The evidence presented by plaintiffs must be accepted as true, *Beck v. Prupis,* 529 U.S. 494, 498, n.3 (2000), and any inferences to be drawn from the evidence must be drawn in the light most favorable to the plaintiffs. *Matsushita Elec. v. Zenith,* 475 U.S. 574, 588 (1986). An order granting summary judgment is reviewed *de novo*. *Mayo v. Engel,* 733 F.2d 807, 808 (11th Cir. 1984).

SUMMARY OF THE ARGUMENT

Equal Protection.

The State of Florida argues that its ban on adoption by otherwise eligible lesbians and gay men is rational as a matter of law because it can be thought to advance two purposes: 1) expressing the State's disapproval of lesbians and gay men, and 2) the best interests of children.

The first purpose is not legitimate at all. A state may not discriminate against any group to express its dislike for the group's members, even if that dislike is said to be based in morality.

Moreover, on the basis of the undisputed facts before the district court, no one could think the ban could advance the best interests of children by giving those in the State's care married mothers and fathers. Given the surplus of children waiting for homes and the shortage of married couples (or even singles) willing to adopt, no one could rationally think banning lesbians and gay men from adopting would put more children in homes with married couples.

Given the State's frank acknowledgment that lesbians and gay men pose no risk of harm to children, and its willingness to place children with lesbians and gay men permanently, it is impossible to credit the idea that the ban was adopted to promote child welfare. That idea is all the more ludicrous given the State's willingness to allow groups whom it believes threaten children to apply. The only

purpose the ban could possibly serve is the forbidden one: expressing the State's disapproval of lesbians and gay men.

Finally, the State is unable even to articulate a reason for categorically banning adoptions by lesbians and gay men–prospective parents it shows it trusts–while making a case-by-case evaluation of others who represent a threat to children. The State fails to do one thing equal protection always demands: articulate a reason for treating the disadvantaged class differently.

The district court should have denied that State's motion for summary judgment. Indeed, although the State and not the plaintiffs moved for summary judgment, the facts before the trial court were essentially undisputed. Therefore, this Court should direct judgment for the plaintiffs.

Due Process

Both foster parents and guardians are capable of forming real parent-child relationships with the children they raise. The Constitution protects those relationships, and the district courts' holding that it does not was error. Moreover, the evidence offered by the Loftons and the Houghtons makes it impossible to conclude that they would be unable to prove that they believed their families were permanent. They should be allowed to show at trial that their relationships are constitutionally protected.

The State of Florida denies the Loftons and the Houghtons the substantive and procedural protections the Constitution guarantees parents and children. Florida instead subjects their relationships to a system of statutes that accord them few, if any, rights. Florida insists they will be treated as parent and child only if the adults adopt the children, something which the State then forbids. This Catch-22 violates both due process and equal protection if those relationships are shown at trial to be constitutionally protected.

ARGUMENT

I. Florida's law banning eligible lesbians and gay men from applying to adopt violates the equal protection clause of the federal Constitution.

A. The equal protection clause does not allow Florida to discriminate against lesbians and gay men to express disapproval.

With refreshing candor, the State admitted in the court below what everyone knows to be the truth: Florida's ban on adoption applications from eligible lesbians and gay men was enacted so that the State could express its official "disapproval" of gay people (according to the sponsor of the bill, the law was designed to send this message to lesbians and gay men: "[w]e are really tired of you. We wish you'd go back into the closet"). R-117-MSJ, at 16-19; R-142-SJ Order at 14-15; *see also* Tab B, Plaintiffs' Statement, ¶ 13.

But passing a law that discriminates against a group of citizens to express dislike or disapproval of them is precisely what the equal protection clause of the U.S. Constitution does not allow. *U.S. Dep't of Agric. v. Moreno,* 413 U.S. 528, 534 (1973) ("[f]or if the constitutional conception of 'equal protection of the laws' means anything, it must at the very least mean that a bare congressional purpose to harm a politically unpopular group can not constitute a *legitimate* governmental interest.") (emphasis in the original); *Romer v. Evans*, 517 U.S. 620, 633-35 (1996). Laws that discriminate in order to hurt a group are sometimes described as driven by "animus," sometimes as driven by "negative attitudes," sometimes by "unease," "fear," "bias," or simple "unpopularity." *See, e.g.*, *City of Cleburne v. Cleburne Living Ctr., Inc.*, 473 U.S. 432, 448 (1985) ("negative attitudes"); *Palmore v. Sidoti*, 466 U.S. 429, 433 (1982) ("bias"); *O'Conner v. Donaldson*, 422 U.S. 563, 575 (1975) ("unease"); *Marks v. City of Chesapeake*, 883 F.2d 308, 312 (4th Cir. 1989) ("fear"); *Guitterez v. Mun. Court*, 838 F.2d 1031, 1042-43 (9th Cir. 1988), *vacated as moot*, 490 U.S. 1016 (1989) ("suspicion"), *Moreno,* 413 U.S. at 534 (unpopularity). What matters is not the descriptive language but the central idea, which is that a state may not adopt a classification "for the purpose of disadvantaging the group burdened by the law." *Romer,* 517 U.S. at 633.

The State of Florida insists that it may discriminate in order to express its dislike of lesbians and gay men so long as its "negative attitude" is based on

"morality." It attempts to tie the "disapproval" it expresses in its adoption law to what it says is the "disfavor" of gay people in the law generally, which it says dates from "Roman times." R-117-MSJ, at 17. But the "sodomy" laws which the State invokes applied not to gay people but to anyone who engaged in nonprocreative sexual intimacy. Nan Hunter, *Life After Hardwick,* Harv. C.R.-C.L. L. Rev., 533-536 (1992). That includes Florida's own sodomy law, which applied to and was enforced against heterosexuals as well as gay people. *See, e.g., Thomas v. State,* 326 So. 2d 413, 417 (Fla. 1975). The longstanding legal tradition on which the State relies was not a tradition of disfavoring gay people, but rather a tradition of disfavoring sexual intimacy not aimed at procreation.[10]

The more fundamental problem with Florida's argument, however, is that there simply is no "morality" exception to the equal protection clause. If there were, the guarantee of equal protection would mean little. For when states pass laws to express "disapproval" of a group of citizens, they typically say they are doing it to express a "moral" position. For example, states have argued that laws which discriminated to express disapproval of interracial relationships or disapproval of women working outside the home were supposedly based on the law of God. *Loving v. Virginia,* 388 U.S. 1, 3 (1967) (trial judge who sentenced

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[10] Until 1969, not a single state in the nation outlawed sodomy for same-sex couples only. William Eskridge, *Addison C. Harris Lecture,* 74 Ind. L.J. 1085, 1091 n. 28 (1998).

couple to 25 years for interracial marriage explains that God separated the races); *Bradwell v. Illinois,* 83 U.S. 130, 141 (1872) (Bradley, J., joined by Field and Swayne, JJ, concurring) (upholding refusal to admit women to practice law on basis of "divine ordinance"). But whatever the "moral" basis for either, as we now recognize, disapproval of neither interracial relationships nor women in the workplace is a legitimate justification for discrimination. *United States v. Virginia Military Inst.,* 518 U.S. 515, 550 (1996)*; Palmore,* 466 U.S. at 431-32. States have asserted that discrimination against unrelated individuals who live together and even discrimination against the mentally disabled is justified because it is aimed at preserving public morality. *See Moreno v. U.S. Dep't of Agric.* 345 F. Supp. 310, 314 (D.D.C. 1972) (federal assistance denied to communes in an attempt to advance morality by combating unconventional living arrangements) and *Pennsylvania Ass'n, Retd. Child. v. Commonwealth,* 343 F. Supp. 279, 294 (E.D. Penn. 1972) (mentally disabled treated as criminals); *see also Buck v. Bell*, 274 U.S. 200, 207 (1926). But discrimination for the purpose of expressing that "moral" disapproval is hardly legitimate. *Moreno,* 413 U.S. at 534-35 (invalidating statute because it was based on disapproval of hippies); *Cleburne*, 473 U.S. at 448 (law can not be upheld on the basis of "negative attitudes" about mental disability).

This is not to say that government cannot legislate to achieve things which it thinks morally good. *See, e.g., Berman v. Parker*, 348 U.S. 26, 32-33 (1954). It is to say most emphatically that government can not single one group of its citizens out for disfavor simply because it "disapproves" of them, and avoid the equal protection clause by saying that the disapproval is based in morality. *Moreno,* 413 U.S. at 534-35; *Romer* 517 U.S. at 634.

It is true that the Court in *Bowers v. Hardwick*, 478 U.S. 186, 196 (1986), said "the presumed belief of a majority of the electorate in Georgia that homosexual sodomy is immoral and unacceptable" was a legitimate purpose when Georgia's sodomy law was challenged under the due process clause. But the due process decision in *Bowers*, which goes to the trouble of explicitly pointing out that it decided no equal protection questions (*id.* at 196, n.8), can hardly be read to have silently overruled the Court's equal protection decisions in *Moreno*, *Palmore*, and *Cleburne*.[11] *See Stemler v. City of Florence,* 126 F.3d 856, 873 (6th Cir. 1997) ("[i]t is inconceivable that *Bowers* stands for the proposition that the state may discriminate against individuals on the basis of their sexual orientation solely out

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[11] Moreover, under due process, as under equal protection, disapproval of a group of people as opposed to disapproval of an activity is not a legitimate purpose. *See, e.g., O'Conner v. Donaldson*, 422 U.S. 563, 575 (1975). It is unlikely that the *Bowers* court meant to change that without discussion by using the ambiguous phrase "homosexual sodomy." Besides, Georgia, like Florida, disapproved not of "homosexual sodomy" but of sodomy regardless of who was involved. *See* former Ga. Code sec. 16-6-2 (invalidated in *Powell v. State*, 270 Ga. 327 (1998)).

of animus"). And any notion that it had could not survive the Court's decision in *Romer,* where the Court held that disapproval of gay people is not a legitimate purpose. *Romer* 517 U.S. at 633, 635; *see also id.* at 636 (Scalia, J, dissenting) (*Romer* "contradicts" broad reading of *Bowers*).[12]

Florida is not helped by recasting its claim of disapproval and saying that it seeks not to express its own disapproval of lesbians and gay men but rather to shield children of lesbians and gay men from the disapproval of others. As the Supreme Court held in *Cleburne*, 473 U.S. 432, negative attitudes are not a legitimate purpose, and it matters not whether the attitude belongs to the state or the state is deferring to the negative attitudes of others. In *Cleburne,* a city said that it refused a permit to a home for the mentally disabled not because the city objected to those who would live in the home, but because neighbors would. Rejecting that justification, the Court held that government can not avoid the requirements of equal protection by deferring to "the objections of some faction of the body politic." *Cleburne,* 473 U.S. at 448.

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[12] The Sixth Circuit in *Equality Foundation v. Cincinnati,* 128 F.3d 289, 301 (6th Cir. 1997), said in *dicta* that "community moral disapproval of homosexuality" would be a legitimate purpose for a charter amendment repealing sexual orientation nondiscrimination laws. However, the Court took great pains to make it clear that its holding rested on "conservation of resources" as a legitimate purpose "standing alone" and that the court thus found it "unnecessary" even to discuss morality as a purpose.

That principle applies with equal force to cases involving parents and children. In *Palmore,* 466 U.S. 429, the Supreme Court struck down a Florida state court decision denying custody to a woman in an interracial relationship on the basis that society disapproved of interracial relationships and would stigmatize her child. As the Court put it: "[p]rivate biases may be outside the reach of the law, but the law cannot, directly or indirectly, give them effect. *Palmore,* 466 U.S. at 433.

Florida says that since *Palmore* was about race, it is not in point here. It is true that Florida's deference to public disapproval of interracial relationships was at the heart *Palmore.* But as the Supreme Court has made abundantly clear, *Palmore's* condemnation of government capitulation to prejudice is not limited to cases involving race, and indeed applies to cases involving public disapproval of groups who are protected by rational basis review. In *Cleburne,* 473 U.S. 432, the Court explicitly held that classifications which disadvantage the mentally disabled are entitled only to rational basis review. *Id.,* at 442-446. Nonetheless, in rejecting the city's reliance on the "negative attitudes" of neighbors to refuse a permit to a home for the mentally disabled, the Court explicitly rested its ruling on *Palmore* and its holding there that government may base discrimination on neither its own negative attitudes nor the negative attitudes of others.

While the Supreme Court has yet to decide what level of review applies to

classifications that disadvantage lesbians and gay men, it is clear that it is nothing less than rational basis. *Romer*, 517 U.S. 620. Thus, bias and stigma directed at lesbians and gay men are no more a proper basis for different treatment than bias directed at race or mental disability. *See S.N.E. v. R.L.B.*, 699 P.2d 875, 879 (Alaska 1985) (unconstitutional to rely on social stigma attaching to mother's status as a lesbian when making child custody decision); *see also Romer,* 517 U.S. at 635; *Stemler*, 126 F.3d at 873-74.

Finally, discrimination designed to harm a group because the State dislikes its members does not become legitimate simply because the State says its goal is to pass its disapproval on to new generations in a kind of teaching by example. R-117-MSJ, at 17-19. Florida has a long tradition of morally disapproving of those who become intimate with members of other races, and of heterosexuals who become sexually intimate without marriage. *See McLaughlin v. Florida,* 379 U.S. 184 (1964) (Florida law made fornication a felony instead of a misdemeanor for interracial couples); *Palmore,* 466 U.S. at 431.[13] But Florida may no more seek to

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[13] The trial court in *Palmore* explained its decision to take custody of a child away from her mother in these words:

> The father's evident resentment of the mother's choice of a black partner is not sufficient to wrest custody from the mother. It is of some significance, however, that the mother did see fit to bring a man into her home and carry on a sexual relationship with him without being married to him. Such action tended to place gratification of her own desires ahead of her concern for the child's future welfare. This Court feels that despite the strides that have been made in bettering

teach its view by discriminating against people it dislikes because of the gender of those with whom they become intimate than it may by discriminating against people it dislikes because of the race of those with whom they become intimate. It may no more use discrimination to teach by example than Congress can use discrimination to teach its disapproval of "hippies." *Moreno,* 413 U.S. at 534; *see also Carey v. Population Serv.,* 431 U.S. 678, 715 (1977) (Stevens, J., concurring) (while state may teach, it may not attempt to persuade by inflicting harm).

Not by invoking the views of others, not by invoking morality, not by invoking a desire to teach, not by invoking any of these things can Florida transform what it has done–discriminate against gay people out of dislike–into something legitimate. Discrimination essentially for its own sake is "something the equal protection clause does not permit." *Romer,* 517 U.S. at 635. No amount of high-minded rhetoric can change that.

> relations between the races in this country, it is inevitable that Melanie will, if allowed to remain in her present situation and attains school age and thus more vulnerable to peer pressures, suffer from the social stigmatization that is sure to come.

B. Given the undisputed facts, no one could rationally think that categorically excluding lesbians and gay men alone from applying to adopt would achieve any legitimate goal.

Florida proposed one facially legitimate purpose which it said it sought to advance by blocking eligible lesbians and gay men from applying to adopt. That purpose is promoting the best interests of children. Florida says that purpose could at least be thought to be advanced by the ban because keeping gay people out of the pool of adoptive parents could be thought to make it more likely that children will be raised by a married mother and father. That, the State says, could be thought to be advantageous to their well-being. One could think, the State says, that homes with mothers and fathers are more stable, and will promote "proper gender identification." R-117- MSJ, at 15-16; R-142-SJ Order at 15-16.[14]

But for three distinct reasons, Florida's invocation of this purpose was not enough to justify summary judgment upholding the law, even under the deferential rational basis test.[15]

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[14] The State also argued placement with married couples would avoid the social stigma children would suffer if their parents are gay, an argument the district court accepted. R-117-MSJ, at 16. As explained above in section I.A., it is not legitimate for the government to discriminate against a group because society stigmatizes the group.

[15] Because plaintiffs should prevail even if the rational basis test applies, this Court need not decide whether the classifications involved here should be treated as "suspect," and subjected to one of the two more strict equal protection standards. *See Hopper v. Bernalillo County Assessor*, 472 U.S. 612, 618 (1985).

First, given the undisputed facts offered by plaintiffs in opposition to the State's motion for summary judgment, no one could rationally think that banning lesbians and gay men from the pool of prospective adoptive parents would increase the number of children adopted by a married mother and father. Second, given the undisputed facts offered by plaintiffs, it is impossible to credit the idea that this discrimination was aimed at achieving any legitimate purpose. Finally, the State has utterly failed to articulate any rationale for categorically excluding from the pool of adoptive parents lesbians and gay men, whom it concedes pose no threat of harm, while allowing into the pool those whom it knows pose a serious risk.

1. No one could rationally think excluding lesbians and gay men from the pool of adoptive parents would increase the chance children would be raised by married heterosexual couples.

The State says that the law can rationally be thought to get more children adopted by married mothers and fathers. But whether there is a conceivable rational basis for the classification in the statute is decided in light of the facts as they are known to the court, not in some theoretical vacuum. Even systems for taxing property, which are judged under an "especially deferential" form of rational basis review (*Nordlinger v. Hahn,* 505 U.S. 1, 11 (1992)) must be rational in reality and not just in theory. *Allegheny Pittsburgh Coal Co. v. Webster,* 488 U.S. 336, 343 (1989). Thus, as Chief Justice Rehnquist wrote for a unanimous

court in striking down a tax system that used two different methods for valuing property, even though a system might be aimed at finding the true value of all property, and even though it "theoretically"might be able to do that, it will nonetheless violate equal protection if in fact it results in widespread disparity. *Allegheny,* 488 U.S. at 343. The Court's decision in *Heller v. Doe* is to much the same effect. 509 U.S. 312, 321 (1993) (different systems for confining those who are mentally retarded and those who are mentally ill upheld because, reviewing evidence, Court finds claims of differences in ability to diagnose, potential for harm, and ways to treat have "a sufficient basis in fact"); *see also Id.* at 321 ("[t]rue, even the standard of rationality as we so often have defined it must find some footing in the realities of the subject matter addressed by the legislation"); *see also Moreno,* 413 U.S. at 536-539 (in practical effect, ban on unrelated households does not rationally prevent fraud in food stamp programs).

Here, the State and the plaintiffs agreed that over 25 percent of the adoption placements made in Florida are made to single people. Tab A, R-124-Stipulation, ¶ 24. In Miami-Dade, that number is over 40 per cent. *Id.*, ¶ 25. The Florida adoption statute expressly permits adoption by single people, Fla. Stat. § 63.042(2)(b). Florida law allows adoption by singles without regard to whether they plan or hope to marry or even partner. Fla. Stat. § 63.042.

In fact, after giving primary consideration to married couples, R-114-Defendants' Statement, Exh. 13, DCF Adoption Manual, p.5-2 , ¶ 2(a), Florida actively *recruits* single individuals to adopt. R-145-Rule 59 Exhibits, 4th Declaration of Leslie Cooper, Exh. 1, Deposition of Carol Hutchison, at 118-19. Nonetheless, despite all the recruitment and all the adoptions by single parents that result, there remain over three thousand children eligible for adoption with no placements at all. Many will spend much of their childhood in foster case (over 80 per cent will be in foster care more than two years and over a third more than four years). Tab A, R-124-Stipulation, ¶¶ 15, 16; Tab B, Plaintiffs' Statement, ¶ 12.

Looking at the stipulated facts, no one could rationally think that keeping lesbians and gay men out of the pool of prospective parents will somehow *create* more married couples (or even more heterosexual singles) willing to adopt. Even at its most creative, the State has been unable to imagine a scenario in which that would occur. No one could rationally think excluding gay people from the pool will do anything other than what it does: keep children in foster care, often bouncing from placement to placement, with no home at all. Tab A, R-124-Stipulation, ¶¶ 16, 17; Tab B, Plaintiffs' Statement, ¶ 12.

What is true in general is true of the plaintiffs in this case. Steven Lofton didn't push aside any married heterosexual couples eager to give a loving home to

the four children he took in and raised. He stood alone. The biological father of Doug Houghton's son didn't choose Doug over a crowd of married heterosexual couples who wanted to raise the child. He chose Doug because Doug alone was willing to take in his son.

No one could think that banishing gays will bring more married couples into the pool. Since no one could rationally think that the classification would advance the State's interest, the classification is simply irrational and therefore invalid. *See, e.g., Hooper v. Bernalillo County Assessor,* 472 U.S. 612, 619 (1985) (no one could rationally think that a law passed in 1983 would encourage people to move into the state by May 8, 1976).

2. Given the undisputed facts, it is impossible to think that Florida's ban on adoption by lesbians and gay men was intended to do anything other than express disapproval of lesbians and gay men.

It is simply not possible to credit the State's claim that it is rational to think Florida

has banned lesbians and gay men from applying to adopt in order to promote the well-being of children.

The State of Florida does not know of a single child who is now in foster care because of any harm associated with the lesbian or gay orientation of parents

or caregivers. Tab A, R-124-Stipulation, ¶ 5. Responsible State welfare officials are "unaware of any harms to children associated with having lesbian or gay parents." Tab B, R-130-Plaintiffs' Statement, ¶ 7. Those officials admit there is "no child welfare basis for excluding lesbians and gay men from adopting." Tab B, R-130-Plaintiffs' Statement, ¶ 8.

Florida's actual use of lesbians and gay men as parents makes an even stronger statement. The State not only places children in foster care with lesbian and gay parents; it places them in long-term foster care, which can in effect result in placement for an entire childhood, as it has in this case with the Loftons. Tab A, R-124-Stipulation, ¶¶ 6, 7, 8, 29, 31; Tab B., R-130-Plaintiffs' Statement, at 9.

Moreover, the State permits lesbians and gay men to become guardians of children, as Doug Houghton did. DCF actually places children in the care of lesbian and gay guardians. When it does, it ceases any supervision of the family. Tab A, R-124-Stipulation, ¶¶ 9, 10, 11.

In short, in both word and deed, the State of Florida has made it perfectly clear that lesbians and gay men represent no threat to children. The State has made it perfectly clear that children in Florida need the care lesbian and gay parents can provide. The State, quite sensibly, uses them to provide that care. It simply is not possible to credit the idea that Florida bans lesbians and gay men from applying to

adopt in pursuit of child welfare-- or more specifically, "stable homes" and "proper gender identity" -- while it uses other methods to place children with lesbian and gay parents permanently.

Other provisions of the State's adoption laws make any connection between the ban on gay parents and child welfare seem even more fantastic. For while the State bans the very lesbians and gay men it relies on to parent from adopting, it allows individuals whom it knows represent a threat to the safety and welfare of children to apply to adopt. Parental substance abuse and violence play a role in over half the cases in which children are removed from their families. Parental substance abuse alone was a factor in removal for over 57% of children in foster care. Tab B, R-130-Plaintiffs' Statement, ¶ 2. Unsurprisingly, high-ranking Florida child welfare officials agree that parental substance abuse and violence pose serious dangers to children. *Id.*, ¶ 1. Yet there is no ban on adoption applications from those with substance abuse problems or a history of domestic violence. Tab A, R-124-Stipulation, ¶¶ 1, 3.

It is simply beyond comprehension that, in the name of child welfare, the State bans the lesbians and gay men it trusts to parent from applying to adopt while permitting those whom it knows pose perhaps the greatest threat to the physical and mental safety of children to apply.

The State's principal answer to this is to insist that as long as it invokes a legitimate purpose in support of its discriminatory rule, the court must accept it. But that is simply not true. As the Supreme Court held in *Romer*, 517 U.S. 620, even a classification that is conceivably supported in some way by purposes that are legitimate will be struck down if the classification is in fact far removed from the purpose offered to justify it. *Accord Allegheny*, 488 U.S. at 343-46.

In *Romer*, the Court struck down "Amendment 2," a state constitutional amendment that prohibited the passage of civil rights laws that would protect lesbians, gay men and bisexuals from discrimination on the job, in housing, and in public accommodations. *Romer,* 517 U.S. at 623. The primary interests the State offered in support of the classification—respect for the freedom of association of others and conserving resources to fight race and sex discrimination—were unquestionably legitimate.[16] *Romer*, 517 U.S. at 635. Indeed, the first represents a value enshrined in the Constitution, and the second has long been acknowledged to be a legitimate interest. *See Shapiro v. Thompson* 394 U.S. 618, 633 (1969).

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[16] The State argued that part of this freedom of association involved conveying disapproval of gay people. *See Romer v. Evans,* Brief of Petitioners, 1995 WL 310026, at 45-46. In the trial court, the State argued that Amendment 2 was aimed at "promoting the physical and psychological well-being of Colorado children," an argument it abandoned on appeal. *Romer v. Evans,* 882 P.2d 1335, 1339-40 (Colo. 1994).

The Supreme Court nonetheless struck "Amendment 2" down. The Court said Amendment 2 defied the "conventional and venerable" principles of the rational basis test because the classification swept so far beyond the State's stated purposes that the Court found it "impossible to credit them." Being unable to credit those purposes, the Court could only conclude that Amendment 2 drew its classification just to make lesbians and gay men "unequal," something equal protection forbids. *Romer,* 517 U.S. at 635-36.

Similarly, in *Allegheny,* 488 U.S. at 343-46, the Court struck down a system of measuring property value despite the State's insistence that its use of two methods was designed to ensure the system measured true market value. The Court agreed that finding true market value was a legitimate purpose, and it allowed that theoretically, the system could work. It struck the system down because in fact it resulted in widespread disparities in valuation. *Id.* at 343-46.

If the State's rationales were beyond crediting in *Romer* and not sustainable in fact in *Allegheny*, they are simply beyond the pale here. It can not be plausibly thought to be in the best interests of children to deny them potential adoptive parents, and then put them in relationships which the State itself describes as "de facto permanency" with the very same individuals the State spurns as potential adoptive parents. R-24-Defendants' Motion to Dismiss, at 10. It most emphatically

can not be in the best interests of children to deny them the chance of adoption by those to whom the State itself turns for parenting, while allowing adoption by those the State itself identifies as the greatest threat to children. The only possible conclusion is that this law was adopted to achieve the one goal which it manifestly accomplishes, discriminating against lesbians and gay men. *See, e.g., Romer,* 517 U.S. at 635. That, as explained above, the equal protection clause does not permit. *Id.; Moreno,* 413 U.S. at 537-38.

3. The State failed to articulate any rational basis for denying children lesbian or gay parents who pose no threat to their well-being, while allowing those whom the State believes pose a serious threat to children to apply to adopt.

Finally, Florida's failure to explain why it categorically excludes lesbians and gay men from applying to adopt while it provides a case-by-case analysis for those who engage in substance abuse and violence is by itself grounds to strike the law. For the most fundamental requirement of equal protection is that the State explain why it has singled out one group–in this case lesbians and gay men–and not others who pose the same or a greater threat to the State's asserted interests.

In *City of Cleburne v. Cleburne Living Center*, 473 U.S. 432 (1985), the Supreme Court invalidated the application of a special use permit requirement to a

home for the mentally disabled. The city offered seven explanations for the requirement: 1) neighbors did not want such homes located near their property; 2) nearby high school students might harass residents of the home; 3) the location was in a 500-year flood plain; 4) potential city liability for acts of the residents of a home; 5) maintaining low-density land uses in the neighborhood; 6) avoiding congestion in neighborhood streets; 7) avoiding fire hazards. *Cleburne,* 473 U.S. at 448-50.

The Court held that the first two purposes were improper reasons for singling out those who would live in the home. The first amounted to deference to the dislike of others, the second, capitulation to it; both of which the court said equal protection does not allow. *Cleburne,* 473 U.S. at 448-449.

None of the five remaining purposes were improper. However, the Court said that none explained the city's decision to single out this home. As the Court put it:

> [T]his concern with the possibility of a flood, however, can hardly be based on a distinction between the Featherston home and, for example, nursing homes, homes for convalescents or the aged, or sanitariums or hospitals, any of which could be located on the Featherston site without obtaining a special use permit.

Cleburne, 473 U.S. at 449. The Court used similar reasoning to dispatch the remaining rationales. While any might explain in isolation why the group home for

the mentally disabled needed special permission, none explained why uses that implicated the same interests weren't subject to the same process. *Cleburne*, 473 U.S. at 449-50; *see also Bacon v. Toia,* 648 F.2d 801, 809 (2d Cir. 1981).

Lesbians and gay men on the one hand, and abusive parents on the other, are not similarly situated. Gay people pose far less of a threat to the State's interest, even according to the State. The most the State will say against lesbian and gay parents is that one could think they are less likely than heterosexual couples to provide optimal homes. At the same time, the State admits that adults who engage in violence and substance abuse pose all too real a threat to children. So here, the justification for the classification must explain why the State has singled out for far more severe treatment a group that poses no threat, while being open to a group that poses a dire threat. *See, e.g., Stemler v. City of Florence* 126 F.3d 856, 873 (6th Cir 1997) (violation of equal protection to arrest lesbian for intoxication but not "far drunker" heterosexual because of sexual orientation); *see also Edwards v. South Carolina,* 372 U.S. 229, 232-33 (1963); *Cox v. Louisiana,* 372 U.S. 536, 550 (1965) (violation of the first amendment to arrest peaceful demonstrators to avoid possibility of spectator violence).

The State says that it uses the ban to get stable homes. R-117-MSJ, at 15-16. But Florida places its children, often in effect permanently, in unsupervised homes

with lesbians and gay men. Tab A, R-124-Stipulation, ¶¶ 6-11. It concedes, as it must, that substance abusers are a threat to children, and that children often have to be removed from their homes. Tab B, R-130-Plaintiffs' Statement, ¶¶ 1, 2. The State never explains why, supposedly in the name of stability, it bans adoption applications from the lesbians and gay men it trusts with its children, but relies on a case-by-case system with substance abusing parents.

It is not clear what the State means by "proper gender identification." If the State means perpetuating traditional ideas about gender roles, it would not be a proper purpose at all. *See, e.g., Mississippi Univ. for Women v. Hogan,* 458 U.S. 718, 729-730 (1982). Whatever the State thinks gender identification is, it obviously is not serious enough to keep defendants from placing children with lesbian/gay foster parents or guardians in what amount to permanent, unsupervised placements. Tab A, R-124-Stipulation, ¶¶ 6-11. More to the point, the State never explains why what it hopes to achieve in terms of "gender identification" is important enough to justify a categorical ban on adoption by lesbians and gay men, while case-by-case analysis is adequate to handle the all too real threat to well-being posed by abusive parents. Under *Cleburne,* that failure to articulate a rationale for different treatment is, by itself, fatal.

C. This Court should direct judgment for the plaintiffs.

Since it is simply not rational to think the ban will place more children in homes with married parents, and since it is plain that the ban was adopted solely to express disapproval of lesbians and gay men, it was improper for the district court to grant summary judgment to the State.

Indeed, while the families did not move for summary judgment, this court may direct the entry of judgment for them. The State has stipulated to all of the facts about the surplus of children and the shortage of prospective married (and single heterosexual) adoptive parents. Tab A, R-124-Stipulation, at 4-6. Most of the facts about the State's use of lesbians and gay men to parent, and its recognition about the dangers abusers pose to children are also stipulated. *Id.* The remainder come from evidence proffered by the families in response to the State's motion for summary judgment. That evidence has never been objected to, and was contradicted neither on the original motion nor when the families moved to alter or amend. Tab B, R-130-Plaintiffs' Statement, at 2-3. Thus, on the equal protection question, this case is essentially before the court on uncontested facts. Even though the families did not seek summary judgment, this Court could enter judgment here if those facts establish that they are entitled to judgment. *Fabric v. Provident Life,*

115 F.3d 908, 914-15 (11th Cir. 1997). Since those facts show that no one could think Florida's law rationally advances a legitimate purpose, they are.

II. The Loftons and the Houghtons can show they have constitutionally protected family relationships and that the State refuses to recognize those relationships in violation of due process and equal protection.

As the Supreme Court recently observed in *Troxel v. Granville,* 530 U.S. 57, 65 (2000), the parent-child relationship is perhaps the oldest of the fundamental liberty interests recognized by the Supreme Court. Since at least *Prince v. Massachusetts*, 321 U.S. 158 (1944), the Supreme Court has recognized that it is not biological parents alone whose interest in their relationships with their children is entitled to constitutional protection.[17] The critical core of the family interest protected by the due process clause, according to the Court, is the emotional bond that develops between family members as a result of shared daily life. *Lehr v. Robertson,* 463 U.S. 248, 261 (1983). As the Court put it in *Smith v. Organization of Foster Families for Equality and Reform* , 431 U.S. 816, 844 (1977):

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[17] The Supreme Court treated the relationship between Sara Prince and Betty Simmons as a constitutionally protected parent-child relationship, acknowledging that Prince was Simmons' "custodian" (and aunt). *Prince,* 321 U.S. at 159, 169; *Smith v. Organization of Foster Families for Equality and Reform*, 431 U.S. 816, 843, n. 49 (1977) (citing *Prince* as example of parental due process rights extending beyond biological parents).

> [T]he importance of the familial relationship, to the individuals involved and to the society, stems from the emotional attachments that derive from the intimacy of daily association, and from the role it plays in "promot[ing] a way of life" through the instruction of children . . . as well as from the fact of blood relationship.

See also Moore v. City of East Cleveland, 431 U.S. 494, 504-506 (1977).

There is no dispute here that both the Loftons and the Houghtons have the kind of emotional bond that parents and children develop in daily life. Indeed, the district court found that their "deeply loving and interdependent" relationship was every bit as close as those between biological parents and children. R-142-SJ Order at 9.

The district court nonetheless granted summary judgment against both families, finding, as a matter of law, that since Lofton was a foster parent and Houghton a guardian, they had no expectation their families would continue, and thus no constitutional protection. Apparently in the alternative, the court held that there is no fundamental right to adopt.

A. The Loftons and the Houghtons should have been allowed to show they have constitutionally protected family relationships.

1. Foster and guardianship relationships are not excluded from constitutional protection as a matter of law.

The district court rejected the claim of Lofton and Doe, and Houghton and Roe, that their families merit constitutional protection because it found that "Lofton's foster family relationship and Houghton's guardianship relationship do not warrant justified expectations of family unit permanency." R-142-SJ Order, at 10. The court appears to have concluded as a matter of law that foster family and guardian/ward relationships are *per se* excluded from constitutional protection, holding that "while this Court recognizes the need, importance and value of foster parent and legal guardian relationships, it cannot extend to those relationships the liberty interest granted to biological parents in the care, custody and control of their children." *Id.*

But in *Smith v. Organization of Foster Families for Equality and Reform,* 431 U.S. 816, 845 (1977), the Supreme Court expressly recognized the possibility that foster family relationships could merit constitutional protection. The case involved New York foster parents' claims that they had liberty interests in their families' integrity, and that they were therefore entitled to due process

protections. The Court ultimately refrained from deciding whether those particular foster families had such protected relationships, holding that even assuming they did, New York's procedures were adequate. *Smith*, 431 U.S. at 847. But the Court made it clear that some foster families could be entitled to constitutional protection, and offered an example of such a family:

> At least where a child has been placed in foster care as an infant, has never known his natural parent, and has remained continuously for several years in the care of the same foster parents, it is natural that the foster family should hold the same place in the emotional life of the foster child, and fulfill the same socializing functions, as a natural family. For this reason, we cannot dismiss the foster family as a mere collection of unrelated individuals.

Id. at 844. These are precisely John Doe's circumstances. Tab A, R-124-Stipulation, ¶ 31.

In *Smith,* after affirming the general principle that emotional attachments are the touchstone of the liberty interest in family integrity, the Court explained that for foster families, constitutional protection also depends on two additional factors. *Smith*, 431 U.S. at 845-46. The first is the parties' expectations about continuation of their relationships. Since foster family relationships have their origins in state law and contractual arrangements with the state, the Court explained, it is appropriate to ascertain from those laws and contracts the parties' expectations about permanency. *Id.* at 845-46. The second consideration is whether there is a biological parent with a competing constitutional interest. *Id.* Thus, where a foster

parent lacks a reasonable expectation of family continuity and/or there is a biological parent with a competing constitutionally protected relationship, the foster family merits less constitutional protection.

Smith therefore calls for a case-by-case analysis of emotional attachments, the details of foster parents' expectations of a continuing relationship, and the existence of competing constitutional rights. That analysis will determine whether and to what extent a particular foster family has a constitutionally protected interest in family integrity. The analysis must include consideration of the State's actions and interactions with the foster parents, which contribute to the foster parents' expectations about permanency. *See People ex rel. A.W.R.*, 17 P.3d 192, 196-97 (Colo. App., 2000) (holding that there could be a liberty interest in a foster family relationship when the State abandoned goal of reunification with biological parent); *see also Drummond v. Fulton County Dep't of Family & Children's Servs.*, 563 F.2d 1200, 1207 (5th Cir. 1977) (each situation "will have to be addressed on a case by case basis."); *Alber v. Illinois Dep't of Mental Heath and Developmental Disability*, 786 F. Supp. 1340, 1367 (N.D. Ill. 1992) ("Lower courts are thus free, within the limits marked by the Court [in *Smith*] to determine that a particular non-nuclear or non-biological family merits constitutional protection."); *Sherrard v. Owens*, 484 F. Supp. 728, 739-40 (W.D. Mich. 1980) (imposing general guidelines to apply to all foster family relationships "would not only be unwise, but foolhardy" since "no two families are alike").

The district court did not conduct the case-by-case analysis *Smith* requires for either of these families. Had it done so, it would not have been able to conclude that they could not demonstrate constitutionally protected relationships. *See* below, pp. 50-51. Instead, the District court held as a matter of law that neither foster families nor guardians can ever have enough of an expectation of permanency to be protected by the Constitution. R-142-SJ Order, at 10-11. That ruling is in irreconcilable conflict with *Smith*. If the District court were correct, no foster family could ever establish a constitutionally protected relationship, but *Smith* expressly recognized that foster families could. *Smith*, 431 U.S. at 844. Indeed, courts since *Smith* have recognized that some foster families can and do have such relationships. *See Brown v. County of San Joaquin*, 601 F. Supp. 653, 664-665 (E.D. Cal. 1985) (three-year foster parent-child relationship constitutionally protected); *Berhow v. Crow*, 423 So. 2d 371 (Fla. App. 1982) (six-year foster family relationship protected); *cf. In the Interest of R.K.W.*, 689 S.W.2d 647, 650-651 (Mo. App. 1985) (relying on *Smith* to hold that state-supervised custodians who raised child for the first four years of her life had right to hearing before removal).

The district court's ruling regarding the Houghton family is particularly difficult to understand. The court ruled that as a matter of law, guardians can never have a sufficient expectation of permanency to have a protected liberty interest. That ruling purports to build on *Smith's* holding that expectations derived from the government's rules and behavior are a factor in determining the scope of

constitutional protection when the parent-child relationship begins with a state-created family. R-142-SJ Order, at 9; *see also Smith,* 431 U.S. at 845. But Doug Houghton's relationship with his son was not created by the State of Florida, it was created by the boy's biological father, who delivered the boy to Houghton and asked him to care for him. R-112/113- Houghton Deposition, at 21-22. It is true that a few months after John Roe came to live with Houghton, Houghton asked the Florida courts to grant him a guardianship, which they did. R-124-Stipulation, ¶ 27. But the State did not "place" John Roe with Houghton, and it was not a "partner" in the creation of the relationship.[18] When a relationship is not state-created, it is far from clear under *Smith* that state rules and representations about continuity have anything to do with the constitutional status of the relationship.

There are circumstances in which foster families and other nonbiological families are fully protected by the due process clause of the Constitution. *See Smith,* 431 U.S. at 844; *Alber,* 786 F. Supp. at 1366-1375 (couple who cared for mentally retarded children as legal guardians for several years established they had constitutionally protected family relationships); *see also Prince*, 321 U.S. at 159, 169 (holding that child and her "custodian" (and aunt) had constitutionally

[18] The district court's finding that the State and DCF were "partners from the outset" in the creation of Houghton's relationship with his son (R-142-SJ Order, at 10-11) is without support in the record.

protected relationship). The district court should not have precluded the Houghtons and the Loftons from proving theirs are among them.[19]

2. The State did not establish beyond dispute that the Loftons and the Houghtons will be unable to show reasonable expectations of family continuity.

Because the district court's decision dismissing the fundamental rights claims refers to the Loftons and the Houghtons and how their families were formed, there is at least a suggestion that the court's decision was based on the conclusion the State had shown that these families had no evidence of an expectation of permanency. *See* R-142-SJ Order, at 10-11.

However, the district court could not properly have ruled that the State established that the families would unable to show an expectation of permanency. The State offered no evidence that the families had no expectation of permanency. *See* R-117-MSJ, at 7-10. It never even said that the families lacked evidence of such an expectation. *Id.* As the party seeking summary judgment, at the very least the State had the obligation to argue to the district court that there was no evidence to support any claim of expectation by the families. *Celotex Corp. v. Catrett,* 477 U.S. 317, 325 (1986) (while moving party may not be obliged to produce evidence, it must at least show there is an absence of evidence to support the nonmoving party's case).

[19] There is no dispute that there are no competing interests from biological parents with either family.

Moreover, while district courts can grant summary judgment *sua sponte*, the party against whom it is entered must be "on notice that she must come forward with all of her evidence." *Burton v. City of Belle Glade,* 178 F.3d. 1175, 1203 (11th Cir. 1999) (quoting *Celotex,* 477 U.S. at 326). As one court put it,

> The party against whom summary judgment is entered must have notice that the court is considering dropping the ax on him before it actually falls . . . . [T]he entry of summary judgment is inappropriate when it takes a party by surprise.

Goldstein v. Fidelity and Guaranty Ins. Underwriters, Inc., 86 F.3d 749, 750 (7th Cir. 1996). Summary judgment "is appropriate only when the facts are fully developed and the issues clearly presented." *Anderson v. American Auto. Ass'n.*, 454 F.2d 1240, 1242 (9th Cir. 1972) (emphasis added).

Once the families received the district court's initial ruling, and perceived the suggestion that the Court might have thought they had no evidence of an expectation of permanency, they quickly demonstrated that there is ample evidence of such an expectation.[20] The families made a Motion to Alter or Amend the

[20] The children likely had no need to offer further evidence. The record before the Court showed that the State placed John Doe with Lofton when he was two months old and left him there for the next 10 years, allowing him to bond with Lofton as a parent. R-142-SJ Order, at 2, 9-10. The only inference one could possibly draw from that, in the absence of any conflicting evidence from the State, is that Doe expected he was living with his family. The record also showed that John Roe was placed in Doug Houghton's care by his biological father, that he has been raised by Houghton for most of his life, that he has become as close to Houghton as he would be to a biological parent and that his biological father wants Houghton to adopt him. R-142-SJ Order at 3; R-112/113-Houghton Dep., at 21-26. Again, the only inference one could draw from this evidence is that John Roe expects to be

Judgment under Fed. R. Civ. P. 59, telling the Court that they did not understand the State to have questioned the sufficiency of their evidence in its motion, and offering their evidence. R-144-Motion to Alter or Amend, at 2-6.

The Loftons offered evidence not only that Lofton and John Doe long had a reasonable expectation of family permanency, but that the State of Florida had created and fostered that expectation. For example, the Loftons offered evidence that at least by 1996, the State had acknowledged that Doe's placement with Lofton was "permanent," and made that known to Lofton. R-146-Rule 59 Exhibits, Lofton Decl., ¶ 17, and Exhs. 3-5. The Loftons offered evidence that the State chose not to recruit adoptive parents for Doe so that Doe could remain with Lofton. *Id.,* ¶ 18, and Exh. 6 thereto. The Loftons offered evidence that the State even gave Lofton permission to relocate to Oregon with Doe, finding that it was in Doe's "manifest best interest" to go with his family. *Id.*, ¶ 19, and Exh. 8 thereto. The Loftons showed that while Doe's permanency goal had been adoption, the State changed that goal to long-term foster care with Lofton, and advised Lofton that this change was made "in order to allow you to keep [John] on a long-term/permanent basis until you are allowed to adopt." *Id.*, ¶ 20, and Exhs. 10-11 thereto.

The Houghtons offered evidence that John's biological father asked Doug Houghton to take in his son and take care of him, and that Doug agreed to do so.

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raised by Doug Houghton.

They also offered evidence that John's biological father had agreed to surrender his rights as a parent so that Doug could adopt him. They offered evidence that John's mother is dead. They offered evidence that Doug has always understood that as long as he took care of John, they would remain together. R-145-Rule 59 Exhibits, Houghton Decl., ¶¶ 2-4, 8.

The evidence offered by the Loftons and the Houghtons was certainly adequate to negate any impression that the families could not show a reasonable expectation of permanency. However, the district court rejected it, holding that the Motion for Summary Judgment had given the families fair notice that the sufficiency of the evidence was in issue. R-155-Order, at 2. The Court relied solely on the italicized portion of the following passage from the Motion as fair notice the State was attacking the evidentiary basis for the families' expectation of permanency:

> Moreover, emotional attachment alone does not give right [sic] to constitutional protection as a "family": [sic] Although "family" is broader than just the social units that make up the archetypal nuclear family, *the Constitution protects only those social units that share an expectation of continuity justified by the presence of basic features traditionally recognized as characteristics of a family. Wooley v. City of Baton Rouge,* 211 F.3d 913 (5th Cir. 2000).
>
> Even assuming, however, that any set of Plaintiffs has a constitutionally protected interest in living together, that interest would at most require the State of Florida or DCF to follow appropriate procedures in the event it were to remove or separate them, ...

R-117-MSJ, at 9.

Celotex relieves a party moving for summary judgment of the responsibility to produce *evidence* showing the absence of a genuine issue of material fact. But it insists that a party who does not offer that kind of evidence can prevail only by "'showing—that is, pointing out to the district court—that there is an absence of evidence to support the nonmoving party's case." *Celotex,* 477 U.S. at 323-325. The passage quoted above never says plaintiffs will be unable to prove an expectation, never says plaintiffs lack evidence or that the evidence is flawed; in fact it never mentions evidence at all. Instead, after asserting that an expectation is required, it jumps to the assumption that the families *have* constitutionally protected relationships. This is hardly sufficient notice under *Celotex*.

Given the lack of fair notice, it would have been wrong for the district court to base its ruling on any finding that plaintiffs could not show they had an expectation of permanency. If it did so, it would have been wrong to exclude the evidence the families offered on their Rule 59 Motion, once they understood that the issue might have been raised. *See, e.g.*, *Burton,* 178 F.3d. at 1204. Considering this evidence in the light most favorable to the families, it would be improper to enter summary judgment on the basis that they can not show any expectation of permanency. *See Matsushita Elec. v. Zenith,* 475 U.S. 574, 588 (1986).

B. The State refuses to give the families the protections to which they are entitled if they show their relationships are constitutionally protected.

1. Florida refuses to give the families the substantive and procedural protections required by due process.

The relationship between parent and child is "far more precious than any property right." *M.L.B. v. S.L.J.,* 519 U.S. 102, 105 (1996) (quoting *Santosky v. Kramer,* 455 U.S. 745, 758-759 (1982)). The Constitution places significant substantive and procedural limits on state interference with the relationship. Thus, the State may not terminate a parent-child relationship without "powerful countervailing" reasons, *Stanley v. Illinois,* 405 U.S. 645, 651 (1972), and it may not do so without very significant procedural protections, *M.L.B.,* 519 U.S. at 119-124.

For the parent-child relationships it recognizes, Florida complies with the Constitution. It provides thorough process. For example, a parent-child relationship cannot be ended without a full evidentiary hearing before a judge, applying all the civil rules of evidence. Fla. Stat. § 39.809. Florida also puts strict limits on the circumstances in which state interference in parent-child relationships is allowed. For example, a parent-child relationship cannot be ended unless it threatens the life, safety or well-being of the child, or the parent has abandoned the child or, under certain circumstances, is incarcerated. Fla. Stat. § 39.806. Even a

temporary removal from a parent's custody requires probable cause to believe the child has been abused, neglected or abandoned. Fla. Stat. § 39.401(b). Immediate notice to the parents and a prompt hearing is required. *See, e.g.*, Fla. Stat. § 39.402.

However, the State insists that any parent and child who are not biologically related go through an adoption to be treated as parent and child. *See* Fla. Stat. § 63.172(c). The only way it will treat the Loftons and the Houghtons as parent and child is if the adults adopt the children. But that is precisely what the law challenged in this case does not permit them to do. Fla. Stat. § 63.042(3). Thus, Doug Houghton can have his relationship with his son legally destroyed if any of a wide variety of individuals files a petition to end it, and a court thinks it would be in his son's best interest to live with someone else. But the "best interest" standard is plainly insufficient to deprive a parent of custody under the due process clause. Fla. Stat. § 744.474; *see Troxel v. Granville,* 530 U.S. 57 (2000). For a foster parent like Steven Lofton, the situation is far worse. The defendants may remove his son from his home whenever they think that would be in the boy's best interests. No independent determination of cause is required. Fla. Stat. § 409.165.

In an alternative holding, the district court dismissed the families' claim that they are entitled to the protection only adoption would give them by saying that there is no fundamental right to adopt. R-142-SJ Order, at 11. The holding that

there is no fundamental right to adopt is unexceptional, but it misses the point of the families' claim. If they can establish the relationships they have—"deeply loving relationships" that are "as close as those between biological parents"—are constitutionally protected, they have a right to be treated as parent and child by the State. Neither the families nor the federal Constitution say the only way to obtain that treatment from the State is by adoption. The State of Florida says that. The State can hardly create an exclusive system for getting access to a set of constitutional rights, and then ban someone who is entitled to those rights from using the system. *See, e.g., Boddie v. Connecticut* 401 U.S. 371, 375-6 (1972) (even though there is no general right of access to civil courts, since a civil action is the only way to end a marriage, and marriage is a fundamental interest, Connecticut could not effectively keep poor people from obtaining divorces by charging filing and service fees).

The families need not wait until the State actually brings proceedings against them to insist they be allowed to become legal parents, anymore than the plaintiffs in *Boddie* needed to wait until the state saddled them with a spouse's debt or charged them as bigamists to complain about its refusal to allow them to divorce. *See, e.g., Boddie, supra,* 401 U.S. 371. And the State has hardly left the families alone. After ten years of being raised by Lofton, ten years growing up with children

he regards as his brothers and sisters, ten years in a "deeply loving" relationship with Lofton, a relationship as close as a biological family, the State is trying to take John Doe away and have him adopted by someone else. R-130-Plaintiffs' Concise Statement, ¶¶ 19-22. And Houghton faces claims he is negligent for failing to file reports with the court on his son' s social skills, R-114-Defendants' Statement, at 7; Fla. Stat. § 744.3675, something the state could hardly require of a parent. *See Troxel v. Granville,* 530 U.S. 57 (2000). These families need the shelter the Constitution gives parent-child relationships, and they need it now, before John Doe finds himself torn from his family and living with strangers.

2. Florida's refusal to let the families obtain the protection of parent-child status by adopting violates equal protection.

In *Police Dep't. of Chicago v. Mosley* , 408 U.S. 92 (1972), the Supreme Court held that a classification that treats two groups of people exercising the same fundamental federal right differently can be upheld if it is narrowly tailored to achieve a substantial government interest. *Mosley* struck down a Chicago ordinance that allowed only labor pickets near schools. The Court said Chicago's insistence that labor pickets were more likely to be peaceful was not enough, since a narrow ordinance which prohibited individual acts of violence would serve. *Mosley,* 408

U.S. at 101-102; *see also Zablocki v. Redhail,* 434 U.S. 374, 383- 390 (1978) (since the right to marry is fundamental, state law that limits ability of "deadbeat dads" to remarry is subject to close scrutiny); *Shapiro v. Thompson,* 394 U.S. 618, 634 (1969) (classifications that penalize the exercise of fundamental right must be "necessary to promote a compelling governmental interest").

Florida's ban on adoption by lesbians and gays creates differential access to a fundamental right, and that differential access cannot be justified. A heterosexual adult with a nonbiological constitutionally protected parent-child relationship may adopt his child in Florida, and be legally treated as a parent. *See* Fla. Stat. § 63.040. But a lesbian or gay adult, who also has a nonbiological constitutionally protected parent-child relationship, may not adopt his or her child, and will not be legally treated as a parent. *See* Fla. Stat. § 63.042 (3). Thus, if either the Houghtons or the Loftons are able to show they have constitutionally protected parent-child relationships, Florida's ban against Houghton or Lofton adopting could be upheld only if the State could prove that the ban is narrowly tailored to achieve a substantial government interest. *Mosley,* 408 U.S. at 102; *Shapiro,* 394 U.S. at 634.

As the earlier of discussion of equal protection suggests, it is very doubtful the State could ever meet this burden. This is particularly true in light of the case-by-case system it uses to determine the suitability of all other parents. *See* Fla.

Stats., ch. 63; sec. 63.142(4). But at this point, the State has not offered any evidence that in fact (as opposed to speculation), its law serves any legitimate purpose at all. See R-117-MSJ, at 13-20. Thus, it should not have been granted summary judgment.

CONCLUSION

The judgment of the district court should be reversed. On the equal protection claim, the district court should be directed to enter judgment for the plaintiffs. On the due process claim, the case should be remanded for trial.

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Respectfully Submitted,

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CERTIFICATE OF COMPLIANCE

Plaintiffs' brief is in compliance with the type-volume limitation of F.R.App.P. 32(a)(7)(B)(1). It contains 13,948 words, excluding the materials referred to in 11th Cir. Rule 28-1(a), (b), (c), (d), (e), (f), (g), (m), and (n), according to the word count program in Word Perfect word processing system, which was used to prepare the brief

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by federal express this 13th day of February, 2002, to:

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