IN THE THIRD DISTRICT COURT OF APPEAL
STATE OF FLORIDA

CASE NO. 3D08-3044

FLORIDA DEPARTMENT OF CHILDREN AND FAMILIES,

Appellant,

v.

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

Appellees.

ANSWER BRIEF OF APPELLEES X.X.G. and N.R.G.

ON APPEAL FROM A FINAL ORDER OF ADOPTION ENTERED IN THE 11TH JUDICIAL CIRCUIT IN AND FOR MIAMI-DADE COUNTY, FLORIDA

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TABLE OF CONTENTS

TABLE OF CONTENTS
(Continued)

Page

TABLE OF CITATIONS

Page

Cases

TABLE OF CITATIONS
(Continued)

Page

TABLE OF CITATIONS
(Continued)

Page

Federal Statutes

TABLE OF CITATIONS
(Continued)

Page

State Statutes

INTRODUCTION

Although this case has generated considerable debate about gay and lesbian rights, what can be lost in that debate is that the rights and the best interests of two children – who indisputably have overcome the horrors of their neglect at the hands of their biological family with the love and care of their adoptive father and his family – are at the heart of the trial court's invalidation of Florida's absurd and unconstitutional ban on "gay adoptions." Gay and lesbian adoptive parents, to be sure, are entitled to equal treatment under the law. This case, however, begins and ends with what is best for two brothers (the Children), who are individually referred to as X.X.G. (John) and N.R.G. (James).

The Children's right to equal protection and permanency have been unduly burdened by Florida's horrendous legacy from the social wars of the 1970s over equal rights for gay and lesbian citizens. Although tremendous strides have been made since that time in recognizing that a citizen's sexual orientation should be of no moment in according equal treatment under the law and entitlement to mutual respect, Section 63.042(3), Florida Statutes (2009), remains as the *only* statutory prohibition – anywhere in this country – that categorically excludes gay people from adopting. The prohibition against adoptions by gay people denies adoptive children both equal protection of the laws and their right to a safe and permanent home. After careful consideration of the overwhelming evidence that the statutory classification not only has no rational basis, but is utterly absurd, the trial court correctly declared the statute unconstitutional.

If the Department of Children & Families (DCF) is correct in its core argument, *i.e.*, that the classification is rational because gay people are unfit, "immoral," and will "support adolescent sexual activity and experimentation" (R:709-11); Initial Brief of Florida Department of Children & Families (DCF Brief) at 26-32, the State of Florida, in the exercise of its *parens patrie* powers, should institute termination of parental rights proceedings against *every* gay citizen who is the biological parent of a child in Florida. And, for that matter, DCF's pathetic attempt to distinguish between its acceptance of gay *foster* parents and guardians and the statutory ban on gay people adopting the same children for whom they are already caring – because DCF can "monitor and intervene" – could never withstand even cursory scrutiny, in light of DCF's chronic inability to supervise the thousands of children who are in its own care and when DCF admits that it places children in permanent guardianships with gay people and ceases its supervision.

If DCF is correct, and gay citizens are so unfit to parent that they cannot adopt a parentless child, how can the State of Florida justify placing children with gay people in long-term or permanent unsupervised guardianship or foster care. But DCF freely does so. Indeed, DCF argues that the Children *should* remain in foster care with their father. For that matter, if DCF is correct, how can the State of Florida allow gay judges, who presumably suffer from the same afflictions and inclinations of their gay brothers and sisters – and who, in DCF's parochial view, are engaged in "immoral" behavior in their personal lives – to make decisions about the best interests of parentless children?

The answer, of course, is that DCF is dead wrong, and the trial court correctly so ruled. There is no rational basis for the absurd classification in Section 63.042(3), Florida Statutes (2009).

The Children were before the circuit court asking that petitioner F.M.G. (the Father) be allowed by the Court to adopt them. The Father has been their foster parent since December 2004, when they were brought to his home by DCF, in deplorable circumstances of abandonment and neglect. The Children did not ask to be placed with the Father, a gay man. Rather, it was *DCF* that chose the Father to nurture them.

The Children have thrived under the Father's love and care. The State of Florida is willing to let the Children live with the Father as a foster parent, albeit under the risk that the Children would suffer the emotional devastation that undisputedly would result from being separated from him if and when DCF carries out its statutory mission of permanent placement. The Children have the same right to permanent placement as any other child in DCF's custody, and should not be denied having their Father as their adoptive parent based on irrational prejudice. In the end, however, that is all that DCF has to offer in its effort to overturn the trial court's entirely well-founded ruling that Section 63.042(3) violates equal protection of the laws and unlawfully denies the Children their right to permanency with their only true family.

STATEMENT OF THE CASE AND FACTS

I. PROCEDURAL HISTORY.

On December 11, 2004, the Children were removed from their parental home and placed in DCF's custody. (R:661). The Father agreed to accept and care for the Children. *Id.* The Children have remained continuously in the Father's care from the date of that temporary placement. (R:662).

By July 2006, DCF had secured a termination of parental rights of the Children's biological mother and fathers, and the Children became available for adoption. (R:22-58). The Father applied to adopt the Children. (R:8-83). Although the Center for Family and Child Enrichment (CFCE) performed a positive preliminary home study regarding the Father's suitability as a prospective parent, CFCE did not recommend that he be permitted to adopt the Children because Florida law bans adoption by gay people and DCF denied the Father's application based solely on the fact that the Father is a gay man and thus barred by the statute from adopting. (R:60-83; 662).

On January 17, 2007, the Father petitioned the trial court to adopt the Children. *Id.* The Father requested a judicial determination that Section 63.042(3), Florida Statutes (2009), which states, in pertinent part, that "[n]o person eligible to adopt under this statute may adopt if that person is a homosexual" is unconstitutional. *Id.* The Children also asserted claims against DCF, seeking to have the statute declared unconstitutional. *Id.*

After a four-day hearing in October 2008, at which both lay and expert witnesses testified for the parties (R:716-3286), the court entered a Final Judgment

of Adoption on November 25, 2009, ruling: (i) Section 63.042(3) violates the Father's and the Children's equal protection rights, as guaranteed by Article I, Section 2 of the Florida Constitution, for lack of any rational basis for the classification; and (ii) application of the statute to deny the Father's adoption application unconstitutionally denied the Children their right to permanency, as guaranteed by federal and state law, pursuant to the Adoption and Safe Families Act of 1997. (R:712). The court declared the Father to be the Children's legal parent. *Id.*[1]

II. STATEMENT OF FACTS.

A. The Children.

> The [C]hildren arrived at the home of [the Father] and ... [his] domestic partner[ ] and [the domestic partner's] then eight year old biological son ... on the evening of December 11, 2004. [John], the elder sibling, arrived with his four-month old brother wearing a dirty adult sized t-shirt and sneakers four sizes too small that seemed more like flip-flops than shoes. Both [C]hildren were suffering from scalp ringworm. Although [John] was clearly suffering from a severe case of ringworm, the medication brought from [John]'s home to treat his scalp was unopened and expired. [James], too, suffered from an untreated ear infection, as evidenced by the one-month old, nearly unused medication. [John] did not speak and had no affect. He had one concern: changing, feeding, and caring for his baby brother. It was clear from the [C]hildren's first evening at the ... home that the baby's main caretaker was [John], his four year old brother.
>
> On that December evening, [John] and [James] left a world of chronic neglect, emotional impoverishment and deprivation to enter a new

[1] The court's 53-page judgment exhaustively reviews the testimony and other evidence adduced at trial. In Part II, *infra*, in which the Children will set forth the pertinent facts, reference will be made to the trial court's recitation and findings of fact, except where other citations are necessary for clarity.

> world, foreign to them, that was nurturing, safe, structured and stimulating. Although [the Father and his partner] had fostered other children, caring for [John] was the most challenging of their foster care experiences. For the first few months, [John] seemed depressed and presented a void, unresponsive demeanor and appearance. Upon arriving at the [Father's] home, [John] did not speak a word for about one week. After two weeks, he began to mumble imperceptible utterances. After about one month, [John] finally began speaking. [The Father] quickly learned that [John] had never seen a book, could not distinguish letters from numbers, could not identify colors and could not count. He could not hold a pencil. He had never been in an early childhood program or day care. Nevertheless, [John]'s potential for educational development was apparent. Although he had not had any formal education, [John] could sing and pick up lyrics very quickly. Early on, [the Father] noticed that [John] hoarded food by requesting additional servings at the start of dinnertime and later hiding the extra food in his room. [John] eventually grew out of this behavior, due in part to a tactic employed by [the Father] of showing [John], in advance of mealtime, the more than sufficient amount of food on the stove prepared and available for the family.
>
> [James] was a very happy baby and was content with anyone, even strangers. After approximately two months, [James] began to exhibit signs of attachment to his primary caregivers.... [John], however, took about two years to fully bond. At one time, [John] shunned hugs from [the Father]. However, in his own, [John] developed bonding and today, initiates goodbye hugs each morning before going to school.

(R:663-64).

After the Father had decided to adopt the Children he had a conversation with them about their names:

> I took out three pieces of paper and I wrote out my name, [Father Doe], I wrote out [James's] name, ... and then I wrote out [John's] name – their new names, of course, under adoption .... And then I put the papers in front of them and I said, "See, what happens in adoption is, you're going to get a new name,["] and [John] looked at me like, "I must be crazy, I just learned to write my name." ... I said, "Go ahead and draw out your name there." [John] traced over the first one, and

> then he started doing the second one, and he looked at the three names and he said, "We all have the same name," and I said "Yeah, in adoption, we have the same name, and we're all going to be [Does]. That's going to be our last name." And he said, "That means we're a family. We're going to have the same name."
>
> . . . .
>
> [John] sat there, with just this look of pure contentment on his face, and he wrote down his new name for about an hour there. He just kept writing and writing, and the more he'd write it, the happier he looked. He had a smile on his face and he just had this look of pure joy, and he had a sense, I mean, just the names, and that's only one small part of an adoption – he had a sense that that was going to make us a family, a permanent family.

(R:1156-57).

B. The Children's Home Environment.

The Children are parented by the Father and his domestic partner (referred to as Tom Roe), who have been living together since July 2000 and consider themselves to be spouses. (R:664). Their respective families both support their relationship. *Id.* The Father and Roe both have stable, long-term employment and pool their income. *Id.* They decided together to expand their family by becoming foster parents, and fostered a total of nine children before taking in the Children. (R:664-65). The Children have lived in the same neighborhood since they were taken to the Father's house to stay in December 2004, and have formed relationships both there and in school. (R:666). The Children are closely bonded with Roe's biological son, Roe, Jr., as well as with their parents' extended families, who visit regularly and send the Children birthday and holiday gifts. *Id.*

During the week, the family eats the breakfast and dinner meals together without the distraction of the television or telephones. (R:665). The Children and Roe, Jr. have assigned chores, including assisting with preparing breakfast and clearing the table. *Id.* The Father takes the Children to school every morning, drops them off at their classrooms, and speaks with their teachers. *Id.* After school, the Children usually take tennis lessons. *Id.* At dinner, the Children take turns sharing their day's activities with their parents. *Id.* The Children also spend an hour after dinner doing homework or reading, after which they can watch television or play. (R:665-66). The family attends a non-denominational church. (R:666).

C. Assessments.

1. Clinical and developmental assessment.

Dr. David Brodzinsky, a clinical and developmental psychologist, and an expert in child clinical and developmental psychology, who specializes in adoption, foster care and the adjustment of children in adoption, performed an assessment of the Children and their family. (R:666-67, 1456-1516).

Dr. Brodzinsky found that the Children are attached to the Father, as well as to Roe and Roe, Jr. (R:667). John has limited memory of his former family, while James has no independent memory of his former family or caretakers. *Id.* The Children show healthy signs of social development, with appropriate levels of friendliness and sibling conflict. *Id.* Both parents are very involved in the Children's educational development. *Id.*

Dr. Brodzinsky concluded that the Children "would be emotionally devastated if removed from the [Father's] home." (R:668). Sexual orientation is not a factor in the Father's "parental abilities" or the Children's well being. *Id.* The Father's family is "the only family [James] knows and as [John] has not yet developed stability, a second separation would cause academic regression, separation anxiety, sleep problems, and trust issues." *Id.* Thus, "it is in the [C]hildren's best interest to be adopted by [the Father], as opposed to maintaining lesser forms of permanency through continued foster care, permanent guardianship or the like." *Id.* Dr. Brodzinsky testified that "children, at age appropriate levels, understand that foster parents and guardians are not legal family." *Id.* Because the Father's "quality of parenting is high and healthy", the parent-child relationships "are strong and healthy", the family can provide "resources and educational opportunities," and "separation would cause emotional trauma" to the Children and the family, adoption is the appropriate course. (R:668).

2. The Guardian ad Litem's assessment.

Ronald Gilbert, the Children's Guardian ad Litem (GAL) from June 2005 to the present, who has served as guardian to more than 100 children, visited the Children's home on a monthly basis. (R:668, 1999-2002). He found that: (i) the Children "are in excellent health, well behaved, performing well in school, and bonded" with their parents and Roe, Jr.; (ii) the Father and Roe "are model parents" and their home "is one of the most caring and nurturing placements" he has seen; (iii) "adoption is the preferred form of permanency" because the Children "deserve parents"; and (iv) "the [C]hildren would suffer mentally and physically if

separated" from the Father and Roe. (R:668-69). Mr. Gilbert's "official recommendation" is that the Father should adopt the Children because doing so is in the Children's "manifest best interest" (R:669), and to separate the Children from the Father "would be tragic." (R:1451).[2]

3. The CFCE assessment.

Yves Francois, the CFCE's Adoption Supervisor, was assigned to the Children's case in 2005. (R:669, 2003-12). Mr. Francois confirmed Florida's "permanency plan," placing children in a stable home through the age of majority, and preferably through re-unification with natural parents, placement with a permanent guardian or family member, or adoption. *Id.*

The Children's permanency plan is and will remain adoption, although any placement other than with the Father "may result in [the Children's] separation." (R:670). Mr. Francois performed a home study, and "although all aspects of the home study were positive, CFCE could not recommend adoption only because of the statutory exclusion of homosexuals as adoptive parents." *Id.*

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[2] When asked his opinion as to the effect on the children if they were separated from the Father, the GAL stated:

> It would be against their manifest best interests. I think it would be tragic. These kids obviously were subject to abuse and neglect, and this would add legal abuse and neglect to their placement, and their mental and physical well-being.

(R:1451).

D. Findings Based on Expert Testimony.

1. Psychological experts.

a. Testimony for the Father and the Children.

Dr. Letitia Peplau. Dr. Peplau is a Professor of Psychology at the University of California Los Angeles, and specializes in couple relationships, including same-sex couple relationships. (R:671, R:732-840). Based on research in those areas, Dr. Peplau testified "the relationships of lesbians and gay men are similar in stability, quality, satisfaction, shared experiences and conflict resolution, to that of heterosexual married and unmarried couples." *Id.* "Among all of the predictors of couple break-ups, including age, income, religion, education and race, sexual orientation is no more a significant predictor of break-up than the other demographic characteristics." *Id.* Dr. Peplau also testified that: (i) "there is no basis for the assertion that gay people or gay couples have higher rates of domestic violence than heterosexual couples"; (ii) "the presence of children in a home of homosexual parents adds to the factors promoting relationship stability"; and (iii) gays and lesbians "tend to be more highly educated and high income earners, sexual orientation is less correlated to break-up rates than race or income." (R:671-73).

Dr. Susan Cochran. Dr. Susan Cochran, a Professor of Epidemiology and Statistics at the University of California Los Angeles is an expert in psychology and epidemiology, with specializations in health disparities among minority communities and the use of statistical analysis in social science research. (R:673, 842-978). She testified regarding the prevalence of psychiatric disorders among

gay and heterosexual people, as well as other demographic groups: "[S]exual orientation alone is not a proxy for psychiatric disorders, mental health conditions, substance abuse or smoking; members of every demographic group suffer from these conditions at rates not significantly higher than for homosexuals." (R:673-74). Thus, Dr. Cochran pointed out, "if every demographic group with elevated rates of psychiatric disorders, substance abuse and smoking were excluded from adopting, the only group eligible to adopt under this rationale would be Asian American[s]." (R:674).

Dr. Michael Lamb. Dr. Michael Lamb, Professor of Psychology at the University of Cambridge, London, is an expert in psychology with a specialization in the development and adjustment of children, including children of gay and lesbian parents. (R:675, 1165-1349). Dr. Lamb testified that "most families, today, are not traditional families" and there are three factors that predict healthy adjustment for children: (i) "a child is more likely to be well adjusted if he has a warm, harmonious relationship with committed, involved, sensitive parents"; (ii) "a child is more likely to be adjusted when the relationship between the parents is harmonious and positive"; and (iii) "[c]hildren tend to adjust ... better when they have adequate resources available." *Id.* In sum, the quality of the parenting is what is important; and "children raised by homosexual parents do not suffer an increased risk of behavioral problems, psychological problems, academic development, gender identity, sexual identity, maladjustment, or interpersonal relationship development." *Id.*

Dr. Lamb explained that children raised by gay people are as well adjusted as those raised by heterosexuals, and that there is no reliable literature to the contrary. (R:676). And Dr. Lamb testified that studies reveal there is "no difference in the age [that] children raised by lesbians began engaging in sex versus those raised by heterosexuals" and "no significant difference between the sexual orientation of children with lesbian parents and those with heterosexual parents." (R:677). Dr. Lamb also testified that: "children raised by gay parents develop social relationships the same as those raised by heterosexual parents"; "children of gay parents do not experience discrimination or ostracizion any more than children of heterosexual parents," such that "exclusion of homosexuals from adoption does not shield a child from being teased by ... peers"; and "there is no optimal gender combination of parents," so the exclusion of gays as adoptive parents "hurts children by reducing the number of capable and appropriate parents available and willing to adopt." (R:677-78).

b. Testimony for DCF.

Dr. George Rekers. Dr. George Rekers, a clinical psychologist and behavioral scientist who is also an ordained Baptist minister, testified for DCF as an expert. (R:678; 1523-1768). The court summarized Dr. Rekers' testimony in its order (R:678-83), and ultimately found:

> Dr. Rekers' testimony was far from a neutral and unbiased recitation of the relevant scientific evidence. Dr. Rekers' beliefs are motivated by his strong ideological and theological convictions that are not consistent with the science. Based on his testimony and demeanor at trial, the court cannot consider his testimony to be credible nor worthy of forming the basis of public policy.

(R:683).

Dr. Walter Schumm. Dr. Walter Schumm, an associate professor of family studies at Kansas State University, testified for DCF as an expert in family child development, empirical and theoretical family studies and research methodology. (R:683, 1768-1957). The court summarized Dr. Schumm's testimony, noting that the witness is not a psychologist, but rather "conducted a methodological analysis of the works of psychologists in homosexual parenting" and that he "understands that much of the scientific community disagrees with his conclusions and concedes the possibility that some gay parents may be beneficial for some children." (R:683-84). Dr. Schumm tries "to use statistics to highlight the truth of the Scripture." (R:683). Dr. Schumm opined that the decision to permit gay people to adopt is best made by the judiciary on a case-by-case basis. (R:684).

2. Child welfare policy and practice.

Patricia Lager. The Father presented Patricia Lager, a licensed clinical social worker and a Professor of Social Work at Florida State University. (R:687-88, 978-1046). Ms. Lager testified that "there are a number of characteristics which make up a good adoptive parent but not one kind of family is best for all children" so that "categorical exclusion[s] [are] not in the best interest of children." *Id.* Moreover, Florida has a shortage of adoptive parents and the categorical exclusion of gay people reduces the number of potential qualified applicants. (R:688). The Child Welfare League of America and the National Association of Social Workers have published position statements that gay people "should not be

treated any differently than heterosexuals in terms of their ability to adopt." (R:688).

Christine Thorne. Christine Thorne, DCF's Quality Assurance Manager, interpreted DCF regulations, operating procedures and practices regarding foster care, and the recruitment of lesbians and gay men as foster parents. (R:688-89, R:1977-1987). Ms. Thorne's testimony, as summarized by the court, was that "there is no law, policy or procedure that permits one child to receive disparate treatment," but that "children with homosexual foster parents could not be adopted by their caregiver while children with heterosexual foster parents could." *Id.* She confirmed that "the court must consider the opinion of the [GAL] when ruling on an adoption petition." (R:689).

Ada Gonzalez. Ada Gonzalez, a DCF Licensing Foster Care Specialist, confirmed that DCF policy encourages "foster parents to adopt children in their homes because of the established relationship and the need to maintain stability for the child." (R:689, 1960-69). Ms. Gonzalez testified DCF allows, encourages and recruits gay people to become foster parents. (R:689). She acknowledged that children can be harmed by switching "families, schools and their social network," and she could not identify any risk from placing children with gay foster parents. *Id.*

Gay Frizzell. Gay Frizzell, Chief of Child Welfare Services and Training in the Family Safety Program Office, confirmed the inconsistency in DCF's policies with regard to gay foster parents and gay adoptive applicants. (R:689-90). She

also testified that adoption is preferred over guardianship and that "adopted children perceive themselves differently than children in guardianship." *Id.*

E. Stipulated Facts.

The parties stipulated to facts in several pertinent areas.

1. Eligibility to adopt.

- "DCF and its agents will not approve an adoptive parent applicant who is not currently deemed suitable to care for a child based on speculation about the applicant's improved future circumstance." (R:690).

- "[F]or certain children, single adoptive parents are preferred, even over available married couples." (R:691).

- "No person eligible to adopt shall be prohibited from adopting solely because such person possesses a physical handicap, unless it is determined that such disability or handicap renders the person incapable of serving as an effective parent." *Id.*

- "Adoptive parent applicants with serious or chronic medical conditions that could predictably compromise or could compromise the ability to provide the physical, emotional, social or economic support necessary for a child to thrive are subject for review by the Adoption Review Committee." *Id.*

- Although DCF may not place a child with anyone other than a parent who has been convicted of certain felonies or within certain time periods from the date of the conviction, including those where children were the victims, children may be privately adopted by such felons. *Id.*

- "Adoption applicants who have previously verified findings of abuse, neglect or abandonment of a child are subject to a special review before they can be approved to adopt, but are not automatically disqualified from adopting." (R:692).

- "A social study which involves careful observation, screening and evaluation is made of the child and adoptive applicant prior to placement of the child to select families who will be able to meet the physical, emotional, social, educational and financial needs of a child, while

safeguarding the child from further loss and separation from primary caretakers." *Id.*

- "Before DCF and its agents approve an applicant seeking to adopt a child, that applicant is individually screened to ensure he or she can provide a safe, healthy, stable, nurturing environment for a child." *Id.*

- "Anyone deemed by DCF or its agents, after an individualized evaluation, unable to provide a safe, healthy, stable, nurturing home for a child is not approved to adopt a child in Florida." *Id.*

- "The percentage of adoptions of dependent children in Florida that were by the children's foster parents in 2006 was 34.74%." *Id.*

2. Placement with gay people.

- "DCF is a member of the [Child Welfare League of America] and looks to its policies for guidance in developing best practices in child welfare." *Id.*

- "Lesbians and gay men are not prohibited by any state law, regulation or policy from serving as foster parents" and have done so short-term, long-term and permanently in Florida without any special considerations applied by DCF. (R:692-93).

- "DCF...[has] placed children in the legal guardianship of individuals known by DCF...to be lesbians or gay men, and ceased DCF supervision." (R:693).

- "DCF...[has] place children in the permanent care of legal guardians know by DCF...to be lesbians or gay men, and ceased DCF supervision." *Id.*

- "Lesbians and gay men are not prohibited by any state law or regulation from being legal guardians of children in Florida." *Id.*

- "DCF agrees that gay people and heterosexuals make equally good parents." *Id.*

- "The qualities that make a particular applicant the optimal match for a particular child could exist in a heterosexual or gay person." *Id.*

3. Florida's need for adoptive parents.

- "Florida seeks to find adoptive parents who are able to meet the unique needs of each child who is eligible for adoption and provide a secure and stable permanent family home." *Id.*

- "Florida has set up several program to increase the pool of potential adoptive parents." *Id.*

- "At any given point, there are about 900 to 1,000 children in Florida who need adoptive parents to be recruited for them." *Id.*

- "The average length of stay for children in foster care in Florida before a finalized adoption was over 30 months." *Id.*

- "DCF agrees that the shortage of adoptive parents is a serious problem." *Id.*

- "DCF agrees that having a bigger pool of qualified adoptive parents would help DCF find families for medically involved children, teens, large sibling groups and children with mental health problems." *Id.*

III. THE COURT'S RULINGS.

A. Permanency.

The trial court first addressed the Children's right to permanency under Florida law:

> Chapter 39 of the Florida Statutes requires the State to provide all dependent children with a stable and permanent home. The aim is to assure that every child in foster care is placed in a permanent home as soon as possible. The law also provides that adoption is the preferred permanency option for children who cannot be returned to their biological families. Furthermore, the federal Adoption and Safe Families Act of 1997 sets strict time limits for states to make certain children receive permanency to prevent them from lingering in foster care.
>
> ... The law is also explicit that there is a compelling state interest in providing such permanent, adoptive placement as rapidly as possible. Florida's dependency and adoption laws thereby embody the substance of state and federal decisions that declare a child's

> constitutional right to a true home, and in the case of a foster child, to a permanent adoptive home....
>
> ... [W]hen it exercises *parens patrie* authority to remove a child, the State's actions must be in accordance with that child's best interest in achieving a permanent adoptive home.... Under Florida law, a child's rights are co-extensive with an adult's rights, unless there is a specific reason to protect the child that requires a limitation on the child's rights. 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 it imposes contradicts [sic] the legislative purpose and constitutional basis of the child's having been taken into custody by the State in the first place.... The exclusion of gay people from adopting cannot survive this impairment of foster children's rights.

(R:698-700).

Because the Father "is qualified and meets all the suitability requirements for an adoptive parent, all the parties stipulate that [he] and his partner provide a safe, healthy, stable and nurturing home for [the Children] meeting their physical, emotional social and education needs, and that placement is in the children's best interest" (R:700), Section 63.042(3) necessarily denies the Children their fundamental right to an adoptive home:

> Section 63.042(3) violates the Children's rights by burdening liberty interest in being free from undue restraint in State custody on one hand and simultaneously operating to deny them a permanent adoptive placement that is in their best interest. This Court cannot permit such a double-edged sworn to continue to lie dormant in our state law, to the peril of children ..., without review. The 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. .... There is no question, the blanket exclusion of gay applicants defeats Florida's goal of providing dependent children a permanent family through

> adoption. .... The record clearly reflects that it is in [the Children's] best interests to remain in this placement permanently and to be adopted by [the Father]. However, the statutory exclusion deprives [the Children] the ability to be adopted by their caregivers, to whom they are strongly bonded. Failure of the State to effectuate a permanent placement for [the Children] with applicants willing and qualified to assure the task creates the risk of severing the Children's healthy attachments and causing profound long-term negative consequences to their development or relegating them to a childhood and adolescence without a permanent home ....

(R:703-04). The court concluded that "the statutory exclusion of homosexuals as prospective adoptive parents deters permanent placements for children in the care of gay foster parents." (R:704).[3]

B. Equal Protection.

In addressing the Children's and Father's equal protection claim, the trial court applied the "rational basis" test that applies where the claim "does not involve a fundamental right or a suspect class," and rejected as "false" DCF's primary purported rational basis, *i.e.*, "protecting children from the undesirable realities of the homosexual lifestyle." (R:708-09). Based on its factual findings, as set forth *supra*, and because DCF "failed to offer any reasonable, credible evidence to substantiate their beliefs or to justify" the classification, the court declared Section 63.042(3) "illogical to the point of irrationality." (R:709). The court rejected DCF's "attempt to justify the statute by reference to a supposed dark cloud

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[3] The court noted that "[a]lternative forms of permanency" are not adequate substitutes because, among other things, such arrangements would "deprive children of ... significant material benefits, ... including inheritance rights," and, more importantly, "[s]uch alternate forms of permanency ... do not provide the significant psychological benefits afforded by adoption including sharing a common surname or enjoying the sense of belonging to a family." *Id.*

hovering over homes of homosexuals and their children." *Id.* And the court declined to find that children require "dual gender" homes. (R:710).

Finally, the court rejected DCF's reliance on "Florida's legitimate interest to promote public morality." (R:711). The court reasoned:

> [The Father] qualifies for approval as an adoptive parent in all respects but one; his sexual orientation. [DCF's] position is that homosexuality is immoral. Yet, homosexuals may be lawful foster parents in Florida and care for our most fragile children who have been abused, neglected and abandoned. As such, the exclusion forbidding homosexuals to adopt children does not further the public morality interest .... [T]here can be no rationally related public morality interest differentiating in the State's support of a homosexual's long-term foster care relationship with a child and a denial of their legal relationship through adoption. .... The contradiction between the adoption and foster care statutes defeats the public morality argument....

(R:711-12). "[P]ublic morality..., disconnected from any separate legitimate interest, is not a legitimate government interest to justify unequal treatment." (R:711).

SUMMARY OF ARGUMENT

Section 63.042(3), Florida Statutes (2009), is utterly bereft of any basis that could sustain its constitutionality, even under the rational basis test. This Court reviews statutory constitutionality *de novo,* but the trial court's finding of fact are presumed correct and entitled to full deference. The Court thus undertakes its review function with the facts as established by the trial court's extensive findings, which show that there is no rational basis for denying the Children their right to be adopted by the Father based solely on his sexual orientation. There is no rational

basis for the statutory classification, a product of irrational prejudice, that would bar an otherwise entirely appropriate adoption by a gay parent.

Even if that were not so, the Children's right to permanency – which, in Florida, means adoption – is entitled to constitutional protection because, as foster children, they are in State custody and their liberty may not be arbitrarily denied. The only obstruction to the Children's adoption by the Father was that he is a gay man, and the trial court correctly removed that arbitrary and irrational obstruction, allowing the Children and the Father to be recognized as the family that they indeed are, in every meaningful way.

ARGUMENT

I. STANDARD OF REVIEW.

The question whether a statute is facially constitutional is subject to *de novo* review. *E.g.*, *Walton County v. Stop Beach Renourishment, Inc.*, 998 So. 2d 1102, 1109 (Fla. 2008). To the extent that DCF attempts to argue that the court's finding of fact based on extensive testimony and other evidence that the trial court considered so carefully *must* be disregarded, under DCF's view of this Court's role, in favor of so-called "rational speculation unsupported by evidence or empirical data," (DCF Brief at 22), DCF runs afoul of the Florida Supreme Court's plainly stated declaration of the governing review standard:

> To assist appellate courts in evaluating a trial court's ruling concerning the constitutionality of a statute, it oftentimes is preferable to have a record developed in the lower court before a finder of fact. A trial court's ruling concerning the constitutionality of a statute following a trial wherein the parties introduce conflicting evidence is generally a mixed question of law and fact. We conclude that the

> proper standard of review in such cases is as follows: the trial court's ultimate ruling must be subjected to de novo review, but the court's factual findings must be sustained if supported by legally sufficient evidence. Legally sufficient evidence is tantamount to competent substantial evidence.

N. Fla. Women's Health & Counseling Servs., Inc. v. State, 866 So. 2d 612, 626-27 (Fla. 2003) (citing, *inter alia*, *Cox v. Fla. Dep't of Health & Rehab. Servs.*, 656 So. 2d 902 (Fla. 1995)); *accord Liner v. Workers Temp. Staffing, Inc.*, 990 So. 2d 473, 476 (Fla. 2008).[4]

Thus, "[w]hile courts may defer to legislative statements of policy and fact, courts may do so only when those statements are based on actual findings of fact, and even then *courts must conduct their own inquiry*." *N. Fla. Women's Health*, 866 So. 2d at 627 (emphasis added); *accord Chiles v. State Employees Attys. Guild*, 734 So. 2d 1030, 1034-35 (Fla. 1999) (upholding trial court's invalidation of statute as unconstitutional because "trial court examined the statute independently" and "[w]e have been shown no basis for disturbing the trial court's

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[4] Indeed, in *Cox*, the Florida Supreme Court specifically remanded to the trial court to flesh out the equal protection issue:

> The record is insufficient to determine that this statute can be sustained against an attack as to its constitutional validity on the rational-basis standard for equal protection under article I, section 2 of the Florida Constitution. A more complete record is necessary in order to determine this issue. *Upon remand, the proceeding is limited to a factual completion of the record as to this single constitutional issue and a decision as to this issue based upon the completed record.*

Cox, 656 So. 2d at 903 (citation omitted; emphasis added). Although there were no further proceedings in *Cox*, the trial court in this case essentially carried out the *Cox* mandate, albeit some years later.

findings of fact").[5] DCF's attempt to insulate the Legislature's silent "findings" from appellate review is thus unavailing:

> The general rule is that findings of fact made by the legislature are presumptively correct; however the findings of fact made by the legislature must actually be findings of fact, and they are not entitled to the presumption of correctness if they are nothing more than recitations amounting only to conclusions *and are always subject to judicial inquiry.*

N. Fla. Women's Health, 866 So. 2d at 627 (citation omitted; emphasis added).[6]

DCF thus wrongly attempts to "tilt the appellate playing field" by invoking "an inappropriate standard of review." *Id.* at 626.[7] The trial court's extensive

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[5] The United States Supreme Court's statement that "a legislative choice is not subject to courtroom factfinding and may be based on rational speculation unsupported by evidence or empirical data," upon which DCF relies, DCF Brief at 22 (which actually was said in *FCC v. Beach Commc'ns, Inc.*, 508 U.S. 307, 315 (1993)), offers DCF little assistance here. For, to the precise contrary, the trial court rightly found the legislative choice to be based on *irrational* speculation that is *contradicted* by competent and substantial evidence, expert testimony, and empirical data. The Florida Supreme Court is fully entitled to establish standards of review for appeals in the Florida courts and, in any event, what the United States Supreme Court was addressing is that a court does not sit "as a superlegislature to judge the wisdom or desirability of legislative policy determinations made in areas that neither affect fundamental rights nor proceed along suspect lines." *Heller v. Doe*, 509 U.S. 312, 319 (1993) (citation omitted). The trial court in this case appropriately carried out its constitutional authority where, as here, the legislative policy unconstitutionally infringes upon fundamental rights.

[6] So much for DCF's demand for "über deference." DCF Brief at 24.

[7] DCF cites *Hamilton v. State*, 366 So. 2d 8 (Fla. 1978), for the proposition that "substantial expert opinion to the contrary" cannot override legislative factfinding. *Id.* at 10. DCF Brief at 22. In *Hamilton*, however, the defendant challenged the inclusion of marijuana along with purportedly more dangerous illegal drugs in Florida's narcotics statutes, based on the transcript of a Pennsylvania legislative hearing – which transcript the trial court expressly refused to consider on the defendant's motion to dismiss the criminal charges against him. 366 So. 2d at 10 & n.1. Thus, the Supreme Court, based on a cold record, ruled that "the defendant

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factual findings, premised as they are on competent and substantial evidence that DCF cannot and does not meaningfully refute, must be sustained. And, because the Children will show that the findings inexorably support and compel the trial court's conclusion that Section 63.042(3), Florida Statutes (2009) – the only statutory prohibition in the United States barring entirely fit parents from adopting children, based solely on sexual orientation – is utterly arbitrary and irrational, the ruling that the statute is constitutionally infirm, must be upheld.

II. BECAUSE FLORIDA'S PROHIBITION OF ADOPTION BY GAY PARENTS IS WITHOUT ANY RATIONAL BASIS, UNDER THE FACTS AS FOUND BY THE TRIAL COURT, THE STATUTE'S UNREASONED DISTINCTION BASED ON SEXUAL ORIENTATION ALONE VIOLATES THE FLORIDA EQUAL PROTECTION GUARANTEE.

A. The Trial Court's Finding of No Rational Basis for the Statutory Classification.

The trial court found that the distinction drawn in Section 63.042(3), Florida Statutes (2009), between heterosexual and gay adoptive parents is "illogical to the point of irrationality" and therefore violates Article I, Section 2, of the Florida

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has *failed to prove* that there is no rational basis for the statute." *Id.* at 10. DCF thus proceeds as if the trial court ruled without anything in the record to support its decision and the Father and Children are defending that ruling based upon submissions that were never subjected to the crucible of the adversary process and addressed at great length by the trial court. Of course, that is not the case. And the trial court expressly found that DCF's primary "expert" testified to "beliefs" that are "motivated by his strong ideological and theological convictions" and are neither "consistent with science" nor "worthy of forming the basis of public policy." (R:683). Thus, unlike *Hamilton*, this case is before this Court *without* any credible "expert opinion supporting the reasons which prompted the Legislature to enact this statute." 366 So. 2d at 10.

Constitution. (R:709-12).[8] That ruling, based as it is on overwhelming evidence that there is no foundation at all – outside of prejudice – for the statutory distinction, must be upheld. There is no rational basis for depriving adoptive children of a concededly appropriate placement with a gay adoptive parent. The statutory exclusion of gay people from adopting violates the Children's right to equal protection, because parentless children placed with heterosexual foster parents have the opportunity to unite permanently as an adoptive family with their caregivers, while those who, through no voluntary action on their part, are placed with, and bond with, gay caregivers are denied the same right, based solely on the caregivers' sexual orientation.

DCF predictably relies on *Lofton v. Secretary, Dep't of Children & Family Services*, 358 F.3d 804 (11th Cir. 2004). DCF Brief at 24-25.[9] But the core of that decision simply does not speak to the rational-basis issue decided by the trial court. To the contrary, the Eleventh Circuit addressed – purely on the level of constitutional theory and hypothesized rationales – the State's purported interested in "plac[ing] adoptive children in homes that have both a mother and father":

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[8] The Children adopt their Father's arguments on equal protection, as set forth in his brief at 20-22. The equal protection issues are addressed in the Children's brief from the perspective of a parentless child who, under the statute, would be deprived of the right to be adopted by an appropriate parent, merely because the parent happens to be a gay person.

[9] *Lofton* is *not* binding on a Florida state court. *E.g.*, *State v. Dwyer*, 332 So. 2d 333, 335 (Fla. 1976); *Roland v. Fla. E. Coast Ry., LLC*, 873 So. 2d 1271, 1275 n.5 (Fla. 3d DCA 2004). This Court is bound by *Cox*, of course, but DCF liberally gilds the lily in arguing that *Cox* is in any respect dispositive here. DCF Brief at 24-25. See n.4, *supra.*

> Florida argues that its preference for adoptive marital families is based on the premise that the marital family structure is more stable than other household arrangements and that children benefit from the presence of both a mother and a father in the home. Given that appellants *have offered no competent evidence to the contrary,* we find this premise to be one of those "unprovable assumptions" that nevertheless can provide a legitimate basis for legislative action. Although social theorists from Plato to Simone de Beauvoir have proposed alternative child-rearing arrangements, none has proven as enduring as the marital family structure, nor has the accumulated wisdom of several millennia of human experience discovered a superior model. Against this "sum of experience," it is rational for Florida to conclude that it is in the best interest of adoptive children, many of whom come from troubled and unstable backgrounds, to be placed in a home anchored by both a father and a mother.

Id. at 820 (citations omitted; emphasis added).

Lofton rests on the assumption that "[o]penly homosexual households represent a very recent phenomenon, and sufficient time has not yet passed to permit any scientific study of how children raised in those households fare as adults." *Id.* at 826. "Given this state of affairs, it is not irrational for the Florida legislature to credit one side of the debate over the other." *Id.* Here, the trial court found, based on the expert testimony and scientific research on gay parent families going back decades, that the assumption in *Lofton*, which was not based upon a trial to determine rational basis, was simply wrong.[10] There is a consensus among scientists that children raised by gay couples thrive as well as children raised by heterosexual couples. The trial court addressed the factual question head-on:

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[10] One of the Children's experts, Dr. Lamb, has more than 30 years of experience in child development and adjustment, including children of gay and lesbian parents, and based his opinion, in part, on academic research dating back to the 1970s. (R:675-76 & n.11, 1175-96).

> [T]he failure to present any evidence in *Cox* 15 years ago and the weight of the evidence presented in *Lofton* nearly five years ago are both cited as grounds for the courts' inability to find the statute unconstitutional .... [T]oday, based on the developments in the fields of social science, psychology, human sexuality, social work and medicine, the existence of additional studies, the re-analysis and peer review of prior studies, the endorsements by the major psychological, psychiatry, child welfare and social work associations, and the now, consensus based on wide accepted results of respected studies by qualified experts, the issue of whether Fla. Stat. § 63.042(3) violates the equal protection of homosexuals and children adoptable by homosexuals, is now ripe for reconsideration.

(R:707).

If the Father were not a gay man, DCF would have no objection to his adoption of the Children. That is an undisputed fact. Florida's preference for "a home anchored by both a father and a mother" has fallen away. It is no longer a matter of preferring a "traditional" home, but of barring gay people from being adoptive parents, based on "expert" opinions that the trial court rejected as factually unsound and on gay people's "immorality."

The statute's irrationality is made yet more pellucid when the status of gay parents' biological children is considered. There is nothing in Florida law that prohibits gay people from having children or parenting those children after their birth. Nor does the State regulate differently children of gay parents through surrogates. *See* § 742.11, *et seq.*, Fla. Stat (2009). Biological children of gay parents will never suffer the loss at the hands of the State that could well be inflicted upon John and James if DCF were to take them from their Father, either for adoption (together or apart) or for another placement – which DCF is fully empowered to do, without any right on behalf of the Children or the Father to bar

such action. (R:670). The record establishes, without contradiction, the incalculable devastation that would be visited upon the Children if they were to be separated from the Father or from each other. (R:668).[11] If the State truly believes – as DCF maintains on appeal – that gay people are unfit to parent children, it is utterly irrational to target only would-be adoptive parents who, unlike biological parents, are examined under a microscope before they are permitted to adopt. Rather, a termination of parental rights should be ordered for *every* biological child of a gay parent if indeed DCF is correct about the Legislature's rationale for Section 63.042(3).[12]

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[11] DCF acknowledges that the Children's placement is in their best interests. (R:695).

[12] Judge Barkett's dissent from the denial of rehearing *en banc* in *Lofton* traces Section 63.042(3)'s unsavory history:

> The Florida statute was enacted after an organized and relentless anti-homosexual campaign led by Anita Bryant, a pop singer who sought to repeal a January 1977 ordinance of the Dade County Metropolitan Commission prohibiting discrimination against homosexuals in the areas of housing, public accommodations, and employment. Bryant organized a drive that collected the 10,000 signatures needed to force a public referendum on the ordinance. In the course of her campaign, which the Miami Herald described as creating a "witch-hunting hysteria more appropriate to the 17th century than the 20th," Bryant referred to homosexuals as "human garbage." She also promoted the insidious myth that schoolchildren were vulnerable to molestation at the hands of homosexual schoolteachers who would rely on the ordinance to avoid being dismissed from their positions.

Lofton, 377 F.3d at 1302-03 (Barkett, J., dissenting from denial of rehearing *en banc*) (footnotes omitted). In response to Ms. Bryant's crusade, the Florida Legislature took up the bill that ultimately became Section 63.042(3), the sponsor of which declared, upon the bill's passage, that it was "a message to homosexuals that '[w]e're really tired of you. We wish you would go back into the closet.'" *Id.* at 1302. If this indeed is what motivated the Florida Legislature, it would be

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As the Florida Supreme Court observed, in striking down a statute that prohibited minors from entering billiard parlors, without parental consent, but not pool rooms in bowling alleys and similar establishments – purportedly because "exposure to gambling is more apt to occur in billiard parlors," which the Court deemed to be "indeterminate at best" – the asserted rational basis made no sense:

> [T]his espoused intent on the part of the legislature is belied by the fact that under the statute all minors are not prohibited from entering billiard parlors. With written parental consent it is not unlawful to permit a minor to enter and play billiards. *Is the legislature any less concerned about minors being exposed to gambling if their parents have consented?* Certainly this rationale cannot be ascribed to the legislature.

Rollins v. State, 354 So. 2d 61, 64 (Fla. 1978) (emphasis added). DCF can no more articulate a reasoned distinction between allowing biological gay parents to raise their children, or allowing gay people to become unsupervised permanent guardians, while disallowing those same parents from adopting parentless children. "Certainly this rationale cannot be ascribed to the legislature" in enacting Section 63.042(3).

B. Heightened Scrutiny Standard.

Although the trial court reviewed the Children's equal protection claim under the same rational-basis standard as the Father's claim, should there be any question whether the Children's claim could survive that test, the court could have

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(. . . continued)
impossible for the State to justify leaving biological children of gay parents to be raised by those parents.

as readily ruled for the Children under the heightened-scrutiny standard first enunciated by the United States Supreme Court in *Weber v. Aetna Cas. & Surety Co.*, 406 U.S. 164 (1972), to govern equal protection claims founded on classifications based on illegitimate birth:

> The status of illegitimacy has expressed through the ages society's condemnation of irresponsible liaisons beyond the bonds of marriage. But visiting this condemnation on the heads of an infant is illogical and unjust. Moreover, imposing disabilities on the illegitimate child is contrary to the basic concept of our system that legal burdens should bear some relationship to individual responsibility or wrongdoing. Obviously, no child is responsible for his birth and penalizing the illegitimate child is an ineffectual -- as well as an unjust -- way of deterring the parent. Courts are powerless to prevent the social opprobrium suffered by these hapless children, but the Equal Protection Clause does enable us to strike down discriminatory laws ... where – as in this case – the classification is justified by no legitimate state interest, compelling or otherwise.

Id. at 175 (footnote and citations omitted); *accord Pickett v. Brown*, 462 U.S. 1, 3 (1983) ("[o]ur consideration of these cases has been animated by a special concern for discrimination against illegitimate children"); *Mills v. Habluetzel*, 456 U.S. 91, 99 (1982) (restrictions on support suits by illegitimate children "will survive equal protection scrutiny to the extent they are substantially related to a legitimate state interest"); *United States v. Clark*, 445 U.S. 23, 27 (1980) ("a classification based on illegitimacy is unconstitutional unless it bears 'an evident and substantial relation to the particular ... interests [the] statute is designed to serve'"); *Lalli v. Lalli*, 439 U.S. 259, 265 (1978) (plurality opinion) ("classifications based on illegitimacy ... are invalid under the Fourteenth Amendment if they are not substantially related to permissible state interests"); *Gomez v. Perez*, 409 U.S. 535,

538 (1973) ("a State may not invidiously discriminate against illegitimate children by denying them substantial benefits accorded children generally").

This precedent has "culminated in a definitive test to apply in cases involving an equal protection challenge to an illegitimacy-based classification":

> This test, although it falls in the "realm of less than strictest scrutiny," requires more than a determination that there is a rational basis for the classification. The classification must also bear a substantial relationship to the state's interest asserted as the basis for the statute.

State, Dep't of Health & Rehab. Servs. v. West, 378 So. 2d 1220, 1226 (Fla. 1979). The courts must ensure that a legislative classification "reflects a reasoned judgment consistent with the ideal of equal protection by inquiring whether it may fairly be viewed as furthering a substantial interest of the State." *Plyler v. Doe*, 457 U.S. 202, 217 (1982).

That test is fully applicable here, because – although the classification is not, strictly speaking, based on illegitimacy *qua* illegitimacy – the Children have as little control over their status as abandoned children of unfit biological parents and the foster children of an appropriate adoptive father who happens to be a gay man, as does an illegitimate child who becomes a ward of the State. The statutory classification is based on circumstances beyond John and James' control and which the children are similarly powerless to influence, namely, the sexual orientation of their caregiver. The statute penalizes John and James and other children placed in the care of gay caregivers by denying them all of the critical benefits of adoption.

The requisite "substantial interest" cannot be found to exist in a statute that discriminates against abandoned children who are involuntarily placed with gay

caregivers and, through a natural bonding process, become as attached to those caregivers as if they were their parents.

III. DENYING THE CHILDREN THE RIGHT TO BE ADOPTED BY THE FATHER UNLAWFULLY DENIGRATES THE CHILDREN'S RIGHT TO PERMANENCY IN THEIR PLACEMENT.

The facial constitutionality of Section 63.042(3) aside, the Legislature has decreed that children in State custody have a right to expeditious permanent placement. That right is nothing less than what the trial court correctly labeled "a child's constitutional right to a true home" (R:699), which right the Children would be denied if their otherwise-appropriate adoption by the Father is thwarted by the mere – and irrelevant – fact of his sexual orientation.

A. The Right to Permanency.

"The state has a compelling interest in providing stable and permanent homes for adoptive children in a prompt manner." § 63.022(1)(a), Fla. Stat. (2009). Adoptive children accordingly "have the right to permanence and stability in adoptive placements." § 63.022(1)(c), Fla. Stat. (2009). Thus, "in every adoption, the best interest of the child should govern and be of foremost concern in the court's determination," and the State shall "provide to all children who can benefit by it a permanent family life." § 63.022(2), Fla. Stat. (2009). Where, as here, a child cannot be reunited with a natural parent, "adoption ... is the primary permanency option." § 39.621(6), Fla. Stat. (2009). The Florida Legislature has declared that such permanent placement in adoption shall be "achieved as soon as possible for every child in foster care," with "no child remain[ing] in foster care

longer than 1 year." § 39.001(1)(h), Fla. Stat. (2009). *See* 42 U.S.C. § 671(15)(E)(ii) ("reasonable efforts shall be made to place the child in a timely manner in accordance with the permanency plan, and to complete whatever steps are necessary to finalize the permanent placement of the child").

These statutory provisions codify "the State's compelling interest in providing stable and permanent homes for adoptive children ... and enforc[ing] the child's *statutory right to permanence and stability* in adoptive placements." *G.S. v. T.B.*, 985 So. 2d 978, 981-82 (Fla. 2008) (emphasis added). "Achieving permanent stability in the child's life is the paramount concern of the judicial process." *L.M. v. Dep't of Children & Families*, 946 So. 2d 42, 46 (Fla. 4th DCA 2006) (citation omitted).[13] Thus, "[a]t all stages of the proceedings, courts are compelled to expedite proceedings to prevent children from languishing in the foster care system." *C.M. v. Dep't of Children & Families*, 854 So. 2d 777, 779 (Fla. 4th DCA 2003). "[T]he paramount concern is expeditiously achieving permanent stability for the children," and it is DCF's "role to ... select suitable and permanent placement for these children." *B.Y. v. Dep't of Children & Families*, 887 So. 2d 1253, 1256 (Fla. 2004).

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[13] DCF's argument that the Legislature created only a "permanency 'goal' for children in the dependency system, not a 'right'," DCF Brief at 44, is thus manifestly incorrect. There is a "goal," to be sure, which is that children should not remain in foster care in excess of one year, but the *right* to permanency is something else entirely. *E.g.*, *L.M.*, 946 So. 2d at 46 (noting statutory "goal that no child remain in foster care longer than one year," as distinguished from children's "right to permanency").

DCF argues that Section 63.042(3) should be invoked to deny the Children *any* permanency in their placement. If the Father cannot adopt the Children, they will remain in foster care – well cared for, loved and cherished, and provided with all of the benefits of a true family – but subject to DCF's supervision and virtually unchecked power to remove them from their Father and even to separate them. As the trial court found, based on undisputed expert testimony, children come eventually to "understand that foster parents and guardians are not legal family" and "it is in the [C]hildren's best interest to be adopted by [the Father], as opposed to maintaining lesser forms of permanency through continued foster care, permanent guardianship or the like." (R:668).

Indeed, Florida's Chief of Child Welfare Services testified that, "in order for a child in a gay foster home to receive the permanency provided by statute ..., *the child must be uprooted from their current family, school and neighborhood.*" (R:690) (emphasis added). Adoption is thus "preferred ... because of the physical and emotional stability, legality, inheritance and familial relationship benefits offered to adoptees." *Id.* Adopted children "perceive themselves differently than children in guardianship because adoptees feel a stronger sense of belonging and a legal connection to their parents *that children in lesser forms of permanency can never truly feel.*" *Id.* (emphasis added). And singling out parentless children who have bonded with their gay foster parent for this sort of second-class relationship makes a mockery of the Legislature's permanency command.

B. Constitutional Protection of the Right to Permanency.

The Children's undeniable right to permanency is entitled to constitutional protection under the due process guarantee of "[l]iberty from bodily restraint." *Youngberg v. Romeo*, 457 U.S. 307, 316 (1982). That right is fully guaranteed to foster children, who, "like the incarcerated or the involuntarily committed, are 'placed ... in a custodial environment ... [and are] unable to seek alternative living arrangements.'" *Nicini v. Morra*, 212 F.3d 798, 808 (3d Cir. 2000) (citation omitted); *accord E.C. v. Sherman*, 2006 WL 1307641, *37 (W.D. Mo. 2006) (recognizing "the fundamental right of foster children," *i.e.*, their "liberty interest in avoiding unnecessary government confinement" which requires "strict scrutiny review" of governmental action). A foster child "has a liberty interest in his personal security and well-being, an interest protected by the Fourteenth Amendment." *Harris ex rel. Litz v. Lehigh County Office*, 418 F. Supp. 2d 643, 647 (E.D. Pa. 2005) (citing *Youngberg*). Thus, "[a] State's intervention under the foster care system sufficiently imposes upon a child's liberty interest to provide a substantive due process right." *Id.* (citation omitted); *accord Taylor v. Ledbetter*, 818 F.2d 791, 795 (11th Cir. 1987).

The trial court correctly recognized that Section 63.042(3) burdens the Children's "liberty interest in being free from undue restraint in State custody on one hand and simultaneously operating to deny them a permanent adoptive placement that is in their best interests." (R:703). The only obstruction that stood in the way of the Children's liberty from State custody is the sexual orientation of

their only present potential adoptive parent – the same Father with whom they have been happily living since December 2004.

Once a state established statutory rights, access to those rights "must be kept free of unreasoned distinctions." *Mayer v. City of Chicago*, 404 U.S. 189, 193 (1971) (citation omitted). Regardless whether Section 63.042(3) can pass constitutional muster against the Father's equal protection challenges, it is an arbitrary infringement on the Children's liberty, which is anathema to the Fourteenth Amendment. *See Hicks v. Okla.*, 447 U.S. 343, 346 (1980) (Fourteenth Amendment "preserves against arbitrary deprivation" of liberty interest). Denying the Children their right to permanency based upon the Father's sexual orientation "is an 'unreasoned distinction' which the Fourteenth Amendment forbids the State to make." *Shuman v. State*, 358 So. 2d 1333, 1336 (Fla. 1978) (citations omitted).

CONCLUSION

Based on the foregoing, the Children request the Court to affirm the trial court's final adoption judgment.

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