IN THE DISTRICT COURT OF APPEAL
FOR THE THIRD DISTRICT, 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.

INITIAL BRIEF OF FLORIDA DEPARTMENT OF CHILDREN AND FAMILIES

On Appeal from an Order of the Eleventh
Judicial Circuit, in and for Dade County, Florida

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STATEMENT OF THE CASE AND FACTS

A. Background

The central issue in this case is whether the trial court correctly applied the rational basis test under the Equal Protection Clause, article I, section 2, of the Florida Constitution, to section 63.042(3), Fla. Stat. (2006), which provides that "no person eligible to adopt under this statute may adopt if that person is a homosexual."[1]

Since its enactment, the statute has been unchanged[2] and survived constitutional challenges in the state and federal appellate courts as recently as 2004.[3] In Cox v. Florida Department of Health and Rehabilitative Services, 656 So. 2d 902 (Fla. 1995), the Florida Supreme Court reviewed the Second District's

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[1] The term "homosexual" in this context is "limited to applicants who are known to engage in current, voluntary homosexual activity" as distinguished from homosexual orientation. *See* Fla. Dep't of Health & Rehabilitative Servs. v. Cox, 627 So. 2d 1210, 1215 (Fla. 2d DCA 1993), *approved in part, quashed in part,* 656 So. 2d 902 (Fla. 1995).

[2] Efforts to amend the restriction legislatively have been made annually. *See, e.g.,* Fla. SB 200, § 1 (2008); Fla. SB 206, § 1 (2007); Fla. SB 172, § 1 (2006).

[3] *See also* Amer v. Johnson, 4 Fla. L. Weekly Supp. 854 b (Fla. 17th Cir. Ct. 1997) (holding that section 63.042(3) does not violate equal protection, due process, or privacy clauses of Florida's Constitution). In contrast, the Sixteenth Circuit has twice refused to follow the law. *See* In the Matter of the Adoption of John Doe, Case No. (Redacted) (Fla. 16th Cir. Ct. Aug. 29, 2008); Seebol v. Farie, 16 Fla. L. Weekly C52 (Fla. 16th Cir. Ct. 1991).

unanimous en banc conclusion that section 63.042(3) did not facially violate substantive due process, equal protection, or privacy rights under Florida's Constitution. The Supreme Court affirmed as to the substantive due process and privacy claims, but remanded the equal protection claim. Id. at 903. The Court affirmed the Second District's use of the rational basis standard, but found the record too incomplete to resolve the question. Id. Its remand was for the narrow purpose of permitting factual completion of the record. Id.; *see also* Cox, 627 So. 2d at 1213 (noting "virtually *no* evidence in the record") (emphasis in original).[4]

In Lofton v. Secretary of Department of Children and Families, 358 F. 3d 804, 818 (11th Cir. 2004), *rehearing en banc denied*, 377 F.3d 1275 (11th Cir. 2004), *cert. denied*, 535 U.S. 1081 (2005), the Eleventh Circuit held that section 63.042(3) does not violate the federal Due Process or Equal Protection clauses, or a right to private sexual intimacy. Exercising "great caution" out of deference to the legislative policy debate, 358 F.3d at 827, the court noted that there is no fundamental right to adopt or to be adopted. Id. at 811, 818. It then applied the rational basis test to the equal protection challenge, concluding that Florida has a legitimate interest in structuring adoption to provide stable and nurturing homes to educate and socialize adopted children, particularly as to their sexual development.

[4] On remand, the petitioner voluntarily dismissed the case, reportedly because his domestic relationship ended. *See* Gay Men Give Up on Adoptions, St. Petersburg Times, Dec. 15, 1995, at 6B.

Id. at 818-823. Because a high percentage of children available for adoption will develop heterosexual preferences, the legislature could reasonably decide that a heterosexual household is the preferred model for educating and guiding the sexual development of children from pubescence through adolescence. Id. at 819-20, 822, 826. The court also rejected arguments that section 63.042(3) was invalid as both over- and under-inclusive. Id. at 820. It found that unmarried heterosexuals (a) are better positioned than homosexuals to provide guidance and education on sexual development to adoptees, who statistically are highly likely to develop heterosexual preferences, and (b) have a greater probability of forming a dual gender parenting environment via marriage. Id. at 822. The possibility that some homosexual households might provide a better environment did not the violate equal protection principles because the legislature is permitted to establish classifications, even imperfect ones, under the rational basis test. Id. at 822-23. As to the plaintiffs' social science evidence, the court held it did not disprove unequivocally the legitimate reasons underpinning section 63.042(3) because that evidence was not "so well established and so far beyond dispute that it would be irrational for the Florida legislature to believe that the interests of its children are best served by not permitting homosexual adoption." Id. at 825. Finally, the court deemed it unnecessary to resolve whether the statute is rationally related to the state's interest in promoting public morality in adoptive childrearing; it suggested,

however, that the argument against the public morality justification had been resolved given language from a United States Supreme Court case, stating that there exists "a substantial governmental interest in protecting order and morality." Id. at 819 n.17.

In this case, as discussed in more detail below, the only claims at issue are (a) an equal protection claim under the rational basis test; and (b) a claim that section 63.042(3) violates a child's "right" to permanency, a right not previously recognized.

B. Facts and Proceedings Below

1. Adoption: Florida Law

Under Florida law, adoption is not a right; instead, it is a statutory privilege that is wholly a creation of the state. Cox, 627 So. 2d at 1216; Lofton, 358 F.3d at 809. The state's overriding interest is not to provide adults with opportunities to be parents, but to ensure the "best interests of the children whom it is seeking to place with adoptive families." Lofton, 358 F.3d at 810. It substantially differs from constitutionally-protected family relationships arising from biological parentage, which have their origin apart from the state, by having its source in state law and contractual arrangements. *See generally* Chapter 63, Fla. Stat.

In deciding upon and establishing the contours of its adoption policy, the State of Florida acts in its protective *in loco parentis* role for children who are

wards of the state and have lost their natural parents. §§ 63.022, 63.089, Fla. Stat. In this role, the state's overriding interest is the "best interests of children," and, similar to natural parents, to make decisions that will best serve the safety, stability, health, welfare, growth, and development of children. Id.; § 63.142(4), Fla. Stat.; Fla. Admin. Code R. 65C-16.005(3). Because the welfare of adoptive children is paramount, Florida adoption policies call for close scrutiny of potential parents using classifications that might fail constitutional review if employed in other areas of law. *See* Lofton, 358 F.3d at 810-11; Fla. Admin. Code R. 65C-16.005(3) (applications are evaluated based in part on child-rearing experience, marital status, state of residence, income, neighborhood, health history, racial-ethnic views, and whether a parent will give priority to childcare needs over their career/employment situation). As such, the decision to adopt a child is not private, but a public act subject to invasive public scrutiny of an applicant and his or her family and home environments, including an "applicant's physical and psychiatric medical history, previous marriages, arrest record, financial status, and educational history." Lofton, 358 F.3d at 810-11; *see also* Cox, 627 So. 2d at 1216.

2. The Children's History.

In December 2004, the state took custody of two young brothers X.X.G. and N.R.G. (the "Children"), aged 4 and 4 months, based on allegations of

abandonment and neglect. [R-423, 661, 694][5] It placed the Children with Petitioner and his domestic partner, licensed foster caregivers, who agreed to accept them temporarily. Id. They kept the Children and took good care of them for the next year and a half [R-423-24, 694-95, 697], during which time the Center for Family and Child Enrichment ("CFCE"), which is the adoptive services subcontractor in Miami-Dade County for the Florida Department of Children and Families ("DCF"), and the courts closely monitored the placement. [R-668-70, 697 (monthly visits and 58 court hearings occurred)]

3. Petitioner's Adoption Petition.

On July 25, 2006, the Children's biological parents lost their parental rights and the Children became available for adoption. [R-423, 694] Two months later, Petitioner filed a petition to adopt them. Id.

Upon receipt of the petition, the CFCE placed a hold on the Children, preventing their placement elsewhere or their public identification as available for adoption. [R-669, 2008] The CFCE performed a preliminary home study, finding that Petitioner met caregiver requirements; it denied the petition, however, because he is a homosexual in a same-sex relationship. [R-423-24, 695, 669, 2009-10]

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[5] Citations to the record on appeal appear as [R-*], where * is the page number. The Record Index provided by the circuit court did not include volume numbers. All transcript citations are to the "Bailey" transcript [R-716-2094] per agreement of the parties and the court's designation. [R-432]

4. Petitioner's and the Children's Legal Challenge.

On November 7, 2006, Petitioner filed a constitutional challenge to section 63.042(3), seeking a final judgment of adoption. [R-8] Petitioner alleged that the statute violates his equal protection, privacy, and due process rights under Florida's Constitution. [R-13 (¶ 24)] Through counsel, the Children also asserted equal protection, substantive due process, and separation of powers claims. [R-194, 2017] As the agency charged with enforcing the law, DCF assumed responsibility for the law's defense. [R-90] DCF filed a motion to dismiss the Petition's claims, which both the Petitioner and the Children opposed. [R-174, 194, 211] The circuit court denied the motion as to the equal protection and substantive due process claims, but granted the motion as to Petitioner's privacy claim. [R-230][6]

5. The Trial Proceedings.

A four-day trial was held in October 2008 at which the court heard testimony from witnesses from DCF, CFCE, and the guardian ad litem program regarding Florida's child welfare system as well as the particulars of Petitioner's

[6] Just before trial, the Petitioner and Children filed a Notice of Supplemental Authority submitting a decision of the Sixteenth Judicial Circuit Court invalidating section 63.042(3), and seeking to add the claim that the law constituted an invalid special law. [R-433 (citing In the Matter of the Adoption of John Doe, Case No. (Redacted) (Fla. 16th Cir. Ct. Aug. 29, 2008)] At trial, the trial court denied Petitioner's request to add the new claim. [R-2093]

case. [R-668-70, 688-90] The Petitioner testified regarding his personal history, partner relationship, and experience with the Children. [R-663-666, 1100-1164]

Most of the trial, however, was devoted to the expert testimony of the parties' social science and medical experts (whose vitae's stretch for dozens of pages), who addressed the existing and evolving social science research, on various topics. [R-670-688] Among others, the Petitioner and Children presented the testimony of:

1. Dr. Letita A. Peplau – Faculty Affiliate, UCLA Center for the Study of Women; Vice-Chair for Graduate Studies, Psychology Department; Director, NSF IGERT Interdisciplinary Relationship Science Program [R-3715] – who testified regarding the quality and stability of same-sex relationships, including their rates of domestic violence [R-732 et seq.];

2. Dr. Susan D. Cochran – Professor, Department of Epidemiology (School of Public Health) & Department of Statistics, UCLA [R-3730] – who testified regarding the effects of sexual orientation on mental health and the development of psychiatric and other conditions [R-842 et seq.];

3. Dr. Michael Lamb – Professor of Psychology in the Social Sciences, Faculty of Social and Political Sciences, University of Cambridge [R-3829] – who testified regarding the development and adjustment of children in families, including the sexual behavior, sexual orientation, social relationships, and peer adjustments of children of homosexuals [R-1165 et seq.];

4. Dr. Frederick S. Berlin – Founder and Director, National Institute for the Study, Prevention and Treatment of Sexual Trauma [R-3927] – who testified regarding sexual disorder, homosexuality, pedophilia, sex abuse, and the sexual behavior and orientation of children of homosexuals [R-1349 et seq.]; and

5. Dr. David M. Brodzinsky – Professor Emeritus, Developmental and Clinical Psychology, Rutgers University [R-4825] – who testified

regarding his evaluation of Petitioner and the Children and the caregiver-child relationship generally. [R-1456 et seq.]

DCF offered the testimony of two experts:

1. Dr. George A. Rekers – Distinguished Professor of Neuropsychiatry and Behavioral Science Emeritus, and former Chairman of the Faculty in Psychology, University of South Carolina School of Medicine [R-4869] – who testified regarding the effects of sexual orientation on mental and physical health of homosexuals and their children, the instability of homosexual relationships, the development and adjustment of the children of homosexuals, including health, social relationships, sexual behavior and orientation, and peer adjustments [R-1523 et seq.]; and

2. Dr. Walter R. Schumm – Professor of Family Studies and Human Services, Kansas State University [R-4882] – who testified regarding family studies and child development, the effects of sexual orientation on mental and physical health of homosexuals and their children, the methodological reliability of current social science research, and the sexual behavior and orientation, social relationships, and peer adjustments of the children of homosexuals. [R-1769 et seq.]

As detailed in the trial court's final judgment, the Petitioner's and Children's experts generally testified that Florida's adoption restriction lacked a scientific basis, that no adjustment-related differences exist with the placement of children into the homes of homosexuals versus heterosexuals, and that homosexual parents are equally fit to parent and provide a stable and secure home for adoptees. [R-670-88] Appellant's experts generally expressed the opposite opinion, including concerns about the long term welfare of adoptees placed with homosexuals. Id.

Despite the divergent opinions, the expert testimony and research data showed consistencies in the following areas: (1) that homosexuals have higher

rates of psychiatric and other distressing conditions, such as depression, anxiety, substance abuse, suicide, and others, which are risks that DCF's home study evaluations cannot fully predict [R-865, 872-75, 894, 896, 965-66, 972-74, 1325, 1339-40, 1563-79, 1583-86, 1589-97, 1637-38, 1679, 1753-55, 1813, 1864-68], (2) that homosexual parents are generally more tolerant of sexual activity by their minor children, who may tend to be more sexually active and prone to sexual experimentation [R-677, 1234-39, 1314-16, 1327-29, 1386-90, 1739, 1809-13, 1845-51, 1855-61, 1864], (3) that some studies indicate that homosexuals have worse relationship stability rates than heterosexuals (particularly in heterosexual homes with children) [R-764-71, 777, 1552-54, 1598-1603, 1667-69], and (4) that the children of homosexuals tend to suffer peer bullying, teasing, and stigma due to their parents' sexual orientation. [R-1224-26, 1247, 1609-17, 1621-23, 1636-38]

Both sides' experts cited relevant gaps in the current social science research related to the issues of this case. [R-758, 777, 812, 876, 965-66, 1199, 1314-15, 1388-90, 1613, 1635-38, 1742, 1849] In spite of these common observations, the experts had divergent opinions as to their relative importance for purposes of shaping adoption policy. [R-670-88] After trial, each party submitted proposed findings and conclusions of law. [R-509, 547]

6. The Trial Court's Final Judgment of Adoption.

On November 25, 2008, the trial court entered a Final Judgment of Adoption granting Petitioner's petition and facially invalidating section 63.042(3) on equal protection grounds. [R-661, 712] The court also held the adoption restriction violated the rights of children to permanency under the federal Adoption and Safe Families Act of 1997 and chapter 39, Florida Statutes. [R-712]

First, citing chapter 39, Florida Statutes, the court held that the ban on adoptions by homosexuals infringed Florida's broader goal and recognition of "a child's constitutional right ... to a permanent adoptive home." [R-698-99 (Order at 39-40)] The trial court held that G.S. v. T.B., 985 So. 2d 978 (Fla. 2008), recognized a child's statutory right of permanence and adoptive stability, which section 63.042(3) unlawfully infringed. [R-700-01] It relied on rulings of the Supreme Court of California and an unreported decision from the Western District of Missouri, courts that had recognized children to have fundamental permanency rights. [R-702] The court concluded that section 63.042(3) harms children by hindering permanency and suitable placements. [R-704]

Second, the court held that section 63.042(3) violates Petitioner's and the Children's equal protection rights. [R-705-11] Like the Florida Supreme Court and Eleventh Circuit in the past, the trial court applied the rational basis test because this case "does not involve a fundamental right or suspect class." [R-707-08 (citing

Cox, 656 So. 2d at 903 & Lofton, 358 F. 3d at 818)] Though it noted the high deference due to the legislature under the test, the trial court held that the adoption restriction failed to meet the lowest level of judicial scrutiny. Id. It concluded the social science research had formed a consensus since the Eleventh Circuit upheld section 63.042(3) four years ago under the same test. [R-707]

The trial court relied only on select portions of the testimony of Appellees' experts. Id. It wholly disregarded the two days of research-backed testimony and opinions from DCF's experts, characterizing them as unreasonable and non-credible on account of their religion. [R-678-84, 709 (citing church affiliation, religious writings, and publication in a journal that promotes faith and research integration)] Having wholly disregarded DCF's evidence, the court adopted in toto Appellees' experts' opinion and concluded categorically that the issue is "so far beyond dispute that it would be irrational to hold otherwise." [R-696-97]

Specifically, the trial court held that "homosexuals are no more susceptible to mental health or psychological disorders, substance or alcohol abuse or relationship instability than their heterosexual counterparts." [R-709-10] Despite this conclusion, the court cited studies showing that homosexuals have significantly higher rates of:

- Depression/major depression [R-674 n.8, 678-79 n.17, 679 n.18];
- alcohol use/dependency/abuse disorder [Id.];
- drug use/dependency/abuse disorder [Id.];
- suicide risk and attempts [Id.];

- having two or more disorders [R-679 n.17];
- domestic violence rates as high as 60% [R-671-72]; and
- disparate break-up/stable relationship rates, especially as compared to those heterosexual homes with children [R-671 n.4, 672 n.5, 679 n.20].

The trial court also rejected justifications of the statute based on the maladjustment and social stigmatization of children in homosexual homes. Regarding maladjustment, the court acknowledged that contrary published research exists that Appellees' experts attempted to discredit. [R-676 n.11] As to social stigmatization, the trial court noted evidence that the children of homosexuals experience stress due to bullying and teasing of peers because of their parent's sexual orientation. [R-677-78, 680] It concluded, however, that professionals and major associations agree "that there is no optimal gender combination of parents." [R-710-11]

The trial court also noted expert testimony that children of homosexuals are more sexually active and less tied to sexual roles. [R-677] A study cited by the court indicated that they are also more open to same-sex behavior. [R-677 n.14; R-686 ("one-fourth of the children raised by lesbians were open to same-sex relationships while none of the children raised by heterosexuals considered [it]")]

Finally, the trial court concluded that a state concern for public morality "is inapplicable in the adoption context." [R-711] The court held DCF's practice of allowing homosexuals to serve as foster parents to contradict any public morality interest that might underpin an argument for upholding section 63.042(3). Id.

In conclusion, the trial court found section 63.042(3) wholly irrational and unsupported by any conceivable facts. [R-696-97, 709] The court granted the Petition, entered a judgment of adoption, and invalidated section 63.042(3) as violative of equal protection guarantees and the permanency rights of children. [R-712] DCF filed a timely appeal to this Court. [R-659]

SUMMARY OF THE ARGUMENT

Judicial review of section 63.042(3) should be unexceptional. It involves the most highly deferential and minimalist legal inquiry in the judicial tool bag: the rational basis test. Neither the trial court nor the parties dispute that this test applies, a test that is the weakest constraint on legislative power, but the strongest constraint on judicial power, in our legal system. It is premised on the principle that a properly functioning legislative process often produces imperfect legislation, rough accommodations, and uneven compromises. The test restrains courts from overturning a statute unless it is conclusively proven that absolutely no conceivable basis exists for the legislature's classification; indeed, the test is so deferential that a classification may be based on rational speculation without any evidentiary or empirical basis whatsoever.

Moreover, the determination of whether a rational basis exists may not be subject to courtroom fact-finding and a balancing of the policy, wisdom, or merits of the classification as was done below; instead, the law must be upheld, even if the legislature's classification is improvident, ill-advised or unnecessary, if any single state of facts exists that may reasonably be conceived to justify it. It is a search for a single plausible reason for the classification, at which point the judicial inquiry ends. Indeed, if a classification is subject to any debate, the duty of the

judicial branch is to defer to the classification and allow the democratic process to address and resolve the matter via the legislative process.

Given the unexceptional nature of the rational basis test, this case becomes exceptional only because of its socially and politically divisive nature, which is reflected in the caselaw, the social science and legal literature, and here the emotion-laden language and findings of the trial court. The trial court claimed to apply the rational basis test to the equal protection claim, but its application stripped the test of its über deference to legislative enactments. Instead of assuming the most modest judicial role possible, by evaluating whether any conceivable connection exists between the law and the potential well-being of adopted children, the court weighed for itself the conflicting studies and opinions and concluded categorically that none of the asserted grounds for the classification has the slightest degree of plausibility or support. In short, the court engaged in precisely the type of courtroom fact-finding that is impermissible, resulting in its substitution of its own policy judgment for that of the Legislature.

A straightforward and objective application of the rational basis test would have reached a different result for a number of reasons. Beyond the many reasons stated in Lofton and Cox for upholding section 63.042(3) on equal protection and substantive due process grounds, *Appellees' own experts* testified and cited research confirming a rational connection between the law and the welfare of

adopted children. For instance, both sides' experts presented testimony that: (1) homosexuals have higher rates of psychiatric and other distressing conditions (e.g., depression, anxiety, substance abuse, suicide) than heterosexuals, risks that a DCF home study cannot fully insure children against, (2) the minor children of homosexuals (with parental support) are more sexually active and prone to sexual experimentation; (3) the relationships of homosexuals appear less stable than those of heterosexuals (particularly heterosexuals with children), and (4) the children of homosexuals endure notable peer bullying and teasing stressors due to their parents' sexual orientation. It is not the State or its witnesses who generated much of this data, but Appellees' experts themselves.

Notably, both sides' experts cited significant shortcomings with the current state of social science research, which itself supports the legislature's choice of its classification. As the Eleventh Circuit stated only five years ago: "Scientific attempts to study homosexual parenting in general are still in their nascent stages and so far have yielded inconclusive and conflicting results. … Given this state of affairs, it is not irrational for the Florida legislature to credit one side of the debate over the other." Lofton, 358 F. 3d at 826. It is both inconceivable and insupportable to conclude that the research in this field has gone in five years from "nascent" and "inconclusive" to "so far beyond dispute" that is it wholly irrational for Florida's Legislature to believe that adoption by heterosexuals is the better

course, particularly given the critiques and flaws inherent in the research. In addition, legal and moral considerations permit the legislature to draw the classification. For any one of these reasons, the law should be upheld under the highly deferential rational basis test.

Finally, the trial court erred in holding, for the first time by any court, that children have a fundamental right to adoptive permanency arising from federal and state statutes. To the contrary, these laws set forth a "goal" of adoptive permanency, and grant no enforceable legal rights to children sufficient to invalidate any part of Florida's adoption statute. Florida law has consistently characterized adoption as a statutory privilege; no fundamental right to adopt or to be adopted exists. *See, e.g.,* Cox, 627 So. 2d at 1215. Thus, section 63.042(3) cannot violate the claimed right of children to adoptive permanency. For all these reasons, the trial court's order should be reversed and section 63.042(3) upheld.

ARGUMENT[7]

The trial court incorrectly applied the rational basis test to invalidate section 63.042(3) on equal protection grounds. The trial court also erred in creating a newfound fundamental right of permanency. As discussed in section I, the classification that allows only heterosexuals to adopt has been upheld in the face of substantially similar constitutional challenges (equal protection and substantive due process) and is rationally related to the State's weighty interest in structuring the adoptive relationship. As discussed in section II, adoption permanency laws grant no enforceable constitutional or statutory rights; instead, they simply establish exhortatory goals of permanency.

I. Section 63.042(3) Meets The Rational Basis Test.

Like its federal counterpart, Florida's equal protection clause in article I, section 2, does not forbid the state from making classifications. Instead, a central purpose of the legislative branch is to create classifications; indeed, every law must necessarily make some type of classification between sometimes competing social,

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[7] **Standard of Review**: The determination of a statute's constitutionality is a question of law subject to *de novo* review. Crist v. Fla. Ass'n of Criminal Def. Lawyers, Inc., 978 So. 2d 134, 139 (Fla. 2008). Even so, an appellate court begins its review under the established principle that a legislative enactment is presumed to be constitutional and must be construed to achieve a constitutional outcome if possible. Florida Dep't of Rev. v. City of Gainesville, 918 So. 2d 250, 256 (Fla. 2005). The admission or exclusion of scientific evidence is subject to the *de novo* standard of review on appeal. Rodriguez ex rel. Posso-Rodriguez v. Feinstein,793 So. 2d 1057, 1060 (Fla. 3d DCA 2001).

economic, and political interests. In this case, no dispute exists that the trial court was required to apply the lowest degree of judicial scrutiny possible: the rational basis test. As the Florida Supreme Court in Cox and the Eleventh Circuit in Lofton recognized, section 63.042(3) is evaluated under this test because no suspect or quasi-suspect classification and no fundamental constitutional rights are at issue. [R-707-08]; *see* Cox v. Fla. Dep't of Health & Rehabilitative Serv., 656 So. 2d 902, 903 (Fla. 1995); Lofton v. Sec'y of Dep't of Children & Families, 358 F.3d 804, 818 (11th Cir. 2004), *rehearing en banc denied*, 377 F.3d 1275 (11th Cir. 2004), *cert. denied*, 535 U.S. 1081 (2005).

The trial court announced the correct test, but incorrectly applied it. An overview of the test's highly deferential standards shows how far afield the trial court strayed. First, the rational basis test is based on separation of powers principles,[8] whereby courts must give deference to the legislative process, which will often produce laws that are "imperfect" fits and that involve "rough accommodations" between competing interests. *See* Heller v. Doe by Doe, 509 U.S. 312, 321 (1993) (noting that governmental problems may require rough,

[8] FCC v. Beach Commc'ns, 508 U.S. 307, 315 (1993) ("Only by faithful adherence" to judicial restraint under rational basis review "is it possible to preserve to the legislative branch its rightful independence and its ability to function.") (citations omitted).

illogical, and unscientific accommodations); Beach Commc'ns, 508 U.S. at 316.[9]

As the United States Supreme Court stated almost 100 years ago:

> To be able to find fault with a law is not to demonstrate its invalidity. It may seem unjust and oppressive, yet be free from judicial interference. The problems of government are practical ones and may justify, if they do not require, rough accommodations -- illogical, it may be, and unscientific. But even such criticism should not be hastily expressed. What is best is not always discernible; the wisdom of any choice may be disputed or condemned. Mere errors of government are not subject to our judicial review. It is only its palpably arbitrary exercises which can be declared void under the Fourteenth Amendment ... .

Metropolis Theater Co. v. City of Chicago, 228 U.S. 61, 69-70 (1913). For this reason, the "legislature must be allowed leeway to approach a perceived problem incrementally" even if its incremental approach is significantly over-inclusive or under-inclusive. Williams v. Pryor, 240 F.3d 944, 948 (11th Cir. 2001) (citing Beach Commc'ns, 508 U.S. at 316).

Under the rational basis test, a legislative enactment has a "strong presumption" of constitutionality, Heller, 509 U.S. at 319, and a heavy burden rests on the party seeking to overturn a statute: it must be conclusively proven that no

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[9] Florida's courts evaluate claims under the federal and state equal protection clauses in the same way using the same test. Warren v. State Farm Mut. Auto. Ins. Co., 899 So. 2d 1090, 1995 (Fla. 2005) (citing United States Supreme Court precedents to evaluate a state equal protection claim); Fla. High Sch. Activities Ass'n, Inc. v. Thomas, 434 So. 2d 306, 308 (1983); *see also* A Choice For Women, Inc. v. Fla. Agency For Health Care Admin., 872 So.2d 970 (Fla. 3d DCA 2004) (rejecting a claim that Florida's Equal Protection Clause affords greater protection than the U.S. Constitution).

conceivable basis exists for the statute's classification. Beach Commc'ns, 508 U.S. at 315. Stated differently, the challenging party must "negative any reasonably conceivable state of facts that could provide a rational basis." Bd. of Trustees v. Garrett, 531 U.S. 356, 367 (2001) (quotation omitted).

The test is so deferential that the government is not required to produce any proof (Vance v. Bradley, 440 U.S. 93, 110 (1979)), and may base its classification on "rational speculation unsupported by evidence or empirical data" even if there is "substantial expert opinion to the contrary." Hamilton v. State, 366 So. 2d 8, 10 (Fla. 1978); *see also* Heller, 509 U.S. at 321 ("A classification does not fail rational-basis review because it 'is not made with mathematical nicety or because in practice it results in some inequality.'") (citation omitted); Ginsberg v. State of New York, 390 U.S. 629, 642-643 (1968) ("We do not demand of legislatures 'scientifically certain criteria of legislation.'") (citation omitted); Sproles v. Binford, 286 U.S. 374, 388 (1932) ("To make scientific precision a criterion of constitutional power would be to subject the State to an intolerable supervision hostile to the basic principles of our Government and wholly beyond the protection which the general clause of the Fourteenth Amendment was intended to secure."). Indeed, even if the assumptions underlying a legislative classification are erroneous, "the very fact that they are 'arguable' is sufficient, on rational-basis review, to 'immunize' the [legislative] choice from constitutional challenge."

Heller, 509 U.S. at 333 (1993) (citing Beach Commc'ns, 508 U.S. at 320) (quoting Vance, 440 U.S. at 112)).

In addition, the inquiry into whether a rational basis exists is not subject to courtroom fact-finding or a judicial balancing of the "wisdom, fairness, or logic" of the classification. Beach Commc'ns, 508 U.S. at 313, 319. "Nor does it authorize 'the judiciary [to] 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, 509 U.S. at 319 (quoting New Orleans v. Dukes, 427 U.S. 297, 303 (1976)). Instead, the law must be upheld, even if the classification is improvident, ill-advised or unnecessary, if any single state of facts exists that may reasonably be conceived to justify it. Beach Commc'ns, 508 U.S. at 313-15. If a single plausible reason exists for the classification, the test is met and the court's work is over. Id. at 313-14 ("Where there are plausible reasons for Congress' action, our inquiry is at an end.").

If the classification is based on debatable evidence, a court must uphold the classification. Sproles, 286 U.S. at 388-89; Haire v. Fla. Dep't of Agric. & Consumer Servs., 870 So. 2d 774, 787 (Fla. 2004). Because legislatures are not required to articulate their reasons for enacting statutes, "it is entirely irrelevant for constitutional purposes whether the conceived reason for the challenged distinction actually motivated the legislature." Beach Commc'ns, 508 U.S. at 315. Thus, if an

appellate court conceives of any ground to support the law, regardless of whether the trial court considered that ground, the law must be upheld. Johnson v. Bd. of Regents, 263 F.3d 1234, 1251 n.17 (11th Cir. 2001); Panama City Med. Diagnostic Ltd. v. Williams, 13 F.3d 1541, 1546 (11th Cir. 1994) ("it is entirely permissible to rely on rationales that were not contemplated by the legislature at the time of the statute's passage"), 1546 n.3 (noting that "one of the rationales relied on [in Beach Commc'ns, 508 U.S. at 318] was proffered not by the legislature in support of the challenged statute, but rather by a circuit judge, concurring in the circuit court's opinion"). As the Eleventh Circuit has noted, "[a]lmost every statute subject to the very deferential rational basis standard is found to be constitutional." Doe v. Moore, 410 F.3d 1337, 1346-47 (11th Cir. 2005) (citation omitted).

Given the substantial burden that Appellees shoulder, and the über deference given to the legislative classification at issue, it quickly becomes apparent that the trial court did not apply the test correctly. The trial court erred by disregarding many conceivable rationales for the statute. In fact, some of these rationales were amply covered in Lofton and Cox,[10] which upheld section 63.042(3) under equal

[10] This Court may take account of reasoning from courts that have considered similar issues. *See, e.g.,* Food Fair Stores, Inc. v. Zoning Bd. of Appeals of City of Pompano, 143 So. 2d 58, 61-62 (Fla. 2d DCA 1962) (relying on rationale of other state courts to uphold city ordinance in equal protection case); *see also* Crawford v. Marion County Election Bd., 128 S.Ct. 1610, 1619 n.12-13 (2008) (validating state concerns of potential voter fraud by citing evidence from other court cases).

protection and substantive due process challenges,[11] providing a more than sufficient basis for reversal. More importantly, as this brief states in greater detail, the trial court's order cannot be sustained under the rational basis test *based solely on the testimony of, and studies relied upon by, Appellees' own experts*. As the next sections demonstrate, at least four separate independent grounds exist for upholding section 63.042(3) based on Appellees' evidence alone (without even considering Appellant's experts' testimony and evidence, other court decisions, research and other rationales of which this Court may take notice).

A. Expert studies show that homosexuals, as a class, have higher rates of specific adverse conditions that are relevant in the adoption context.

Despite the trial court's categorical conclusion that "homosexuals are no more susceptible to mental health or psychological disorders, substance or alcohol abuse … than their heterosexual counterparts" [R-710], expert testimony (from

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[11] The Eleventh Circuit in Lofton found section 63.042(3) constitutional under equal protection analysis because it is rationally related to: home stability concerns, the provision of heterosexual role models (the orientation that most adoptees will pursue); legislative caution because social science is not well-established and undisputed; and, potentially, state morality interests. 358 F. 3d at 818-26; *see also* Hernandez v. Robles, 855 N.E.2d 1, 7-8 (N.Y. 2006) (noting the same concerns as in Lofton). The Florida Supreme Court in Cox upheld the Second District's unanimous, en banc conclusion that section 63.042(3) does not violate substantive due process standards, finding that no liberty interest exists to adopt a child. 656 So. 2d at 903; 627 So. 2d at 1217.

both sides) suggests that homosexuals have an elevated risk of psychiatric and other distressing conditions that could affect children placed in their care.

Dr. Susan Cochran, one of Appellees' experts, testified about her extensive research that shows homosexuals to have much higher rates than heterosexuals of suicide, depression, anxiety, psychiatric disorders, alcohol dependency, illegal drug use, and smoking. Dr. Cochran estimated the following rates [*see also* R-674 n.8, 678-79 n.17-18]:

- major depression – 17% of gay men versus 8% of heterosexual men and 27% of lesbian/bisexual women versus about 14% of heterosexual women [R-873-74];
- anxiety – 5.6% for gay men and 2.8% for heterosexual men; 11% for lesbian/bisexual women and 4.5% for heterosexual women; [R-874]
- suicide attempts – 14% of gay-classified respondents had a history of attempting suicide versus 4.5% of heterosexuals [R-875];
- any psychiatric disorder – 41.8% of homosexuals/bisexuals versus 21.2% of heterosexuals [R-946-47];
- drug dependency (including marijuana, cocaine, hallucinogens, sedatives, stimulants and tranquilizers [R-942]) – 7.5% for gay/bisexual men, 3% for heterosexual men; 5% for lesbian/bisexual women and 1.5% for heterosexual women (not considered statistically significant) [R-875; *see also* R-1813 (one study showed that the daughters of homosexuals also had a much higher rate of drug use)];
- alcohol dependency – 9.2% for gay/bisexual men versus 6.5% for heterosexual men (she considered this not statistically significant); 9% for lesbians versus 2.7% for heterosexual women [R-874]; and

- smoking – 28% among gay/bisexual men, 19% among heterosexual men; 23% among lesbians, and 13% for heterosexual women. [R-894]

Dr. Cochran acknowledged that some data sets have limitations because they are relatively new (only about 10 years old) and more research is needed to discover trend characteristics and whether these rates are changing. [R-965-66][12]

The trial court's categorical conclusion to the contrary ignored these rates, highlighting their relevance to adoption policy, but disregarding their unmistakable support for the state's restriction. [R-710][13] Notably, Dr. Cochran conceded that a point-in-time screening (like a DCF home study) is insufficient to discover whether a person will ultimately develop a psychiatric or distressing condition. [R-972-74] In particular, she testified that there is no age when people are no longer susceptible to developing alcohol- or drug-related problem.

In this regard, Florida's legislature has established logical parameters with respect to children in the State's care. When DCF allows foster children to be placed with homosexuals, it retains authority to monitor and intervene. *See, e.g.*, R-668, 697 (for instance, the Children's placement has been monitored monthly and

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[12] DCF's experts, whom the trial court wholly discredited, likewise testified that homosexuals show higher rates of psychiatric and other distressing conditions. [R-678-79 n.17-18, 1563-79, 1583-86, 1589-97, 1637-38, 1813, 1864-77]

[13] Even Dr. Lamb conceded that if there were higher levels of psychiatric disorders among gays and lesbians (he did not concede the premise), it definitely would have possible adverse maladjustment issues for a child. [R-1325, 1339-40]

the trial court has presided over 58 hearings and "observe[d] the children, Petitioner, and the growing relationship between them"). A final adoptive placement substantially ends DCF's ability to protect children if these distressing conditions occur.

The trial court also downplayed the risks of adoptive placements with homosexuals by comparing their negative health statistics to other groups based on race, gender, socioeconomic class, and other demographic characteristics. [R-695] These arguments overlook, however, the combination of risk factors that are not present in the other groups, such as elevated rates of various conditions; they also overlook other factors (discussed below) regarding homosexual parents' support of sexual activity and experimentation by children, children's health factors, relationship stability factors, and social stigma/sex development-related concerns.

The trial court's ad hoc, non-scientific demographic comparisons fail to adequately isolate variables and are insufficient to make apples-to-apples comparisons. For example, the court's comparison of the break-up rates of African-Americans fails to control for important variables such as income and education level, which may disproportionally affect their break-up rates.[14] [R-709

[14] The experts discussed segregating variables as a basic methodological necessity. [R-788-89, 792-94, 808, 830, 1886-87] Notably, homosexuals generally possess attributes that should result in a high stability rate – higher income, education levels, and occupational status – but their stability rate is low. [R-1884-87]

n. 37 (noting a 47% break-up rate)] Thus, the court's comparisons do not provide an adequate basis to disregard the risks of placing adoptees with homosexuals, especially because a law that is imperfect still survives the rational basis test. *See* pp. 21-22, *supra.*

Furthermore, the trial court's analysis is faulty because legal and moral limitations may make broader class-based adoption restrictions impracticable. For example, race, gender, and ethnic origin classifications receive the strictest judicial scrutiny, making them the least likely candidates for legislative classification. In contrast, classifications subject to rational basis review are the most likely candidates due to the highest degree of judicial deference applied. Also, statutes routinely protect demographic distinctions other than sexual orientation, demonstrating why the trial court's comparison is flawed. *See, e.g.,* 42 U.S.C. § 671(a)(18) (states that receive adoption-related federal assistance may not discriminate on the basis of an adoptive parent's "race, color, or national origin"; sexual orientation is not included).

Finally, even if race, gender, and origin-based discrimination were not strictly protected at law, moral considerations would militate against including these sorts of suspect classifications in the adoption law. In contrast, the moral considerations here – taking into consideration how the health, welfare, and stability of adoptees' lives may be affected by a parent's sexual orientation – may

support the statutory restriction. The Florida Supreme Court's discussion in Stall v. State noted that a state's interest in protecting morality may be itself a sufficient reason to uphold a statute:

> [A] legislature can [pass commercial obscenity laws] ... to protect the social interest in order and morality. Moreover, even if a legislative enactment reflects unprovable assumptions about what is good for the people, including imponderable aesthetic assumptions, that is not a sufficient reason to find that statute unconstitutional.

570 So. 2d 257, 260-61 (Fla. 1990) (references omitted); *see also* Orange County v. Costco Wholesale Corp., 823 So. 2d 732, 738 (Fla. 2002) (affirming the legislature's prerogative to protect public health and morals in the context of alcohol sales); Gonzales v. Carhart, 127 S. Ct. 1610, 1633 (U.S. 2007) (noting "ethical and moral concerns that justify a special [abortion] prohibition"). "[C]rafting and safeguarding of public morality has long been an established part of the States' plenary police power to legislate and indisputably is a legitimate government interest under rational basis scrutiny." Williams v. Morgan, 478 F.3d 1316, 1321 (11th Cir. 2007). Furthermore, "[i]n a democratic society, legislatures, not courts, are constituted to respond to the will and consequently the moral values of the people." Id. at 1323 (quoting Lofton, 358 F.3d at 819 n.17).[15] Thus, the lines

[15] The trial court considered DCF's policy of permitting homosexuals to be foster parents (a function of agency policy) to conflict with any public morality interest underlying section 63.042(3). [R-711-12] This is a false comparison, however, because DCF can monitor and more easily intervene in non-adoptive placements (Continued ...)

drawn by Florida's adoption statute take account of legal and public morality factors in a permissible and unremarkable manner that easily survives rational basis scrutiny.

B. Children of homosexual parents appear to have higher rates of sexual activity and experimentation.

As a general matter, research shows that homosexual parents tolerate and support sexual activity and experimentation that may be contrary to the best interests of minor children. The trial court concluded that "there are no differences in the parenting of homosexuals or the adjustment of their children," but Appellees' witness Dr. Michael Lamb testified that children raised by gay and lesbian parents eschew gender stereotypes, tend to be more experimental with sexual activity, and show less sexual restraint. [R-677, 697, 1236-39] He cited studies indicating that the children of lesbians were "more open to both considering same-sex relationships and were more likely to have ... acted on it." [R-1236-40] He cited one study that found about one-quarter of lesbian-parented children had at least one same-sex sexual experience by the time they were 24 years-old, compared to none in the comparison group. [R-677 n.14, 1237, 1314] Appellees' expert, Dr. Frederick Berlin, agreed that children raised in a gay environment are more willing to pursue sexual activity based on their feelings. [R-

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(as occurred here) versus the permanent adoption context (where no significant further ongoing state involvement exists).

1386][16] Dr. Lamb opined that this literature demonstrates that the children of homosexuals feel freer to act and pursue "experimentation around sexuality" and "different kinds of sexual experiences." [R-1237, 1316, 1327-29]

Dr. Lamb attributed these results to parenting, based on the notion that homosexual parents are more flexible in tolerating and supporting sexual activity and by inculcating a credo that children should "feel free to act on it, if they feel it." [R-1316] Having a homosexual parent "made it easier for those children who felt same-sex attraction to actually act on it." [R-1238-39]

Avoiding placements of children in homes that support adolescent sexual activity and experimentation is a legitimate concern. Both state and federal public health officials warn of health risks and attempt to educate and counsel parents to encourage sexual restraint by minors.[17] In addition, the United States Supreme Court has noted that the social and economic problems related to teenage sexuality is a legitimate governmental concern. Bowen v. Kendrick, 487 U.S. 589, 602

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[16] Dr. Rekers similarly testified "that children raised in homosexual headed homes have atypical or less typical gender role behavior, [and] are more likely to explore the possibility of homosexual behavior themselves, as teenagers." [R-1739]

[17] *See* Fla. Dep't of Health, http://www.greattowait.com/parents-educators.html (the state "It's Great to Wait" Campaign alerts minors and parents of the physical and emotional risks of teen sex and urges restraint); U.S. Dep't of Health and Human Services, Office of Public Health & Science "Parents, Speak Up!" National Campaign, http://www.4parents.gov (the federal government advises parents to "speak up" for adolescent sexual restraint and warn of health and emotional risks).

(1988). In Bowen, the Court considered the constitutionality of a federal grant program targeting issues of teenage sexuality and noted the crucial role of parents reflected in the legislation:

> Congress was well aware that the problems of adolescent premarital sexual relations, pregnancy, and parenthood are multiple and complex. Indeed, Congress expressly recognized that legislative or governmental action alone would be insufficient: "[S]uch problems are best approached through a variety of integrated and essential services provided to adolescents and their families by other family members, ..." Accordingly, the [Act] expressly states that federally provided services in this area should promote the involvement of parents [and others ... and] implements this goal by providing in [the Act] that demonstration projects funded by the government "shall use such methods as will strengthen the capacity of families to deal with the sexual behavior, pregnancy, or parenthood of adolescents ..."

Id. at 595-96 (quotations omitted). Likewise the Florida Legislature could rationally believe that section 63.042(3) advances a policy of limiting the potential for adolescent sexual activity and associated harms among adopted children.[18]

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[18] Dr. Schumm also noted a "life-threatening" concern particularly with the same-sex experimentation of children in homosexual homes because of a study reporting that at least 47% of gay and lesbian teens have seriously considered suicide and 34% have actually attempted suicide. [R-1864; *see also* R-875-76 (Dr. Cochran confirmed suicidal tendencies among youth who are "coming to terms with being gay")] Dr. Schumm opined that social science may yet acknowledge that the children of homosexuals may be more likely to adopt a homosexual orientation (a minority position with which Appellees' experts disagreed). [R-1811, 1848-51] He noted one of Dr. Peplau's publications, which stated: "Whether the percentage of gay and lesbian offspring differs depending on the parents' sexual orientation is open to debate, and a final conclusion must await more extensive research. Second, children of lesbian parents appear to be more open to same-sexual [sic] sexual experiences." [R-1849] Dr. Berlin's testimony noted that it is difficult to answer (Continued ...)

C. Non-heterosexual households tend to be less stable.

Florida considers home stability of paramount concern. *See* § 63.022, Fla. Stat. ("[t]he state has a compelling interest in providing stable and permanent homes for adoptive children"); *see also* R-1603 (testimony that "instability leads to higher rates of child psychiatric disturbance, higher rates of conduct disorder, higher rates of adjustment disorder, and anxiety disorders in children"). Section 63.042(3) relates to this important state interest because the homes of homosexuals may be less stable and more prone to domestic violence.

Despite the trial court's categorical conclusion that "the evidence proves ... homosexuals are no more susceptible to ... relationship instability than their heterosexual counterparts" [R-710], experts on both sides noted contrary studies. For example, a recent Vermont study described by Appellees' expert, Dr. Letita Peplau, showed break up rates for heterosexual married couples was 2.7%, while for same-sex couples the rates were 3.8% and 9.3%, respectively, depending on whether or not those couples were part of a same-sex civil union. [R-764-65] A study involving registered partners in Sweden showed breakup rates of 14% for

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whether biological or environmental forces were mostly at work in determining sexual orientation. [R-1388-90]; *see also* Richard E. Redding, It's Really About Sex: Same-sex Marriage, Lesbigay Parenting, & the Psychology of Disgust, 15 DUKE J. GENDER L. & POL'Y 127, 147 (2008) (noting studies that suggest differences in the sexual identity and orientation of children raised in lesbigay households) (hereinafter "Lesbigay Parenting").

gay partners, 20% for lesbian partners, but only 8% for married couples. [R-765-66] Another study cited by Dr. Peplau estimated breakup rates of heterosexual married couples at 5%, compared to 13% and 19%, respectively, for gay and lesbian couples. [R-770-71] A fourth study based on relationship length showed that for 0-2 year relationships, the break up rates were 4% for married couples, 16% for gay men, and 22% for lesbian women (same-sex relationships that survive the first 10 years show less disparity). [R-3729][19]

Moreover, the presence of children may widen the comparative difference in relational stability rates between heterosexuals and homosexuals. Dr. Peplau testified of a study showing that break-up rates of heterosexuals with children are dramatically lower (only 3.1%) than those of homosexuals without children, though more data is needed. [R-777 ("the presence of children is something that we need to look at in making comparisons between same-sex and heterosexual couples")] Dr. Schumm testified that one study (Lesbian Family Study) followed lesbian families for ten years and found that 45% of relationships had broken up

[19] Dr. Peplau testified that unmarried heterosexual couples show break-up rates similar to homosexuals. [R-773] But two studies cited by Dr. Rekers appear to show contrary data. First, a large Dutch government study found that homosexuals less frequently report having a steady partner than heterosexuals. [R-1555, 1559] Second, a book published by the University of Chicago (Laumann) reported that gay men have nearly three times, and lesbian women four times, the number of sexual partners than heterosexual men and women respectively. [R-1598-1600]

between the birth of a child and the tenth birthday, compared to an estimated 30% of heterosexual marriages. [R-1879][20]

In addition, Dr. Peplau acknowledged a study showing that homosexuals may not feel the same moral obligation or family-based compulsion to remain in a relationship. [R-818-20] The study (Kurdek) asked a large sample of homosexual and heterosexual couples about deterrents to leaving a relationship. Id. Relative to heterosexuals, homosexual couples cited intimacy as a stronger reason to stay in a relationship, whereas family/children and moral values were rated lower. Id. (none of the homosexual respondents cited moral reasons as cause to stay in a relationship). While Dr. Peplau concluded that "gay couples [are] able to have stable, committed relationships," the testimony and research show that stability rates are a legitimate and ongoing concern. [R-778][21]

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[20] Anecdotal evidence suggests that the presence of children does not solve the relationship stability issues. Reportedly, the petitioner in the Cox litigation ultimately dismissed his case during the litigation because of a broken relationship. *See* note 4, supra; *see also* Miller-Jenkins v. Miller-Jenkins, 661 S.E.2d 822 (Va. 2008) (considering difficult interstate custody issues after break-up of civil union).

[21] Likewise, none of the four American Psychological Association conclusions the trial court (and Dr. Peplau) relied on address broader stability concerns within homosexual homes. [R-672, 779-80 (providing aspirational statements like Dr. Peplau's that homosexuals want and sometimes achieve stable relationships)] Furthermore, the Legislature may be wary of the conclusions of the APA and other groups whose conclusions have been criticized for being political, instead of science-based. [R-1741-44 (noting that a competing national organization – the American Psychological Society – was founded because of such concerns about (Continued …)

According to Dr. Peplau, the best comparisons for assessing stability and sexual orientation in the U.S. "we'll have down the road … the research hasn't been done." [R-758, 765-77] Appellant's experts also testified based on the same (and similar) studies that homosexuals appear to have less stable relationships. [R-1552-59, 1598-1603, 1667-69, 1881-82]

Finally, Dr. Peplau identified studies showing disturbingly high domestic violence rates among same-sex couples "as low as seven or eight percent and as high as 60% or more." [R-691-92, 811] However, she considered these statistics too inconsistent to support Florida's adoption restriction. [R-812 ("you really should have population-based, representative surveys, and the vast majority of the research on same-sex couples has not done that. To my knowledge, there's only one study that's a population-based study.")][22] In sum, this evidence provides a rational basis for concerns regarding the stability of homosexual relationships.

APA politics]; *see also* Lesbigay Parenting, *supra*, note 17, at 136-142 (discussing substantial bias in the social science related to homosexual issues and significant research limitations); Lofton, 358 F.3d at 825 ("we must credit any conceivable rational reason that the legislature might have for choosing not to alter its statutory scheme in response to this recent social science").

[22] The many research limitations noted throughout the trial by experts is a basis by itself to uphold section 63.042(3):

> Openly 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. Scientific attempts to study homosexual parenting in general are still in their

(Continued …)

D. Children in homosexual households face discrimination and stigma.

The placement of children with homosexuals adds a concern related to discrimination and societal stigma. For instance, Dr. Lamb acknowledged that the children in the care of homosexuals are more likely to be teased about their parent's sexuality, though he did not think this type of teasing was more damaging than other teasing that children endure. [R-1247] A study from the Netherlands (Bos and van Balen), cited by Dr. Rekers, found 60.7% of the children of lesbians reported peers making jokes regarding their mother's sexual orientation, 56.7% said their peers asked annoying questions about their mother's sexual orientation and 26.2% reported being excluded as a result of their mother's sexual orientation. [R-1615-16] Differing from Dr. Lamb, he indicated that the children of homosexuals are uniquely affected by this stigma. He cited the National Lesbian Family Study (Gatrell), which found that 43% of children of lesbians had experienced homophobia, and that 69% of those children reacted negatively to that experience and showed behavior problems. [R-1612-13] In another study

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> nascent stages and so far have yielded inconclusive and conflicting results.... Given this state of affairs, it is not irrational for the Florida legislature to credit one side of the debate over the other.

Lofton, 358 F.3d at 826; *see also* Hernandez v. Robles, 855 N.E.2d 1, 8 (N.Y. 2006) ("until recently few children have been raised in same-sex households, and there has not been enough time to study the long-term results").

(Sarantakos), teachers reported that the children of lesbian and gay-parent couples performed worse and were more poorly adjusted than those of either married or cohabiting heterosexuals. [R-1224][23]

Dr. Schumm cited a New York University dissertation study (Sirota) that also showed social/relational differences in the children of homosexuals:

- A higher percentage of insecure adult attachment: 77.6% for the homosexual group versus 44.1% for the heterosexual [R-1813];
- a higher percentage of daughters who were uncomfortable seeking and being in love relationships, 42.2% versus 11.8% respectively (Id.);
- 69.8% of daughters with gay fathers questioned their sexual orientation compared with 23.3% of those with heterosexual fathers [R-1811]; and
- a higher rate of divorce in the children of gay fathers [R-1813].

Furthermore, other courts have recognized that heterosexual parent models assist with healthy sexual and gender development. *See* Hernandez, 855 N.E. 2d at 7 ("intuition and experience suggest that a child benefits from having before his or her eyes, every day, living models of what both a man and a woman are like"); Fla. Dep't of Health & Rehab. Servs. v. Cox, 627 So. 2d 1210, 1220 (Fla. 2d DCA 1993) (noting that parents have an important role in guiding sex education), *approved in part, quashed in part,* 656 So. 2d 902 (Fla. 1995); Amer v. Johnson, 4

[23] Dr. Lamb thought the results might be explained by factors other than parental sexual orientation, such as parental separation and divorce or a recent family move. [R-1225-26] The trial court discredited the Sarantakos study by wrongly asserting that it was published in a magazine versus a research journal. [R-676 n.11]

Fla. L. Weekly Supp. 854 b (Fla. 17th Cir. Ct. 1997). In line with these cases, Florida restricts a class of persons from adopting who cannot provide a mainstream heterosexual model (the orientation that most children ultimately adopt). *See* Hernandez, 855 N.E.2d at 11 ("A person's preference for the sort of sexual activity that cannot lead to the birth of children is relevant to the State's interest in fostering relationships that will serve children best"). Thus, it is rational for the legislature to believe that it might limit the stigma and stress faced by adoptees and promote their interests by limiting adoption to those who provide a heterosexual household.

E. The trial court erroneously rejected the testimony of Appellant's expert witnesses.

As just discussed, the expert testimony and reports presented by *Appellees* are alone sufficient to establish a number of rational bases for 63.042(3)'s classification; the State need not have presented any evidence whatsoever and still prevailed on the record below. For this reason, this Court need not consider the testimony and evidence of DCF's experts provided in order to reverse the trial court. Nonetheless, it is important to note that the trial court erred by sweepingly rejecting DCF's evidence because of the religious backgrounds of its experts. Its ruling essentially excluded these experts, which this Court may review *de novo*; even if the abuse of discretion standard applies, the trial court's actions met it.

While it is true that social, religious, and political opinions permeate public discussion of the adoption issue presented, it is likewise true that a trial court must take care when basing its decisions on social, religious or political grounds. For instance, Florida's Rules of Evidence provide that persons with religious perspectives are not to be believed or disbelieved on matters generally. *See* § 90.611, Fla. Stat. ("Evidence of the beliefs or opinions of a witness on matters of religion is inadmissible to show that the witness's credibility is impaired or enhanced thereby."). As federal courts have noted, it "is well established … that courts should refrain from trolling through a person's or institution's religious beliefs." Americans United for Separation of Church & State v. Prison Fellowship Ministries, Inc., 509 F.3d 406, 414 n.2 (8th Cir. 2007) (citing Mitchell v. Helms, 530 U.S. 793, 828 (2000) & Employment Div. v. Smith, 494 U.S. 872, 887 (1990)).

Here, the trial court totally disregarded Dr. Rekers's testimony, citing his religious background and writings as the central reason for concluding that he gave "far from a neutral and unbiased recitation of the relevant scientific evidence." [R-683] For example, the court noted twice that Dr. Rekers – the Distinguished Professor of Neuropsychiatry and Behavioral Science Emeritus, and former Chairman of the Psychology Faculty, at the University of South Carolina School of Medicine [R-4869] – is a minister; it provided long excerpts from some old

religious books that he authored "in his role as an ordained Baptist minister," but which he no longer endorses. [R-678, 681-83, 1717, 1731, 1762, 1766] The trial court also dismissed Dr. Schumm's testimony because of a piece authored for the Journal of Psychology and Theology that simply integrated his religious beliefs and professional research. [R-683, 1939]

Instead of dispassionately considering the evidence and the merits of these experts' research-backed opinions (or circumscribing those portions purportedly based purely on unsubstantiated religious tenets), the trial court repudiated their entire testimony. The court's wholesale disregard is arbitrary because Drs. Rekers and Schumm relied to a great extent on the *same* scientific literature as Appellees' experts, *including the latter's own studies*.[24] For instance, Appellees did not

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[24] The trial court ridiculed Drs. Rekers and Schumm for not being "neutral and unbiased," but Appellees' experts faced no scrutiny despite their membership in the advocacy group that is deeply involved in this very case. [R-1299] Both Drs. Lamb and Berlin identified themselves as members of the ACLU, which serves as legal counsel in the case. [R-1299, 1430; *see also* R-1498-99 (Dr. Brodzinsky has testified for the ACLU in multiple homosexual-rights cases)]. Far from being "neutral and unbiased," the ACLU holds ideological beliefs about homosexual parenting and adoption as strong as any Baptist minister; it tracks and publicizes case-specific developments on its webpage, which identifies Petitioner and the Children, narrates their story, and uses their picture to promote its "Lesbian Gay Bisexual Transgender Project." *See* ACLU, LGBT Project's webpage, http://www.aclu.org/lgbt/parenting/37875res20081124.html. The ACLU's LGBT Project goal is to "move[] public opinion on LGBT rights" via the courts. *See* ACLU, LGBT Project, http://www.aclu.org/lgbt/index.html. Its website includes a "fact sheet" devoted to Dr. Rekers that characterizes him unfavorably. Id. at http://www.aclu.org/lgbt/parenting/12401res20041004.html.

impeach Dr. Rekers's recitation and extensive reliance on Dr. Cochran's research [R-1570-79, 1583, 1590-92], yet the trial court entirely discredited him based on his religion. The same is true for vast parts of their testimony that relied on published research. [R-1523 et seq. (Dr. Rekers); R-1769 et seq. (Dr. Schumm)] The trial court turned the proceeding into the type of "courtroom fact-finding" and battle of the experts that is impermissible under rational basis review; it erred in attempting to overcome the test's deferential standard by entirely discrediting the entirety of DCF's evidence on impermissible grounds.

This Court has great latitude to defer to the Legislature and to uphold section 63.042(3) based solely on the strength of the published research relied upon or referred to by Appellees' experts.[25] In doing so, it should also hold that trial courts may not wholly ignore or discredit research, studies and opinions simply because of the religious backgrounds of the experts presenting them. It was arbitrary and irrational for the trial court to do so.

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[25] *See* Hadden v. State, 690 So. 2d 573, 579 (Fla. 1997) ("An appellate court may examine expert testimony, scientific and legal writings, and judicial opinions" in reviewing expert admissibility issues); *see also* Crawford, 128 S. Ct. at 1619 n.11-14 (2008) (validating a state's concern about potential voter fraud by citing books, other court cases, amicus brief submissions, and newspapers).

II. The Trial Court Erred in Creating A Fundamental Right to Adoption.

A. The trial court's order mistakenly creates a "right" of adoptive permanency.

The trial court erred in holding that Florida and federal law contain a "fundamental right" to achieve adoptive permanency and that section 63.042(3) violates this right. [R-699, 702, 712] First, Florida law repeatedly speaks of a permanency "goal" for children in the dependency system, not a "right." § 39.621(1-6) & (8), Fla. Stat; *see also* § 39.001(1)(h) (exhorting that permanent placement be achieved "as soon as possible … and that no child remain[] in foster care longer than 1 year"). The law further contemplates that its goal may go unmet: "A permanency hearing must be held at least every 12 months for any child who … awaits adoption." § 39.621(1), Fla. Stat. Second, instead of reading chapters 39 and 63 together, the trial court used chapter 39 to eliminate chapter 63's adoption restriction. This reading further ignored chapter 39's explicit deference to chapter 63: "If any child will not be reunited with a parent, adoption, under chapter 63, is the primary permanency option." § 39.621(6), Fla. Stat. (emphasis added).

The court similarly misconstrued federal law as granting a permanency right to foster children. [R-699] The Adoption and Safe Families Act of 1997 does not grant affirmative rights to children; instead, it sets forth parameters for states to receive federal assistance payments. *See* 42 U.S.C. § 671(a); Olivia Y. v. Barbour, 351 F. Supp. 2d 543 (S.D. Miss. 2004) (act sets up a cooperative federal-state grant

program without creating enforceable rights). In 31 Foster Children v. Bush, the Eleventh Circuit considered, but denied, a very similar claim by foster children. 329 F.3d 1255, 1270 (11th Cir. 2003). The court noted that the federal statutes did not use rights-creating language, but had an aggregate focus. Id.; *see also* D.G. v. Henry, 2009 U.S. Dist. LEXIS 3822, *11-12 (N.D. Okla. Jan. 20, 2009) (noting Congress did not intend § 671(a)(16) to confer an individual right).[26] Thus, the trial court erred by invalidating section 63.042(3) based on its newly-created but nonexistent statutory right.

B. The trial court erroneously equated foster care with child confinement and a deprivation of liberty.

The trial court also erred by equating restrictions on adoption privileges with confinement and a denial of constitutional liberties. [R-702-03] Federal and Florida

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[26] In D.G., the court noted that the typical remedy for non-compliance with federal funding parameters is curtailment of the state's access to funds. 2009 U.S. Dist. LEXIS 3822, *12-13 (citing Gonzaga Univ. v. Doe, 536 U.S. 273, 280 (2002)). Even so, the record does not suggest that Florida has violated the Act. First, the statute does not set strict time limits for states to achieve permanency (as was suggested by the trial court [R-699]), but requires that "goals" be set for those children who remain in foster care for more than two years. 42 U.S.C. § 671(a)(14); *see also* (a)(15)(E)(ii) ("reasonable efforts shall be made to place the child in a timely manner in accordance with the permanency plan"). Second, the section declares that "the child's health and safety shall be the paramount concern," which comports with Florida's legislative goals. 42 U.S.C. § 671(a)(15)(A). Finally, the federal Act forbids states from discriminating in adoption placements based upon "race, color, or national origin" of the adoptive parent, but does not list sexual orientation. 42 U.S.C. § 671(a)(18).

courts recognize that adoption is a statutory privilege; there is no fundamental right to adopt or to be adopted.[27] Moreover, the Children's liberties have not been indefinitely or arbitrarily restrained. They may be adopted, just not by a homosexual because of state concerns for the welfare of children. *See* Buckner, 876 So. 2d at 1289 n.2 (noting the state's overriding interest is the best interests of the children).

State and federal courts have rejected the trial court's view that some adoptive permanency right of children may trump statutory parameters. The trial court claims that G.S. v. T.B., 985 So. 2d 978 (Fla. 2008), "recently reestablished the child's right to permanency." [R-700] But, that case establishes no rights of children that can invalidate a part of the adoption statute. To the contrary, the Court in G.S. reversed a well-intentioned trial court that strayed from the statute. Id. at 983-84. The trial court ordered a guardianship arrangement for children whose parents had died – which it believed best accommodated the children and grandparents – despite the availability of an adoptive placement the statute preferred. The Court directed the court to follow the law's terms: "a trial court's determination regarding a child's best interests is not without bounds. The trial court must follow the Legislature's guidance which sets forth the parameters of

[27] Cox, 627 So. 2d at 1215; Lofton, 358 F.3d at 811; *see also* Buckner v. Family Servs. of Central Fla., Inc, 876 So. 2d 1285, 1288 (Fla. 5th DCA 2004) ("adoption is wholly a creature of the State").

adoption." Id. at 982. The principal point is that the adoption statute controls, even if a trial court prefers an alternate arrangement. Id. at 983-84.

Similarly, the United States Supreme Court's limited adoption jurisprudence is very deferential to adoption statutes. *See* Smith v. Org. of Foster Families, 431 U.S. 816, 846 (1977) (recognizing that state law is integral). For example, in Mississippi Band of Choctaw Indians v. Holyfield, 490 U.S. 30 (1989), the Court considered the difficult choice between an adoption law and the best interests of children. Twins were born to Tribe members, but placed privately for adoption outside of the Tribe by their biological parents. Once notified of the adoption, the Tribe sued to regain custody of the children. But, three years had passed, and faced with a dilemma between the law and the children's interests, the Court steadfastly applied the law:

> We are not unaware that over three years have passed since the twin babies were born. ... Three years' development of family ties cannot be undone, and a separation at this point would doubtless cause considerable pain. Whatever feelings we might have as to where the twins should live, however, it is not for us to decide that question. We have been asked to decide the legal question. The law places that decision in the hands of the Choctaw tribal court.... It is not ours to say whether the trauma that might result from removing these children from their adoptive family should outweigh the interest of the Tribe.

Id. at 53. Thus, both the Florida and U.S. Supreme Courts have deferred to adoption laws even in wrenching cases where the children's interests do not seem

immediately to be best served. This case calls for the same deference to the legislature's long-established law.

CONCLUSION

For the foregoing reasons, this Court should vacate the Judgment below and uphold section 63.042(3).

Respectfully Submitted,

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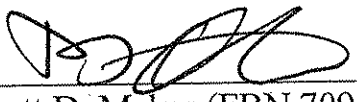
ATTORNEY GENERAL



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CERTIFICATE OF SERVICE AND COMPLIANCE

I hereby certify that this computer-generated brief is prepared in Times New Roman 14-point font and complies with the font requirement of Rule 9.210, Florida Rules of Appellate Procedure, and that a true copy of the foregoing has been furnished this 27th day of February, 2009, by U.S. Mail to: Robert F. Rosenwald, Jr., Shelbi D. Day, American Civil Liberties Union Foundation of Florida, Inc., 4500 Biscayne Boulevard, Suite 340, Miami, FL 33137-3227, *Counsel for Petitioner*; Hilarie Bass, Elliot H. Scherker, Brigid F. Cech Samole, Ricardo Gonzalez, Greenberg Traurig, P.A., 1221 Brickell Avenue, Miami, Florida 33131 *Counsel for the Minor Children*; Hillary Kambour, Guardian Ad Litem Program, 3302 NW 27th Avenue, Miami, Florida 33142,*Counsel for Guardian Ad Litem*, Leslie Cooper, James D. Esseks, American Civil Liberties Union Foundation, 125 Broad Street, 18th Floor, New York, New York 10004, *Counsel for Petitioner*; and Charles M. Auslander, The Children's Trust, 3150 SW Third Avenue, 8th Floor, Miami, Florida 33129, *Counsel for the Minor Children.*

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