OA ~~DISM~~ 11-4-94

FILED
SID J. WHITE
MAY 16 1994
CLERK, SUPREME COURT
By _____
Chief Deputy Clerk

IN THE SUPREME COURT OF FLORIDA

Atty to Amend page 4 file mot & cert of S.S.

CASE NO. 82,~~697~~ 967

James W. Cox,
Petitioner

v.

Delores Dry,
District Administrator
District 8
Florida Department of Health and Rehabilitative Services,
Respondent

BRIEF OF AMICUS CURIAE
GAY AND LESBIAN LAWYERS ASSOCIATION,
FLORIDA ACADEMY OF PUBLIC INTEREST LAWYERS, INC.
LAMBDA LEGAL DEFENSE AND EDUCATION FUND, INC.,
NATIONAL ORGANIZATION FOR WOMEN (FLORIDA CHAPTER),
AND
NATIONAL CENTER FOR LESBIAN RIGHTS
On Behalf of
Petitioner, James W. Cox

Counsel for Amicus Curiae
William E. Adams, Jr.
Rosemary Wilder
3305 College Avenue
Fort Lauderdale, FL 33314
(305) 452-6133

Co-Counsel
~~Abby Abinanti~~ Substitute Paula Brantner
National Center for Lesbian Rights
1370 Mission Street
San Francisco, CA 94103
415-~~621-0674~~ 392-6257

Elizabeth A. Hendrickson
Co-Counsel
Beatrice Dohrn
Lambda Legal Defense and and Education Fund, Inc.
666 Broadway, 12th Flr.
New York, NY 10012
212-995-8585

TABLE OF CONTENTS

TABLE OF CITATIONS

Cases

Constitutional Provisions

Statutes

STATEMENT OF THE CASE AND FACTS

The Amici adopt the statement of the case and facts as submitted by the Petitioner, James W. Cox.

JURISDICTIONAL STATEMENT

This Court accepted jurisdiction of this case pursuant to Art. V., § 3(b)(3), Fla. Const. and Fla. R. App. P. 9.030(a)(2)(A)(i) and (ii), by order dated March 31, 1994.

INTERESTS OF AMICUS CURIAE

GALLA, a voluntary bar association of the Florida Bar, was organized to promote and protect the rights of hundreds of gay and lesbian lawyers in South Florida. GALLA is an affiliate of the National Lesbian and Gay Law Association, an organization with a seat in the House of Delegates of the American Bar Association. The movant is familiar with the customs, practices, sociological and psychological studies, regulations, and laws regarding sexual orientation.

The Florida Academy of Public Interest Lawyers is a non-profit corporation, whose goals include the advocacy for constitutional rights to protect the liberty and freedom of the individual. The Academy includes lawyers with extensive experience in civil rights litigation, including litigation and advocacy regarding issues concerning sexual orientation. As a result FAPIL is familiar with the sociological, psychological, and constitutional issues concerning the rights of gay men, lesbians, and bisexual persons.

The National Organization for Women, Florida chapter, is a national organization formed to seek equal rights for women in our society. Its interest in this challenge is to assert the equal rights of lesbians who are being denied their constitutional rights. The organization is familiar

with the Constitutional and scientific issues in this cause of action and can lend assistance to the court in rendering a decision.

Lambda Legal Defense and Education Fund, Inc. (hereinafter "Lambda") is a not-for-profit corporation based in New York which does impact litigation in all substantive areas affecting the rights of lesbians and gay men. Founded in 1973, Lambda is the oldest and largest national legal organization devoted to these concerns and has appeared as counsel or amicus curiae in numerous cases in state and federal courts on behalf of lesbians and gay men who have suffered discrimination because of their sexual orientation. Through its litigation and community education in many states, Lambda has challenged limitations to the concept of "family" which work to exclude or fail to protect the families of lesbians and gay men. Lambda is committed to gaining legal recognition for lesbian and gay couples and families, and eradicating the injustices that result from the lack of such recognition.

The National Center for Lesbian Rights (NCLR), formerly the Lesbian Rights Project, is a non-profit public interest law firm founded in 1977 and devoted to the legal concerns of women who encounter discrimination on the basis of their sexual identity. NCLR is particularly well-suited to offer amicus assistance to this Court in this matter, as NCLR attorneys litigate in the area of family law as it applies to lesbians and gay men. Most recently, NCLR participated as an amicus curiae in In re: Kenneth Tyler Doustou, before the Virginia Court of Appeal, and Wanda Sue J. v. Steven Wayne J., before the West Virginia Court of Appeal, arguing, in both cases, against denial of custody to a lesbian mother solely because of her sexual identity. NCLR has also written numerous works on the rights of lesbians to preserve and protect the integrity of their families free from unwarranted intrusions based on bias and stereotypes. NCLR

attorneys have written Preserving and Protecting the Families of Lesbians and Gay Men (NCLR 1986), Recognizing Lesbian and Gay Families: Strategies for Extending Employment Benefit Coverage (NCLR 2nd Ed. 1992), Sexual Orientation and the Law (Clark Boardman 1985, 1987, 1989), and the Lesbian Mother Litigation Manual (NCLR 1982, 1990).

SUMMARY OF ARGUMENT

Florida and New Hampshire are the only states in the nation which prohibit all homosexuals from adopting by statute. Florida's blanket prohibition on adoption by all homosexuals is unconstitutionally vague and violates the rights of lesbians, gay men, and bisexuals pursuant to the Florida Constitution's Privacy Amendment as well as its Equal Protection and Due Process Clauses. The statute is based upon unsubstantiated and irrational fears and prejudices. This Court must reject the irrebuttable presumption required by this provision and return the adoptive placement process to the best interests of the child standard upon which it has traditionally relied.

The statute should be rejected because it violates the rights of gay men, lesbians, and bisexuals under the Privacy Amendment of the Florida Constitution. Florida has a free-standing right to privacy which is broader than the right of privacy guaranteed by the United States Constitution. It not only protects information from improper disclosure, it also establishes and protects a zone of autonomy which permits persons to make decisions central to their identity. The formation of loving intimate relationships is the most important and highly individualized right of a person in this society. That protected right is trampled upon by the prohibition on adoption by "homosexuals".

In addition, the statute is unconstitutionally vague because it prohibits "homosexuals" from adopting, but does not define the term. Contrary to the position taken by HRS that it should be interpreted to mean a person currently engaged in homosexual activity, an interpretation accepted by the District Court of Appeal, this term is ambiguous. The definition adopted by the State and the district court is contrary to the plain meaning of the term and to the definitions given to it by various courts. It provides insufficient notice as to its meaning and is subject to arbitrary and discriminatory enforcement.

The adoption statute also violates the state constitution's Equal Protection Clause. Statutes which affect lesbians, gay men, and bisexuals should be subjected to strict scrutiny or at least an active rational basis review. However, this particular provision must be stricken because it cannot withstand even rational basis analysis.

The statute also violates the Due Process Clause requirement that persons not be deprived of rights in an arbitrary fashion. The scientific evidence demonstrates that the homosexuality of a parent does not influence his ability to be a parent. Yet the statute presumes without exception that a lesbian or gay man cannot parent. A blanket prohibition that prevents all homosexuals from adopting exemplifies precisely the type of arbitrary deprivation prohibited by the Due Process Clause.

The Court should strike this statutory section because of its facial unconstitutionality. However, if this Court agrees with the District Court that insufficient evidence was presented to the trial court to uphold a summary judgment for the plaintiff, the case should be remanded to permit the plaintiff to submit additional evidence. The plaintiff and other interested parties should not be foreclosed from a challenge to this statute when the trial court permitted the type

of evidence submitted pursuant to stipulation by the parties, and where the evidence submitted overwhelmingly supported the position of the plaintiff.

ARGUMENT

I. THE DISTRICT COURT ERRED IN FINDING THAT THE ADOPTION STATUTE DID NOT VIOLATE THE FLORIDA CONSTITUTION'S PRIVACY AMENDMENT.

A. The District Court interpretation of the Privacy Amendment is too narrow based upon the history relevant to its passage.

The District Court's narrow interpretation of the Florida Constitution's Privacy Amendment is inconsistent with the history relevant to the provision's passage. Article I, section 23 of the Florida Constitution provides:

> Every natural person has the right to be let alone and free from governmental intrusion in his private life except as otherwise provided herein. This section shall not be construed to limit the public's right of access to public records and meetings as provided by law.

This Court has adopted the concept that the right to privacy is deeply rooted in our heritage. Winfield v. Division of Pari-Mutuel Wagering, 477 So. 2d 544, 545 (Fla.1985), and is a fundamental right which cannot be overcome except by a compelling state interest, Id. at 546. This Court has held that by adopting the amendment on November 4, 1980, Florida citizens opted for a stronger right of privacy than that found in the United States Constitution. Id. at 547. The Court affirmed this right with even stronger language in Shaktman v. State of Florida, 553 So. 2d 148 (Fla. 1989) when it said about the amendment:

> ". . . One of its ultimate goals is to foster the independence and individualism which is a distinguishing mark of our society and which can thrive only by assuring a zone of privacy unless the intrusion is warranted by the necessity of a compelling state interest. In an opinion which predated the adoption of section 23, the First District aptly characterized the nature of this right: A fundamental

> aspect of personhood's integrity is the power to control what we shall reveal about our intimate selves, to whom, and for what purpose. Byron, Harless, Schaffer, Reid & Assoc., Inc. v. State ex rel, Schellenberg, 360 So. 2d 83, 92 (Fla. 1st DCA 1978), quashed and remanded on other grounds, 379 So. 2d 633 (Fla.1980). Because this power is exercised in varying degrees by differing individuals, the parameters of an individual's privacy can be dictated only by that individual. The central concern is the inviolability of one's own thought, person, and personal action. The inviolability of that right assures its preeminence over 'majoritarian sentiment' and thus cannot be universally defined by consensus."

553 So 2d 148, 150 (Fla.1989).

Prior to his appointment to the Third District Court of Appeal for Florida, Judge Gerald B. Cope, Jr., wrote three articles concerning the Florida Constitution's Privacy Amendment. The first discussed the appropriate scope of a privacy amendment. Cope, Toward a Right of Privacy as a Matter of State Constitutional Law, 5 Fla. St. U. L. Rev. 631 (1977). The second discussed the history of the Amendment, including discussion of his testimony, as developed by the Constitutional Revision Commission. The addition of the Amendment was debated extensively by the 1978 Constitutional Revision Commission. See Cope, To Be Let Alone: Florida's Proposed Right of Privacy, 6 Fla. St. U.L. Rev. 673 (1978) (hereinafter To Be Let Alone). (cited with approval in In Re Guardianship of Browning, 568 So. 2d 4, 10 (Fla. 1990)). Judge Cope argued in his articles for a strong freestanding right of privacy, and the Commission ultimately recommended a freestanding right.

Judge Cope also made clear in one of his articles that protection for sexual behavior in the home, and particularly homosexual behavior, might be covered by the Privacy amendment. To Be Let Alone, at 767-8. Judge Cope noted that the Florida Supreme Court had already ruled

in 1978, prior to passage of the Amendment, that a homosexual[1] could not be excluded from the Florida Bar merely for expressing a homosexual preference and nothing more. Florida Bd. of Bar Examiners Re: Eimers, 358 So. 2d 7 (Fla. 1978). This historical analysis and discussion of the Commission's deliberations on the scope of the Florida Right of Privacy prior to the passage of the freestanding amendment makes clear that the Constitutional Revision Commission was well aware of the potential breadth of the amendment's coverage, but chose not to restrict it. The Amendment was passed by 61% of the vote in 1980. Cope, A Quick Look at Florida's New Right of Privacy, 55 Fl.B.J. 12 (1981).

The terminology used in the Privacy Amendment is significant. The phrases "to be let alone" and "free from governmental intrusion into his private life" were chosen rather than the phrase "right to privacy." This choice of terms exemplifies the fact that the Amendment was meant to protect how a person chooses to live his life. One commentator has noted that at the time of passage of the amendment the right to be let alone was understood to be one that is "at the core of the concept of liberty, protecting the citizen's freedom from governmental control". (citations omitted). Note, Interpreting Florida's New Constitutional Right of Privacy, 33 U. Fla L. Rev. 565 (1981). This commentator notes that the contemporary meaning of "private life" includes "those aspects which as a matter of principle should not be subject to governmental control." Id. at 579. As noted by the commentator, passage by the public reflected a dissatisfaction with the existing, i.e., more limited, extent of the right prior to the Amendment.

Case law also reflects that the constitutional privacy right is a broad one. In a concurring

---

[1]For purposes of this brief, the amici will use the term "homosexual" to apply to persons with a sexual or affectional preference for members of the same gender whereas gay, lesbian, and bisexual will refer to those persons who so identify themselves with those terms.

opinion, Justice Ehrlich held that the omission of the words "unreasonable" or "unwarranted" establishes that the right protects an "individual's expectation of privacy regardless of whether society recognizes that expectation as reasonable." Shaktman, 553 So. 2d at 152. If privacy includes the inviolability of one's own thought, person, and personal action, then the intimate aspects of a person's life must fall within that protection. Columbia University Professor Alan Westin, who completed a key study of privacy rights for the New York City Bar Association's Committee on Science and Law pursuant to a Carnegie Research grant, has opined that individual privacy covers four different categories including (1) personal autonomy which entails "a special kind of independence, . . . an attempt to secure autonomy in at least a few personal and spiritual concerns, if necessary in defiance of all the pressures of modern society," (2) emotional release which "[P]hysical and psychological health demand periods of privacy for various types of emotional release, including . . . performing 'bodily and sexual functions' (3) self-evaluation, and (4) limited and protected communication." Privacy and Freedom at 32-39. The values of personal autonomy and emotional release cover the zone of privacy which should protect a person's sexual orientation. The formation of an intimate, committed relationship with is one of the most important concerns of persons in our society, including many of the deeply personal concepts which clearly fall within the zone protected by the privacy right. To interfere with that choice is clearly an invasion of one's privacy.

In addition to the trial court in this case, two other trial courts in this state have found the right of privacy attaches to a person's sexual orientation.[2] In Seebol v. Farie, 16 Fla. L.

[2]Amici are also aware of another trial court finding that the right of privacy protects homosexuals who were denied the right to obtain foster parent licensure. Matthews v. Weinberg, No. 92-7131 (13th Cir. Ct. May 25, 1993).

Weekly C52 (Fla. 16th Cir.Ct. Mar. 15, 1991), 17 Fam.L.Rep. (BNA) 1331), the trial court found that the right to privacy protects lesbians and gay men. In Woodward v. Gallagher, 1 Fla. Supp. 17 (9th Cir.Ct.1992), another trial court determined that a deputy sheriff who had been fired because he is gay was also protected by this Constitutional provision. Although the court in Woodward was unclear about the full reach of the amendment, it ruled that "his honest answers to confidential questions posed to him by agents of the Sheriff about his sexual conduct and preferences as a basis to discharge him violated his right to privacy." (citations omitted) Id. Citing Seebol, supra, the Court noted that the right "protects the individual from the prejudicial or punitive use of such information."

In the case presently before this Court, the district court's analysis recognizes that there are presently three areas of privacy covered by the Florida Constitution: "(1) to protect natural persons from public disclosure of personal matters by the government; (2) to prohibit unwarranted governmental inquiry concerning private matters; and (3) to create a zone of autonomy protecting personal decision-making, especially concerning issues of health. See In re T.W., 551 So. 2d at 1192." Cox v. Dept. of HRS, 627 So. 2d 1210, 1216 (Fla. 2nd DCA 1993). The court's analysis of the latter two issues is defective. The holding that the prohibition in the statute does not compel unwarranted inquiry into private matters ignores the reality of what occurs during the process of an adoption. The District Court attempts to avoid the issue presented by the plaintiff who volunteered the information because of the statute's prohibition. It was the statute's prohibition which motivated the disclosure. To imply that the plaintiff's disclosure was somehow unprompted belies the requirements of the adoption process. Surely the state is not implying that persons do not have to reveal their sexual orientation in the

adoption process unless they choose to do so. The Court's analysis of the voluntariness of the disclosure could lead to the absurd result of lending the Court's imprimatur to deceptive or dishonest behavior by participants in a serious legal proceeding.

The information, which the adoption application requires, is similar to the information sought in Florida Board of Bar Examiners Re: Applicant, 443 So. 2d 71 (Fla. 1983), which permitted the questions on the application for admission to the Florida Bar concerning the history of psychological and medical treatment because the Court held that the questions were drawn with sufficient specificity to promote the state's compelling interest in ensuring the emotional and mental health of attorney applicants. In that case, the court ruled that the applicant's right of privacy had been implicated by the questions, however. Id. at 74. The district court's refusal to distinguish this case is troubling. Its assertion that adoption is not a right, but a privilege, is equally true of practicing law. It is the request for information which violates the privacy right. The request for information concerning sexual orientation is similar to the requests for psychological and medical information in Florida Board of Bar Examiners Re: Applicant. That case is apposite because the requests are similar and just as the fact that one does not have a right to be an attorney, the fact that one does not have a right to an adoption does not void the privacy interest in this case. Thus, the State must have a compelling interest which intrudes in the least manner possible.

Similarly, in Woodward, the deputy also did not have a right to his job, but the disclosure of private information was used to deny him that privilege. Amici believe that the trial courts in Woodward and this case properly construed the scope of the privacy amendment. In addition the Third District Court of Appeal has recently held that a local regulation that

required all job applicants to sign an affidavit that they had not used tobacco for at least one year preceding their application was a violation of the Privacy Amendment. Kurtz v. City of North Miami, 625 So. 2d 899 (Fla. 3rd DCA 1993). In spite of the fact that Ms. Kurtz had no right to smoke or to a government job, she still was held to have a privacy interest which was violated by this regulation. Similarly, Mr. Cox has had private information used to deny him the privilege to adopt.

The district court treats the impact of the statute upon lesbians, gay men, and bisexuals who wish to adopt too lightly. In effect, it forecloses the right of a lesbian or gay man who wishes to adopt a child from having a committed, loving relationship with a person of his or her choice. The difficulty of this decision should be observed from the point of what a heterosexual person would feel if the statute prohibited heterosexuals from adopting. A heterosexual who was told that he could only adopt if he gave up heterosexual activity would surely feel that his private life was being interfered with. Similarly, lesbians, gay men, and bisexuals who choose to adopt also feel their privacy invaded by this irrational prohibition.

This Court has previously noted that the "fundamental right of self-determination" is very broad and has been considered too narrowly, "[B]ecause the word 'privacy' generally has been used in common parlance in its informational or disclosural sense, its broader meaning has been somewhat ignored." In re Guardianship of Browning, 568 So. 2d 4, 9 (Fla. 1990). By way of example, the Court noted with approval the following definitions of privacy:

> . . ., privacy has been defined as an individual's 'control over or the autonomy of the intimacies of personal identity,' Gerety, Redefining Privacy, 12 Harv.C.R.-C.L.L.Rev. 233, 281 (1977); or as a 'physical and psychological zone within which an individual has the right to be free from intrusion or coercion, whether by government or by society at large.' Cope, To Be Let Alone: Florida's Proposed Right of Privacy, 6 Fla.St.U.L.Rev. 671, 677 (1978).

Id. at 10. The "fundamental right to the sole control of his or her person", Id., must include a person's sexual orientation. The right to choose one's romantic and emotional partner for life is part of the "physical and psychological zone" within which the individual should be free. As is explained in more detail in Section II. B. of this brief, a person's sexual orientation is central to the "autonomy of the intimacies of personal identity." The concept discussed in Browning is applicable to sexual orientation.

B. Once a Person has established a right to privacy, it can be overcome only by a compelling state interest.

This Court has clearly established that, "[T]he right of privacy is a fundamental right which we believe demands the compelling state interest standard." Winfield at 546. The state has the burden of proof to justify intruding upon this right. "The burden can be met by demonstrating that the challenged regulation serves a compelling state interest and accomplishes its goal through the use of the least intrusive means." Id.

The difficulty in meeting this burden is demonstrated by looking at this Court's decision in Public Health Trust of Dade County v. Wons, 541 So. 2d 96 (Fla. 1989), which held that a competent adult with a family, including children, had the right to refuse a blood transfusion, without which she may have died. Posited against Ms. Wons' right to refuse a blood transfusion were the state's interests in (1) preserving life, (2) protecting innocent third parties, (3) preventing suicide, and (4) maintaining the ethical integrity of the medical profession. Despite these significant interests, the Court found that they were insufficient to overcome her interest in protecting her zone of decisionmaking autonomy. This Court quoted the district court's articulate opinion which stated:

> ". . ., and here the courts, quite properly, have given great deference to the individual's right to make decisions vitally affecting his private life according to his own conscience. It is difficult to overstate this right because it is, without exaggeration, the very bedrock on which this country was founded."

Id. at 98. In his concurrence, Justice Ehrlich noted that the right to privacy had been held to override these state interests in Satz v. Perlmutter, 379 So. 2d 359 (Fla.1980), aff'g 362 So. 2d 169 (Fla. 4th DCA 1978), decided before the Privacy Amendment was approved. Id. at 102. Justice Ehrlich noted that the Amendment had extended the right even further. Id. This Court has also held that the right to privacy overrode similar interests in Browning and In re T.W.. This "bedrock" right cannot be overcome with vague assertions of competing interests, even if those interests are compelling under most circumstances.

C. The State's justifications for the statute do not satisfy the requirements of the compelling interest.

The compelling interest in this case is to promote the best interests of children as stated in the Florida adoption statute: "It is the intent of the legislature to protect and promote the well-being of persons being adopted and their natural and adoptive parents and to provide to all children who can benefit by it a permanent family life. . . ." § 63.022(1), Fla.Stat. (1991). In Re: Adoption of H.Y.T., 458 So. 2d 1127 (Fla.1984). It is difficult to see how this purpose is accomplished through a statute which completely prohibits an entire class of qualified persons from adopting children who might not otherwise be adopted. Scientific evidence proves that gay and lesbians are capable of being good parents.[3] The general policy that the "best interests of

[3]The Amici to this brief adopt the studies cited in the amicus brief submitted by the National Association of Social Workers in this case.

the child" standard is an individualized determination to be made by the trial judge after considering the full range of facts relevant to a prospective custodian is undercut by this blanket prohibition which removes the ability of judges to consider individual circumstances.

Amici agree with the finding of the trial court in Seebol that the policy pursued by the state "spites its own articulated goals." 16 Fla. L. Weekly at C56 (quoting Stanley, 405 U.S. at 657-58). Amici do not agree that sexual orientation should be considered as a factor in adoptive placements. If it were determined to be a factor, it should only be one of the many factors, and one of the less important ones, which are reviewed to determine the appropriateness of an adoptive placement. When it completely denies the ability to adopt, the state has clearly not selected the least intrusive means of intruding upon the applicant's right to privacy.

The rationale offered by the district court to justify this prohibition shows a misunderstanding of homosexuality. The discussion about children needing education and guidance concerning relationships with the opposite sex is disquieting at best. The statement by the court that "[I]t is in the best interests of a child if his or her parents can personally relate to the child's problems and assist the child in the difficult transition to heterosexual adulthood," is based upon unsupported presumptions. Cox, 627 So. 2d at 1220. The court cites no authority for the notion that a gay, lesbian, or bisexual parent could not personally relate to a child wrestling with his sexual identity. In many cases in our society, it is precisely the gay, lesbian, or bisexual person who has had the most reason to examine and understand questions about sexual identity. Furthermore, the court assumes that lesbians and gay men are unable to relate their experiences to those of heterosexual adolescents. One does not have to rely upon suppositions about a person's past sexual experiences to determine if a person can rear a child,

whatever that child's sexual orientation. The available scientific evidence does not support the assertion by the court. Further, one wonders what is to be made of the best interests of the gay, lesbian, or bisexual child who is struggling with the sexual identity issues and prejudices towards persons with differing sexual orientations. Under the Court's analysis, such children would require parents of similar sexual orientation; such is clearly not the case.[4] Wons, Browning, and In re T.W. all stand for the proposition that it is insufficient for the state to merely assert compelling interests. The rights to preserve life and maintain family integrity which these cases address are amongst the strongest recognized by the law, but they were not sufficient to overcome the privacy right. By comparison to these cases, the intrusion in the case presently before the Court is extremely intrusive.

II. THE DISTRICT COURT ERRED IN FINDING THAT THE DEFINITION OF HOMOSEXUALITY IN FLORIDA'S ADOPTION STATUTE IS NOT UNCONSTITUTIONALLY VAGUE.

A. The District Court's definition of homosexuality is not supported by the text of the statute or the record.

The Due Process Clause requires that a statute give adequate notice of what conduct is prohibited and provide sufficient clarity to avoid arbitrary and discriminatory enforcement. S.E. Fisheries v. Dept. of Nat. Resources, 453 So. 2d 1351, 1353 (Fla. 1984). Despite prohibiting homosexuals from adopting, section 63.042(3), Florida Statutes (1991), does not define the term

---

[4]The 1989 Report of The Secretary's Task Force on Youth Suicide prepared by the U.S. Public Health Service of the Department of Health and Human Services notes that suicide is the leading cause of death among gay male, lesbian, bisexual, and transsexual youth. The report notes that such youth are 2 to 3 times more likely to attempt suicide, in part because of being forced to leave their families. The report notes that the root problem of gay youth suicide is a society that discriminates and stigmatizes homosexuals.

"homosexual".[5] The District Court's conclusion that because no other reported cases have dealt with this term, it must not be a vague one, is not dispositive.[6]

The District Court's analysis of the meaning of the term "homosexual" is not supported by the text of the statute itself which provides no explanation at all as to its meaning. Further, the construction supplied by HRS is one formulated for this case, not based upon textual language in the statute or developed through the formal rule promulgation process, a process which should have been utilized for a term which is so ambiguous in an area as important as the choice of adoptive parents. Whenever a state agency promulgates a rule, it must follow the promulgation requirements of the state Administrative Procedures Act, § 120.54, Fla.Stat., or it constitutes an invalid exercise of delegated legislative authority. § 120.52(8)(a), Fla. Stat. A rule is defined as:

> . . . each agency statement of general applicability that implements, interprets, or prescribes law or policy or describes the organization, procedure, or practice requirements of an agency and includes any form which imposes any requirement or solicits any information not specifically required by statute or by an existing rule.

§ 120.52(16), Fla.Stat. This has been interpreted to cover any agency statement "if it purports in and of itself to create certain rights and adversely affect others, or if it serves by its own effect to create rights, or to require compliance, or otherwise to have the direct and consistent effect of law." Dept. of Nat. Resources v. Wingfield Dev., 581 So. 2d 193 (Fla.App. 1 Dist. 1991). The failure to follow such procedures in this matter has resulted in a definition which

---

[5]Section 63.042(3) states in full: "No person eligible to adopt under this statute may adopt if that person is a homosexual."

[6]There are no other reported cases on this particular section.

affects the adoptive rights of persons in a pernicious and arbitrary manner without allowing public comment or input.

B. The District Court's definition of homosexuality is contrary to its plain and ordinary meaning.

When a statute provides no definition of a term, the courts will look to the term's plain and ordinary meaning. Doe v. Thompson, 620 So. 2d 1004, 1005 (Fla. 1993) (using dictionary meaning of "personally"). In the present case, the State has selected a definition which defines a person's sexual orientation by the sexual activity being engaged in at a particular point in time. This "snapshot" approach not only fails to predict parenting skills accurately, it also fails to precisely define sexual orientation. The term "homosexual" is a clinical term formerly used by the medical profession to define a condition which referred to a person sexually attracted to other persons of one's own gender. See, Law, Homosexuality and the Social Meaning of Gender, Wis. L.R. 187 (1988); Fajer, Can Two Real Men Eat Quiche Together? Storytelling, Gender-Role Stereotypes, and Legal Protection for Lesbians and Gay Men, 46 U. Miami L. Rev. 511 (1992). The difficulty of how to classify a person as a homosexual has been addressed in a number of studies including one of fathers in heterosexual marriages who had homosexual inclinations. Some of these men would not even acknowledge their homosexuality to themselves while others did to themselves, but not others. Matteson, "The Heterosexually Married Gay and Lesbian Parent," p. 138, 144-45, in Bozett, Gay and Lesbian Parents (Praeger 1987). Webster's New Collegiate Dictionary (1979) defines the term as "one who is inclined toward or practices homosexuality." Ballentine's Law Dictionary defines homosexual as "[O]ne, especially a male, whose desire for sexual relations is directed to a person of the same sex." Ballentine's at 566

(1969). The New Shorter Oxford English Dictionary (Oxford University Press 1993) defines homosexual as follows:

> A.adj. Sexually attracted to people of one's own sex; of pertaining to, or characterized by sexual attraction between people of the same sex. B. n. A person who is sexually attracted (often exclusively) to people of his or her own sex.

v. 1, p. 1254. As noted by the U.S. District Court for the Eastern District of New York, the definition of homosexual most recently adopted by the U.S. military as "a person who engages, attempts to engage, has a propensity to engage, or intends to engage in homosexual acts." Able v. U.S., No. CV 94-0974, 62 LW 2626 (April 19, 1994). (Enjoining the "don't ask, "don't tell" policy against lesbian and gay service members). Thus, in its plain meaning the term applies to those with a lesbian or gay orientation.[7]

Courts have been even more expansive in defining this term. Ohio State Law Professor Rhonda Riviera, one of the leading experts on the law regarding homosexuality, has collected materials for over fifteen years including unpublished opinions and briefs, as well as published opinions, in all areas of the law that deal with homosexuality in this country. In her articles she has discussed the confusion over the meaning of the term homosexual. She notes that courts have treated a wide variety of persons as "homosexual" including the following:

> -a married father who engaged in same-sex behavior in his late teens,[8]
> -a man with a single conviction for a same-sex sex crime,[9]

---

[7]In one of the articles submitted by HRS, homosexual is defined as: "The homosexual individual is attracted to her/his own sex and most probably has sexual relations with her/his own sex." Ruse, Are There Gay Genes? Sociobiology and Homosexuality, 6 Journal of Homosexuality 4, 31, fn. 5 (1981).

[8]Dew v. Halaby, 317 F.2d 582 (D.C.Cir.1963).

[9]United States v. Flores-Rodriquez, 237 F.2d 405 (2d Cir.1956).

-a woman whose friends were bisexuals,[10]
-a man who said he was a homosexual but never admitted any overt same-sex behavior,[11]
-women in mannish attire,[12]
-persons who exhibited characteristics and mannerisms which evidenced homosexual propensities.[13]

Rivera, Our Straight-Laced Judges: The Legal Position of Homosexual Persons in the United States, 30 Hastings L.J. 799 (1979)

Although the Amici do not argue that all of the above persons should be classified as homosexual, the list illustrates the difficulty in assigning a definition which everyone understands.

Professor Mark Fajer, who has also studied the subject of homosexuality and the law extensively, has noted that the division of the world into homosexuals and heterosexuals is simplistic and fails to recognize the distinct differences between persons who are variously lumped together under the label of homosexual. He notes one of these distinctions when he discusses persons he calls "homophiles"--those who have sexual fantasies about, affectional preferences for, or sexual activity with members of their own gender:

> Homosexual is somewhat confusing, as people use it to refer both to people whose self-identity is not heterosexual and to the more-inclusive group I call homophiles. Homosexual also suggests that the sexual act is the central defining factor of those it describes; 'homophile' suggests caring about or preference for members of the same sex, rather than just sexual activity.

---

[10]Bennett v. Clemens, 230 Ga. 317, 196 S.E.2d 842 (1973).

[11]Gaylord v. Tacoma School Dist., 85 Wash.2d 348, 535 P.2d 804 (1975).

[12]Nickola v. Munro, 162 Cal. App. 2d 449, 328 P.2d 271 (1958).

[13]Kerma Restaurant Corp. v. State Liquor Auth., 27 App.Div. 2d 918, 278 N.Y.S.2d 951 (1967).

(citations omitted). Fajer at p. 533. Yet another legal commentator, Dr. Janet E. Halley, also has noted the difficulty with which the legal system has in defining "homosexual":

> Courts, legislators, and regulators have encountered intractible difficulties in their efforts to write coherent definitions of the homosexuals upon whom legal borders may be placed.

The Politics of the Closet: Towards Equal Protection for Gay, Lesbian, and Bisexual Identity, 36 U.C.L.A. L.Rev. 915, 948 (1989).

The district court has adopted the definition proffered by HRS that the term applies only "to applicants who are known to engage in current, voluntary homosexual activity." Cox, 627 So. 2d 1214. A reasonable construction of a statute by an agency charged with its administration is entitled to great weight, Department of Ins. v. Southeast Volusia Hosp. Dist., 438 So. 2d 815 (Fla. 1983), appeal dismissed, 466 U.S. 901, 104 S.Ct. 1673, 80 L.Ed.2d 149 (1984). However, the construction offered by HRS in this case is inadequate to withstand a vagueness challenge. The legislature is not required to define every word in a statute and the standard is less stringent when the statute is not criminal. Village of Hoffman Estates v. Flipside, Hoffman Estates, Inc., 455 U.S. 489, 102 S.Ct. 1186, 71 L.Ed.2d 362 (1982); D'Alemberte v. Anderson, 349 So. 2d 164 (Fla.1977); State v. Wershow, 343 So. 2d 605 (Fla.1977); Florida Businessmen for Free Enter. v. City of Hollywood, 673 F.2d 1213 (11th Cir.1982). Nevertheless, it is necessary for the "legislature to give adequate notice of what conduct is prohibited by the statute and to provide clarity sufficient to avoid arbitrary and discriminatory enforcement." Cox, 627 So. 2d at 1214; Southeastern Fisheries Ass'n. Such notice is not given in this statute.

The definition proposed by HRS equates homosexual identity with homosexual sexual

practice. This definition confuses homosexuality as a behavior with homosexuality as a component of identity. As Professor Fajer notes, one of the primary problems with the treatment of gay persons has been the tendency to equate their sexual activity to their identity. Some persons who engage in same sex sexual activity do not identify themselves as being homosexual. Fajer at 547-48. Similarly, many gay and lesbian persons engage in heterosexual activity for a period in their lives in an attempt to conform to society's strictures, but still believe themselves to be gay. Professor Fajer describes this belief as stated by a lesbian:

> Something that people don't understand is that it's not who you go to bed with that determines if you're straight or gay. Sex has nothing to do with it. You can be celibate and gay. Identification as gay or straight is an emotional thing--do you relate primarily emotionally to women or men in an intimate situation?

(citation omitted) Id. at 549. The significance of this behavior versus identity confusion is that by failing to understand the centrality of same gender affectional preference is to fail to understand why this component of a gay man or lesbian's identity is within that zone of autonomy protected by the Privacy Amendment. Further, by defining persons by their current sexual activity, one has classified a diverse group of persons with such differing qualities and values as to make the classification useless to predict parenting abilities of the defined class.

Further, the definition proffered by the state ignores that which we know about human sexuality. Professor Rivera describes the research of noted human sexuality researcher, Dr. Alfred Kinsey, who defined human sexuality as existing on a continuum. At one end of Dr. Kinsey's scale were persons who fantasized about and acted sexually with only persons of the opposite sex ("0" on the Kinsey scale") to the other end where the fantasies and acts were only with persons of the same gender ("6" on the scale). Many people fall within the middle of the spectrum because they have engaged in sexual activities or experienced fantasies about persons

of both genders. Rivera at 801. (citations omitted). The Court's attempt to lump persons into an either/or category does not accurately describe many individuals. Dr. Halley also contends that the notion of "sexual activity" is an amorphous concept. Noting that in the age of AIDS particularly, the types of sexual activity engaged in by members of the gay and lesbian community varies dramatically. Even if one relies upon definitions in sodomy statute, then the class of homosexuals vary from state to state, depending upon the definition of sodomy in each jurisdiction.

The Court's definition is an attempt to avoid the potential legal problems from enforcing a provision which discriminates against a person because that person's status is gay, lesbian, or bisexual. This Court has recognized that discrimination against a person on the basis of sexual orientation is inappropriate. See The Florida Bar Re Amendments to Rules Regulating The Florida Bar, 624 So. 2d 720 (Fla. 1993). (Amending rule 4-8.4(d) to make it an ethical violation for a lawyer to disparage, humiliate, or discriminate against litigants, jurors, witnesses, court personnel or other lawyers on the basis of a number of factors, including sexual orientation). In order to avoid the unconstitutionality of penalizing a person based upon sexual orientation, the district court has created a behavioral approach which classifies a person based upon his conduct at a given point in time. Because child-rearing is a long-term process--some would say a lifetime commitment--this "snapshot" approach results in a determination of the person's parenting skills being based upon the sexual activity in which the person is engaging at a given point of time. This test tells the state nothing useful about the person in regard to the relevant factor, i.e., the parenting abilities of the applicant. The test should be rejected because it only promotes outmoded stereotypes.

C. The District Court's ambiguous definition of homosexuality would result in arbitrary and discriminatory application of the statute.

HRS' explanation of its definition demonstrates the ambiguity of the definition chosen. HRS has opined that it would not apply this statute to persons who have "some degree of homosexual orientation", Cox, 627 So. 2d 1214. HRS' admission that some homosexual feelings in a person do not prevent a person from being a good parent indicate the reality that homosexual feelings are not at all relevant to parenting skills. Further, this distinction defies measurement and therefore cannot provide adequate notice of prohibited conduct to prospective parents. One is provided insufficient guidance as what "some degree" means and how it would be measured, thus avoiding the clarity sufficient to avoid arbitrary and discriminatory enforcement. HRS also claims that persons who have experimented with homosexual activity in the past are not prohibited from adopting under the statute. Cox, 627 So. 2d 1214. The lack of clarity of this test also promotes arbitrary enforcement. How many homosexual acts constitute experimentation as opposed to orientation? How far in the past must the acts have taken place before they are disqualifying? Nothing in the text of the statute helps answer these questions.

The test offered by HRS and accepted by the district court, "current, voluntary homosexual activity," does not resolve the vagueness problems with this statute. The District Court's attempt to define this term shows a misconception of homosexuality that permeates the entire opinion. The court's discussion of choosing to act on one's sexual orientation gives a constricted meaning to the notion of choice. First, scientific evidence supports the proposition that sexual orientation is not chosen by a person and that if an individual chooses to act on his

sexual desires at all, the gender of the person toward whom one experiences sexual attraction is not determined as a result of any conscious election. See Dahl v. Sec. of the Navy, 830 F.Supp. 1393 (D. 1993) (Finding that a 1988 study by the Defense Personnel Security Research and Education Center concluded that complex combinations of genetic, hormonal, neurological, and environmental factors operating prior to birth largely determine sexual orientation). In discussing choice it is important to distinguish between the "choice" of a person to engage in a particular sexual act with a particular person from the notion that lesbians and gays choose to have a sexual orientation toward persons of the same gender. To prohibit an exclusively lesbian or gay man from engaging in homosexual activity is not simply to prohibit her or him from engaging in a particular act or to refrain from engaging in sexual activity with a particular person; it is to prohibit her or him from forming any intimate relationships at all. The proffered definition is also unclear about what constitutes "current" activity. Does a lesbian or gay man who has not had sexual contact with other persons for six months meet the test for not currently engaging in current sexual activity? Is activity within the last six weeks current? This test has the unlawful result that a person who has been exclusively gay or lesbian for his or her entire life, would be able to adopt if he or she has been celibate for an undetermined length of time, while a person who is primarily heterosexual, but who has recently had sexual contact with a person of the same gender would not be eligible. Whatever the suggested rationale for this prohibition, it is unlikely that the legislature would have intended this result. The statement in the test "when HRS knows of" homosexual activity also implies that a gay or lesbian who was able to conceal the information about sexual activity could be eligible. This definition raises the question of whether the district court is adopting some type of "don't ask, don't tell" policy for

adoption. If so, the amici would strongly urge that this Court reject it.

As is implicit by the Kinsey scale, the district court opinion simply fails to recognize the full diversity of human sexual behavior. Persons who consider themselves truly bisexual (a "3" on the Kinsey scale) would be arbitrarily classified as either a homosexual or heterosexual dependent upon the gender of the person with whom they are currently sexually involved. If this statute has any plausible rationale, such a random result should surely not be permissible. Nonetheless, it is the result of the definition adopted by HRS for this litigation, which was accepted by the District Court. This "snapshot" categorization of a person based upon his sexual activity at the point of application is particularly problematic for an adoption case where one is trying to determine a person's long-term ability to rear a child. Current sexual activity is an extremely poor predictor of that ability.

Finally, the definition supplied by HRS and accepted by the district court fails to give any guidance as to what constitutes "sexual activity." As noted by Dr. Halley above, the range of sexual activity varies dramatically within the gay and lesbian community.[14] Further, the term is unclear within society at large. Some would consider a hug or kiss as sexual activity, particularly when it is between persons who feel some sexual attraction to each other. Others would consider it a sign of affection. Some would consider a kiss between two unrelated men to be sexual in nature. Nothing in the text of the statute or in the supplied definition provides guidance as to when a person's behavior with another person of the same gender crosses the line into "sexual activity."

---

[14].Professor Fajer cites an article which notes that one lesbian couple had sex only once in the forty-one years they were together because of the sexual beliefs of one partner. Fajer, at 548, citing Susan E. Johnson, Staying Power: Long Term Lesbian Couples 174-75 (1990).

In summary, HRS and the district court have created a definition for the term "homosexual" which is not supported by the text of the statute. When the district court states that "the legislature is constitutionally permitted to reach its own conclusions on the validity of the distinction between homosexual orientation and activity without any mandate from this court.", Cox, 627 So. 2d 1215, it ignores the fact that there is nothing in the text or the record to indicate that the legislature attempted to make the orientation/activity distinction. The scientific knowledge at the time was such that the difference between orientation and activity was known, and the legislature could have provided the language necessary to make the distinction. There is nothing in the text of the statute, and no legislative history has been offered which suggests that this distinction was intended. Further, the test suggested by HRS and accepted by the Court is also vague, and its application would result in a disparate impact which would undercut the rationale for the statute. The test provides virtually no useful predictive value about the person, not even about the person's sexual orientation since some gay and lesbian persons engage in heterosexual activity during periods of their lives, some heterosexual persons engage in homosexual activity, and bisexual persons engage in both. It clearly provides no predictive value on the parenting skills of the individual.

III. THE DISTRICT COURT ERRED IN FINDING THAT THE ADOPTION STATUTE DOES NOT VIOLATE THE PETITIONER'S GUARANTEES OF DUE PROCESS AND EQUAL PROTECTION.

A. The District Court improperly rejected the petitioner's Due Process claim.

The trial court in this case and the Circuit Court for Monroe County, Florida, in Seebol, found the adoption statute violates substantive due process requirements. The Florida

Constitution prohibits deprivations of "life, liberty or property" without due process of law. Art. I, § 9, Fla. Const. Both the United States and Florida Supreme Courts have held that statutes which create irrebuttable presumptions in regard to protected areas may violate substantive due process requirements. Stanley v. Illinois, 405 U.S. 645 (disapproving statutory presumption of parental unfitness by unmarried father); Carrington v. Rash, 380 U.S. 89, 85 S.Ct. 741, 13 L.Ed2d 675 (1965); Public Health Trust of Dade County v. Valcin, 507 So. 2d 596, 599 (Fla.1987) (finding presumption of liability against doctor who removed medical records to violate due process by its failure "to provide the adverse party any opportunity to rebut the presumption of negligence"); Bass v. General Development Corp., 374 So. 2d 479, 485 (Fla. 1979) (statute classifying certain land as nonagricultural for tax purposes created "irrebuttable presumption" in violation of due process").

The decision in Stanley is particularly germane to this case because it deals with a presumption on parenting ability unrelated to the ability of the particular individual seeking parental rights. The U.S. Supreme Court in Stanley observed:

> . . .when [the statutory exclusion] forecloses the determinative issues of competence and care, when it explicitly disdains present realities in deference to past formalities, it needlessly risks running roughshod over the important interests of both parent and child. It therefore cannot stand.

Id. at 657.

This rationale is directly applicable to this statute. The prohibition in the adoption statute is irrational in the light of current scientific knowledge. To create a presumption that no lesbian or gay man, in spite of stellar professional and personal lives or demonstrated knowledge of child-rearing, can adopt is harmful to those children who cannot locate adoptive parents as well as the persons seeking to adopt. Thus, this statute sweeps aside lesbian, gay, and bisexual

doctors, lawyers, teachers, and social workers without giving them the opportunity to prove their parenting ability. Oddly, it would also preclude a lesbian or gay who has biological children from rearing an adoptive child. This prohibition is contrary to the individualized approach normally taken in child custody matters under the best interests of the child standard. This standard recognizes that the measure of a person's ability to rear a child is a particularly individualized process where innumerable factors are weighed and balanced to determine if a person is fit to be awarded custody. This Court should resume interpreting the adoption statute via this process rather than excluding all persons who may fit into an ill-defined category because those persons are not politically popular. The fact that only Florida and New Hampshire have this prohibition demonstrates that this type of provision is outside the norm and should be rejected as such.

B. The District Court improperly rejected the petitioner's Equal Protection Claim because there is no rational basis upon which to prohibit lesbians and gay men from becoming adoptive parents.

The District Court erred in its application of the Equal Protection Clause in this case. The Florida Equal Protection Clause is worded in a slightly broader fashion than its counterpart in the United States Constitution. "All natural persons are equal before the law. . . ." Art. I, § 2, Fla. Const. No state "shall deny to any person within its jurisdiction the equal protection of the laws." U.S. Const. amend. XIV. Amici acknowledge that the United States Supreme Court has not yet recognized that engaging in homosexual activity involves a fundamental right. Such a finding would require that this statute undergo strict scrutiny, a standard which would void the statute because of the state's inability to demonstrate a compelling interest.

However, this Court does not have to find that homosexuals constitute a suspect class or

that engaging in homosexual activity is a fundamental right in order to void this statutory section. Other states have struck statutes which discriminate against homosexuals under an equal protection analysis. Commonwealth v. Wasson, 842 S.W.2d 487 (Ky.1992) (Striking the state's sodomy statute under the Kentucky Constitution's equal protection and privacy provisions); People v. Onofre, 415 N.E.2d 936 (N.Y.1980); Commonwealth v. Bonadio, 415 A.2d 47 (Pa.1980); Baehr v. Lewin, 852 P.2d 44 (Haw. 1993) (invalidating statute prohibiting same-sex marriages under Hawaii's equal protection clause). In addition, two federal courts have applied an "active" rational basis standard to policies which had a disparate impact upon homosexuals. High Tech Gays v. Defense Indus. Sec. Clearance Office, 895 F.2d 563 (9th Cir.), reh'g denied, 909 F.2d 375 (9th Cir. 1990); Pruitt v. Cheney, 963 F.2d 1160 (9th Cir.1990), cert. denied, __ U.S. __, 113 S.Ct. 655, 121 L.Ed.2d 581 (1992).

The district court in this case cites Heller v. Doe, __ U.S. __, 113 S.Ct. 2637, 125 L.Ed.2d 257 (1993), as its model for rational basis review, a review which the Supreme Court stated relieved the state from the burden of persuasion and any obligation "to produce evidence to sustain the rationality of a statutory classification." Id., __ U.S. at __, 113 S.Ct. at 2643. As noted, a statute may survive if "any reasonably conceivable state of facts that could provide a rational basis for the classification" is available. Id., ___ U.S. at ___, 113 S.Ct. 2642. However, this Court is not limited to applying a rational basis review. As noted above, a number of courts have applied a stricter standard when reviewing statutes affecting gay men and lesbians. Nonetheless, this statute could not meet even a rational basis test.

The District Court for the Eastern District of California has held that the rational basis test can void a classification based upon illegitimate prejudice against homosexuals. Dahl v.

Secretary of the Navy, 830 F.Supp. 1393 (E.D. Cal. 1993). In finding the Navy regulations which require discharge of members who admitted being lesbian or gay to violate the equal protection clause, the court found that the Navy's arguments failed to pass the rational basis standard of review. This case analyzed the Heller decision and rejected the Navy's argument that any justification for the exclusion policy would suffice to support the policy:

> The Navy reads too much into Heller. Although Heller did state that evidence need not necessarily be proffered in support of the rationality of a given policy, this proposition cannot reasonably be construed to mean that, once evidence is proffered, the court has no responsibility to analyze whether there is a triable issue of material fact as to the policy's rationality. Heller does not disturb Pruitt's holding that a court must examine the record to determine whether the policy-maker's proffered justifications for its policy are based on impermissible prejudice.

Id. at 2153. Other courts have also held that discrimination against homosexuals may raise constitutional problems. Meinhold v. United States Dep't of Defense, 808 F.Supp. 1455 (C.D. Cal.1993) (no rational basis for ban on homosexuals in military), stay denied, CV-92-6044, 1993 Westlaw 195368 (9th Cir. Mar. 5, 1993) (per curiam), stay granted in part, stay denied in part, 114 S.Ct. 374 (1993) (staying injunction, pending appeal, except as applicable to named plaintiff); Steffan v. Aspin, 8 F.3d 57 (D.C.Cir.1993) (finding ban unconstitutional), vacated for rehearing en banc, Jan. 7, 1994; Elzie v. Aspin, 841 F.Supp. 439 (D. D.C.1993) (finding, on motion for preliminary injunction, that plaintiff, "presents a strong case that he will probably succeed" on equal protection claim). Similarly, the rationale for Florida's adoption statute in this case must be struck pursuant to a rational basis analysis. It too is based upon impermissible prejudice.

C. Other states have permitted gays and lesbians to adopt.

It was not until March 1979 that The Advocate reported what it believed to be the first

adoption by an openly gay couple. The pastor of a Metropolitan Community Church and his partner, a physician, became adoptive parents of an infant child in Los Angeles, California.[15] In June of that same year an openly gay man in Catskills, New York won permanent custody of the thirteen-year-old boy who had lived with him and his male lover for a year.[16]

Although no statistical information on adoptions by gay and lesbian parents is available, commentators have noted the growing number of adoptions by openly lesbian and gay men, and the likelihood that the number of lesbian and gay adoptive parents has been significantly underreported in the past:

> What newspaper accounts would not reveal, and what has been true for many years, is that hundreds of lesbians and gay men have, in fact, adopted children and been licensed as foster parents across the country. For a variety of reasons, however, the issue of their sexual orientation was never officially raised or made public. Either they did not fit state or agency officials' stereotypes of lesbians or gay men and they were therefore not suspected of being homosexual, or their sexual orientation was known to caseworkers and was overlooked. Such an "official" response is particularly likely if an applicant is well qualified in all other aspects.[17]

All of the early adoptions (even those by openly lesbian or gay individuals) were single parent adoptions, even when the adoptive parent was in a couple and his or her partner was actually co-parenting the child. It had been assumed by practitioners and prospective parents that no agency would recommend and no judge would grant a joint adoption by an unmarried couple.[18] In 1986, however, two northern California counties approved what are thought to be

---

[15] *Gay Couple Granted Adoption of Child*, The Advocate (March 8, 1979), at 12.

[16]G. Vecsey, *Approval given for homosexual to adopt a boy*, The New York Times (June 21, 1979).

[17]Wendell Ricketts & Roberta Achtenberg, *The Adoptive and Foster Gay and Lesbian Parent*, in Gay and Lesbian Parents 89, 92 (F. Bozett ed. 1987).

[18]Id. at 97-98.

the first joint adoption petitions.[19]

As the possibility of joint adoptions became apparent, a new type of adoption also emerged -- the so-called "second parent adoption."[20] Zuckerman, in officially coining this term, contemplated all adoptions by an unmarried, non-biological, non-adoptive co-parent. Two state supreme courts have upheld second parent adoptions by lesbians and gay men, Vermont[21] and Massachusetts[22]. A third state supreme court, Wisconsin[23] is considering the issue. No state supreme court has ruled unfavorably on a request for a second parent adoption.

D. This Court should follow the trend of other states and not follow the New Hampshire advisory opinion cited by the District Court which is distinguishable and should not be held to apply in Florida.

In the United States, Florida and New Hampshire stand alone in banning by statute the adoption of children by lesbians or gay men. New Hampshire's statute[24] has not actually been tested in the courts of that state. The prospective law was reviewed via a process of certification in 1987, when the state House of Representatives certified to the New Hampshire Supreme Court

---

[19]See No. 17350 (Cal. Super. Ct., Alameda County, Apr. 8, 1986) and No. 17945 (Cal. Super Ct., San Francisco County, Feb. 24, 1986).

[20]E. Zuckerman, *Second parent adoption for lesbian-parented families: Legal recognition of the other mother*, 19 U.C. Davis Law Review, 729, 731 (1986).

[21]In re Adoption of BLVB and ELVB, No. 92-321 (Vermont Supreme Court, June 18, 1993).

[22]Adoption of Tammy, 416 Mass. 205, 619 N.E.2d 315 (Massachusetts Supreme Court, 1993).

[23]In the Interest of Angel Lace M., No.'s 92-1369, 92-1370, (Wisconsin Supreme Court, argued March 2, 1994).

[24]N.H. Rev. Stat. Ann. Section 170-B:4 (Supp.).

the question whether the proposed ban would violate the federal or state constitution.[25] The proposed statute banned adoption and foster care placements involving lesbian or gay parents, and the operation of any licensed child care agency by lesbians or gay men.

The New Hampshire Supreme Court concluded that the rational basis test was the only applicable standard for determining whether the statute violated the equal protection rights of lesbians and gay men.[26] As a result, the court defined the question to be decided as whether "a blanket exclusion of homosexuals from adoption, foster parentage, or child care agency licensure is rationally related" to the legislative purpose of promoting "the provision of a healthy environment, ... role models and positive nurturing" to children in such settings.

The court decided that the section of the ban that disqualified lesbians and gay men from being foster or adoptive parents passed constitutional muster. In evaluating this section, the court stressed that it was not addressing "the wisdom or desirability of the legislature's choice." Indeed, the court noted that "[i]t may . . . be preferable to deal with the present issue as the State may now do, as one of a number of relevant factors on a case-by-case basis."[27]

Nonetheless, the court reluctantly upheld this section of the statute as rationally based. As the court acknowledged, numerous studies have found absolutely no correlation between the

---

[25]Opinion of the Justices, 530 A.2d 21 (N.H. 1987).

[26] In deciding that it was bound to apply a rational basis standard, the New Hampshire Court did not have the benefit of the federal court decisions holding that sexual orientation was suspect or quasi-suspect. Since that time three courts have reached that conclusion. See Watkins v. United States Army, 875 F.2d 699, 711-724 (9th Cir. 1989) vacating 847 F.2d 1329 (9th Cir. 1989), cert. denied, 111 S.Ct. 384 (1990); ben Shalom v. Marsh, 703 F. Supp. 1372 (E.D. Wis. 1989); High Tech Gays, 895 F.2d 563. Additionally a federal court applied an active rational basis standard to policies having a disparate impact upon homosexuals. Pruitt v. Cheney, 963 R.2d 1160 (9th Cir. 1990), cert denied, __ U.S. __, 113 S.Ct. 655, 121 L.Ed.2d 581 (1992).

[27]Id. at 24-25.

sexual identity of parents and the sexual identity of their children. Id. at 25. Despite this evidence, the Court was troubled that the origin of sexual identity "is still inadequately understood," and upheld the statute on the speculative possibility that being raised by a lesbian or gay parent might influence a child's sexual identity. "[W]e believe," the court concluded, "that the legislature can rationally act on the theory that a role model can influence the child's developing sexual identity."[28]

In giving weight to the biased rationale, the court misapplied the rational basis test in two important respects. The absence of a consensus on the origins of sexual identity does not, as the court mistakenly concluded, provide any support for the legislature's "role model theory." While the precise origins of sexual identity are still debated, the hypothesis that children might acquire a homosexual identity by imitating a lesbian or gay parent has -- by the unanimous consensus of the numerous researchers who have investigated this possibility -- been definitively discredited.[29] These findings are borne out by the fact that most lesbians and gay men are the biological product of heterosexual parents, and were raised in heterosexual households. Indeed, those who argue for the predominance of environmental factors in the development of a lesbian or gay identity do not rely on the simplistic "role model theory" proposed by the legislature, but on complex psychoanalytic theories about heterosexual family dynamics.[30] In short, the

---

[28] Id. at 25. In contrast, the Court found no rational basis for excluding lesbians and gays from securing licenses to operate child care agencies. Id. at 25-26.

[29]For a review of the existing research, see Charlotte Patterson, Children of Lesbian and Gay Parents, 63 Child Development 1025 (1992).

[30]See, e.g., M. Ruse, Nature/Nurture: Reflections on Approaches to the Study of Homosexuality, 10 Journal of Homosexuality 141 (1984); and C.W. Socarides, Homosexuality (1978).

legislature's "role model theory" has no scientific or professional credibility, and provides no rational support for the blanket exclusion of lesbians and gay men from adoption and foster parenting.

Because the court failed to recognize the "role model theory" as a mask for unsupported bias, the court also failed to screen the proposed statute for the "irrational prejudice" that the United States Supreme Court explicitly prohibited under the rational basis standard in Cleburne.[31] As the Supreme Court clarified in Cleburne, the rational basis test does not give state legislatures *carte blanche* to target politically unpopular groups, or to mask irrational bias beneath a transparently disingenuous rationale. Just as the zoning regulation at issue in Cleburne reflected an irrational prejudice against people with mental disabilities, the blanket exclusion of lesbians and gay men from adoption and foster parenting simply lacks any rationally articulable basis.

As the editors of the Harvard Law Review have observed with regard to the New Hampshire decision:

> According to the dissent, "[t]he legislature received no meaningful evidence to show that homosexual preference, gender role identity, or general physical and psychological health any more than heterosexual parents," because "the overwhelming weight of professional study... concludes" that children raised by homosexual parents are no different from their peers. 129 N.H. at 301, 530 A.2d at 28 (Batchelder, J., concurring in part and dissenting in part) . . . . Although the legislature conceivably could have believed that gay men or lesbians would not be appropriate role models for children, its tenacity in persisting in this belief in the face of "the overwhelming weight" of professional research to the contrary is strong evidence that the true motivation for this legislation was "irrational prejudice" Cf. City of Cleburne Living Center, Inc., 473 U.S. 432, 450 (1985) (invalidating state action that "appear[ed]...to rest on an irrational prejudice") rather than concern for children's welfare. Under this analysis, the legislation is unconstitutional. Cf. United States Dep't of Agric. v. Moreno, 413 U.S. 528, 534

---

[31] City of Cleburne Living Center, Inc., 473 U.S. 432, 450 (1985) (invalidating state action that "appear[ed] . . . to rest on an irrational prejudice").

(1973) (holding that "a bare...desire to harm a politically unpopular group cannot constitute a legitimate governmental interest").

Sexual Orientation and the Law, 138 (1990). Criticizing the definition adopted by the New Hampshire Supreme Court in In re: Opinion,[32] upon which HRS and the district court in this case relied, Dr. Halley states:

> The court maintains a conviction, which we have seen contradicted by the empirical findings, that homosexual status is occupied exclusively by persons who have engaged in homosexual acts. . . . The category includes individuals whose desires may be determined to mask these facts from themselves by embracing a purely heterosexual subjective identity, and from others by passing as straight. The court's example forgives these lies and builds them into the scheme of state enforcement.

Id. at 950.

In the present case, the Florida District Court summarily disposed of the federal equal protection claim as one in which the rational basis standard of Heller[33] is dispositive. This court is not, as argued below, confined to rational basis review. Even as articulated in Heller, however, the rational basis standard does not permit the imposition of legislative sanctions motivated by irrational bias against a particular group.[34] Even under Heller, Florida's prohibition of lesbian and gay adoptive parents flies in the face of the available social science evidence, ignores and demeans the experience of the million plus children in lesbian and gay

---

[32]The Court interpreted the proposed legislation which defined homosexual as "any person who performs or submits to any sexual act involving the sex organs of one person and the mouth or anus of another person of the same gender" to include current and voluntary sexual activity, the same definition as accepted by the district court in this case, although it does not define homosexual activity. Opinion of the Justices, 530 A. 2d at 24.

[33] Heller v. Doe, __ U.S. __, 113 S.Ct. 2637, 125 L.Ed.2d 257 (1993).

[34] Id. at 2642-43 (The state need not "produce evidence to sustain the rationality of a statutory classification" if "any reasonably conceivable state of facts . . . could provide a rational basis for the classification.").

families,[35] and irresponsibly interferes with the obligation of courts to evaluate adoption petitions on a case-by-case basis, in accordance with the best interests of the child. This deeply irrational prohibition cannot be justified by "any reasonably conceivable state of facts." Id. at 2642.

As the Ohio Supreme Court held in 1990, a per se rule that lesbians and gay men are ineligible to adopt is profoundly incompatible with adoption law's traditional focus on the best interests of the child.[36] Overturning an appellate court decision that imputed to the Ohio legislature an intention that lesbians and gay men are unfit to adopt, the Ohio Supreme Court restored the trial court's determination that it was in the best interest of Charles, an eight year old boy with leukemia, brain damage, and speech and learning disorders, to be adopted by the only prospective adoptive parent willing to offer him a permanent home -- namely, a gay counselor with whom Charles had established a loving and supportive parental relationship.[37] The Court rejected the appellate court's contention that it could never be in a child's best interest to be adopted by a gay man: "The polestar by which courts in Ohio, and courts around the country, have been guided is the best interests of the child to be adopted. This standard is applied in every adoption case and the case before us can be no different." Id. at 885.

---

[35] See, e.g., Laura Lott-Whitehead and Carol T. Tully, *The Family Lives of Lesbian Mothers*, 63 Smith College Studies in Social Work 265 (1993); and Nan Hunter and Nancy Polikoff, *Custody Rights of Lesbian Mothers: Legal Theory and Litigation Strategy*, 25 Buffalo L. Rev. 691 (1976).

[36] In re Adoption of Charles B., 552 N.E.2d 884 (Ohio 1990).

[37] Id.

Citing numerous custody decisions granting custody to lesbians and gay men,[38] the court stressed the irrationality of depriving a child of a fit and caring parent in the absence of any evidence that the sexual identity of the parent or prospective parent has any relevance to the child's well-being. "[A]s with all difficult questions concerning adoption or custody of children," the court noted, "trial courts must make decisions on the facts of each individual case." Id. at 887. As the court rightly emphasized, to substitute a blanket rule for a factual determination of the child's best interest in each particular case is needlessly to abandon some children to an indefinite limbo: "Permanent placement in a judicially approved home environment through the process of adoption is clearly preferable to confining the child in an institution or relegating the child to a life of transience, from one foster home to another, until such time as the certified [adoption] organization determines that it is proper to give its consent to an adoption." Id. at 889 (citing *State, ex rel. Portage City Welfare Dept. v. Summers*, 311 N.E.2d 6, 12 (Ohio 1974).

In sum, Florida's statutory exclusion of lesbians and gay men from adoption is deeply irrational. In deciding whether Florida will join New Hampshire as one of only two states in the nation that have adopted a statutory exclusion, this court should give weight neither to discredited myths about lesbian and gay parents, nor to irrational prejudice disguised as legitimate concern. As social science research and the real life experiences of children in lesbian and gay families have overwhelmingly shown, there is simply no rational basis for any generalized concern about children raised by lesbian and gay parents.

---

[38]Id. at 887-88.

IV. THE DISTRICT COURT ERRED IN NOT REMANDING THE CASE TO THE TRIAL COURT ONCE IT FOUND THAT THE FACTUAL RECORD WAS NOT ADEQUATELY DEVELOPED.

A. The District Court erred in substituting its judgment for that of the trial court in ruling on the Equal Protection and Due Process claims.

After complaining about the "trial by photocopy" engaged in by the parties, the District Court erred in not remanding the case for further factual development once it determined that the factual record was incomplete. The rule in Florida is "that the question of the constitutionality of a statute is an issue of law, or of mixed fact and law, depending upon the nature of the statute brought into question and the scope of its threatened operation as against the party attacking the statute. Lykes Bros., Inc. v. Board of Com'rs of Everglades Drainage Dist., 41 So. 2d 898 (Fla. 1949)." Glendale Fed. S. & L. v. State Dept. of Ins., 485 So. 2d 1321 (Fla.App. 1 Dist. 1986). In Glendale, the appellant challenged the constitutionality of a statute restricting licensed insurance agents from engaging in insurance agency activities if they were associated with a financial institution. Amongst other constitutional claims, the appellants claimed equal protection and due process violations. In rejecting appellees' argument that the appellate court could rule on the constitutional claims without a factual record, the Court stated:

> In urging this court to decide the constitutional issues raised without a factual record, appellees are of necessity requesting this court to assume, among other things, that appellants will be unable to present facts establishing the absence of a rational basis for the challenged legislation.

Id. at 1325.

In the case before this Court, the District Court of Appeal states: "We conclude that the constitutional issues raised in this case concerning vagueness and equal protection are mixed questions of law and fact and that the plaintiffs have failed to present evidence to support the

trial court's ruling at this stage of the proceedings." Cox, 627 So. 2d at 1213. This is a curious application of the normal procedure for an appellate court reviewing a summary judgment motion where the court normally does not overturn the fact findings of a trial court unless there is no support for the trial court findings. It is not the function of the appellate court to substitute its judgment regarding findings of fact by the trial court. Marsh v. Marsh, 419 So. 2d 629, 630 (Fla. 1982).

In this case, all of the scientific evidence presented endorsed the notion that gay men, lesbians, and bisexuals are just as capable of being good parents as heterosexual persons. The District Court's complaint that there were not enough articles, that the sources may not have been well qualified, and that further research is suggested is insufficient to warrant a reversal of the trial court's findings. None of these issues provides any evidentiary proof of the opposite of what the plaintiff's sought to prove. Social science cannot give unqualified guaranteed answers to questions about behaviors, particularly when applied to a group of individuals. Nonetheless, the information is reliable and accepted in courts. See § 90.202(11), (12), Fla.Stat. (1993). Of the two studies submitted by HRS, one supports the proposition that gays and lesbians are acceptable parents and the other discusses sociobiological theories for the causes of male homosexuality without any explanation of the parenting abilities of homosexuals. The District Court says that it and the trial court lacked the expertise to evaluate and apply the studies in the record. Cox, 627 So. 2d at 1231. Nonetheless, the District Court then took it upon itself to make the factual findings necessary to uphold the constitutionality of the statute with no scientific studies to support its conclusions. At the very least, the Court should have remanded the case for trial of the disputed issues of fact. If the Court lacked the expertise to

discern the validity of the scientific studies, it should have remanded the matter for testimony by expert witnesses concerning their validity and applicability.

Similar to this case, the First District Court of Appeal in Pitts v. Fox, 591 So. 2d 1042 (Fla. 1st DCA 1991), found that stipulated facts were insufficient to support a summary judgment. Rather than rule itself, the Court remanded the case for trial, which is what the District Court of Appeal should have done in this case. See also Hancock v. Department of Corrections, 585 So. 2d 1068 (Fla. 1st DCA 1991); Berlanti Construction Co. v. Miami Beach Federal Savings and Loan Association, 182 So. 2d 746 (Fla. 3rd DCA 1966); Sunday v. Ikinson, 103 So. 2d 669 (Fla. 3rd DCA 1958). Mr. Cox has been denied the presumption to which he is entitled in the review of this summary judgment motion. This is especially troubling where the definition of the statute adopted by the District Court is one beyond the text of the law. At the very least, Mr. Cox should be given the opportunity to present additional evidence at a full trial in order to obtain a just disposition of this case.

B. If this Court declines to find the statute facially unconstitutional, it should remand the case to the trial court to fully develop the factual record.

The scientific evidence submitted by the petitioner was more than sufficient to demonstrate the irrationality of this statute. See Dahl. However, if insufficient evidence was submitted, the Court should have permitted the petitioner to proceed to trial to permit a fuller explanation of the meaning of the scientific evidence. Amici endorse the findings of the amicus brief of the National Association of Social Workers in this case which cites the numerous studies demonstrating that lesbian, gay, and bisexual parents are equally capable of rearing children as heterosexual parents. It is troubling that the district court, after criticizing the inadequate record of the trial court, chose to rule on the Constitutional issues rather than remand the case to the

trial court to conduct a trial where expert testimony could be taken. Although the Court may wish to hear additional evidence on the studies, it is simply incorrect to rule against Mr. Cox when the State presented no evidence showing that harm would occur from homosexual adoptions. The District Court's ruling is especially troubling here where the Court decided on its own to draw conclusions about what the term "homosexual" means and the abilities of homosexual parents without reference to the scientific evidence about such issues. The Court appears to recognize this problem when it states, "In light of the limited record on appeal, we question whether this is the appropriate case in which to finally resolve these constitutional issues." Cox, 627 So. 2d 1220, fn 11. The Court should have followed its own instincts and remanded the case for further development rather than make rulings on the Constitutional issues.

CONCLUSION

Section 63.042(3), Fla.Stat., violates the rights of lesbians, gay men, and bisexuals pursuant to the Florida Constitution guarantee of the rights to privacy, equal protection, and due process. The Amici join with and endorse the legal arguments made by the petitioner in challenging this statute. The statute is unconstitutionally vague. It violates the rights of Florida's freestanding Privacy Amendment. Finally the law violates the right to Equal Protection. The State has not demonstrated the means necessary to achieve the compelling interest of the best interest of the child. In fact, this statute cannot withstand a rational basis analysis because it spites its own goal rather than promote it. The Amici believe that sufficient evidence has been presented to uphold the judgment of the trial court that this statute is unconstitutional. Should this Court feel that more evidence should have been presented, the Amici believe that the Order of the Second District Court of Appeal be reversed and this case

remanded to the trial court for further proceedings.

Respectfully Submitted,

William E. Adams, Jr.
Rosemary Wilder
Gay and Lesbian Lawyers Association
3305 College Avenue
Ft. Lauderdale, Fl 33134

Certificate of Service

I hereby certify that a copy of this brief was placed in the U.S. mail to the parties listed below at the indicated addresses on the 13th day of May, 1994.

Doris A. Bunnell
406 13th St. W
Bradenton, FL 34205

Nina Vinik
American Civil Liberties Union
225 N.E. 34th St., Ste. 102
Miami, FL 33137

Linda K. Harris
Deputy General Counsel, HRS
1323 Winewood Blvd.
Bldg. 1, Ste. 407
Tallahassee, FL 32399-0700

Anthony DeLuccia, Jr.
District 8 Legal Counsel, HRS
8695 College Parkway, Ste. 217
Fort Myers, FL 33919

William E. Adams, Jr.
FL. Bar No. 304093

IN THE SUPREME COURT OF FLORIDA

James W. Cox
Petitioner

FL. 2nd DCA Case No. 93-01138
Supreme Court Case No. 82,967

vs.

State of Florida,
Department of Health
and Rehabilitative Services,
Respondent
_____/

MOTION OF THE LAMBDA LEGAL DEFENSE AND EDUCATION FUND, INC., NATIONAL CENTER FOR LESBIAN RIGHTS AND NATIONAL ORGANIZATION FOR WOMEN (FLORIDA CHAPTER) FOR LEAVE TO APPEAR AS AMICUS CURIAE
on behalf of
Petitioner, James W. Cox

The Lambda Legal Defense and Education Fund, Inc., the National Center for Lesbian Rights, and the National Organization for Women (Florida Chapter) move for leave to participate in this cause as amicus curiae on behalf of petitioner, James W. Cox, pursuant to Florida Rule of Appellate Procedure 9.370, joining the brief being submitted with the Gay and Lesbian Lawyers Association and Florida Academy of Public Interest Lawyers, who previously moved for leave to participate as amici on April 22, 1994. As grounds therefore, Movants show:

1. The National Organization for Women, Florida chapter, is a national organization formed to seek equal rights for women in our society. Its interest in this challenge is to assert the equal rights of lesbians who are being denied their constitutional rights. The organization is familiar with the Constitutional and scientific issues in this cause of action and can lend assistance to the court in rendering a decision.

2. Lambda Legal Defense and Education Fund, Inc. (hereinafter "Lambda") is a not-for-profit corporation based in New York which does impact litigation in all substantive areas affecting the rights of lesbians and gay men. Founded in 1973, Lambda is the oldest and largest national legal organization devoted to these concerns and has appeared as counsel or amicus curiae in numerous cases in state and federal courts on behalf of lesbians and gay men who have suffered discrimination because of their sexual orientation. Through its litigation and community education in many states, Lambda has challenged limitations to the concept of "family" which work to exclude or fail to protect the families of lesbians and gay men. Lambda is committed to gaining legal recognition for lesbian and gay couples and families, and eradicating the injustices that result from the lack of such recognition. Lambda was lead counsel for a coalition of fifteen parties which filed a brief in In re: Advisory Opinion to the Attorney General -- Restrict Laws Related to Discrimination, Case No. 82,674, a case of which dealt with a proposed amendment which was aimed at gays and lesbians.

3. The National Center for Lesbian Rights (NCLR), formerly the Lesbian Rights Project, is a non-profit public interest law firm founded in 1977 and devoted to the legal concerns of women who encounter discrimination on the basis of their sexual identity. NCLR is particularly well-suited to offer amicus assistance to this Court in this matter, as NCLR attorneys litigate in the area of family law as it applies to lesbians and gay men. Most recently, NCLR participated as an amicus curiae in In re: Kenneth Tyler Doustou, before the Virginia Court of Appeal, and Wanda Sue J. v. Steven Wayne J., before the West Virginia Court of Appeal, arguing, in both cases against denial of custody to a lesbian mother solely because of her sexual identity. NCLR has also written numerous works on the rights of lesbians to preserve and protect the integrity of their families free from unwarranted intrusions based on bias and

stereotypes. NCLR attorneys have written Preserving and Protecting the Families of Lesbians and Gay Men (NCLR 1986), Recognizing Lesbian and Gay Families: Strategies for Extending Employment Benefit Coverage (NCLR 2nd Ed. 1992), Sexual Orientation and the Law (Clark Boardman 1985, 1987, 1989), and the Lesbian Mother Litigation Manual (NCLR 1982, 1990).

4. In the Trial Court, Fla. Stat., Section 63.042(3), was found to be unconstitutional under both the Florida and United States Constitutions because of its blanket exclusion of homosexuals from adoption.

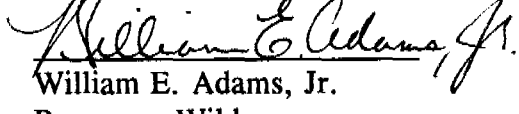
5. On appeal, the District Court of Appeal for the Second District of Florida reversed the trial court and denied the petitioners the right to adopt a child.

6. A decision upholding the District Court of Appeal would have an adverse impact upon members of the three movant organizations and many of their clients, as well as the public in general.

7. Because of Movants' familiarity with issues concerning sexual orientation and its relevance to adoption and child custody, and because they believe that some of these issues were incorrectly analyzed in the District Court's Opinion, their participation in this cause will serve to clarify the issues in question and will assist the Court in reaching a more informed decision.

WHEREFORE, Movants respectfully request that they be permitted to appear as amicus curiae on behalf of the Petitioner James W. Cox and participate in all proceedings in this cause.

Respectfully Submitted,



William E. Adams, Jr.
Rosemary Wilder
Gay and Lesbian Lawyers Association
3305 College Avenue
Ft. Lauderdale, Fl 33134

Certificate of Service

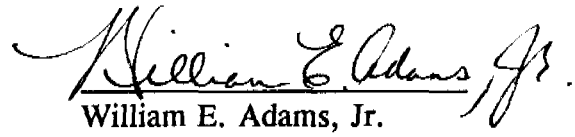
I hereby certify that a copy of this motion was placed in the U.S. mail to the parties listed below at the indicated addresses on the 22nd day of April, 1994.

Doris A. Bunnell
406 13th St. W
Bradenton, FL 34205

Nina Vinik
American Civil Liberties Union
225 N.E. 34th St., Ste. 102
Miami, FL 33137

Linda K. Harris
Deputy General Counsel, HRS
1323 Winewood Blvd.
Bldg. 1, Ste. 407
Tallahassee, FL 32399-0700

Anthony DeLuccia, Jr.
District 8 Legal Counsel, HRS
8695 College Parkway, Ste. 217
Fort Myers, FL 33919



William E. Adams, Jr.
FL. Bar No. 304093