IN THE SUPREME COURT OF THE STATE OF FLORIDA

JAMES W. COX,

Petitioner,

vs. CASE NO. 82,967

DELORES DRY, DISTRICT ADMINISTRATOR, DISTRICT 8, STATE OF FLORIDA, DEPARTMENT OF HEALTH AND REHABILITATIVE SERVICES,

Respondent.
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INITIAL BRIEF OF PETITIONER

On Review from the District Court of Appeal, Second District State of Florida

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STATEMENT OF THE CASE AND FACTS

Petitioner James W. Cox ("Cox") is a male homosexual who wishes to adopt a special needs child. (Complaint and Answer, ¶ 3.) Cox sought to adopt in the Sarasota area, which is part of District 8 of the Florida Department of Health and Rehabilitative Services.[1] (Id.) In March 1991, Cox attempted to register for parenting classes for the purpose of applying to adopt a special needs child. (Id., ¶¶ 5, 6.) At that time, Cox voluntarily disclosed his sexual orientation to HRS. (Id.) HRS then sent a letter informing Cox that his request to apply to adopt a child was being denied based on his statement that he is a homosexual. (Id., ¶ 8.) Cox was denied the opportunity to apply to become an adoptive parent by HRS based on § 63.042(3), Fla. Stat., which provides: "No person eligible to adopt under this statute may adopt if that person is a homosexual." (Id., ¶ 8.)

On June 27, 1991, Cox filed this action[2] for declaratory and injunctive relief challenging the constitutionality of section 63.042(3), both on its face and as applied, under the Florida Constitution's right to privacy, equal protection and due process provisions.

In July 1992, the parties filed cross-motions for

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[1] Respondent Delores Dry is the administrator responsible for all actions of HRS in District 8, including the enforcement of its regulations and laws. Respondent shall be referred to herein as "HRS."

[2] Rodney M. Jackman also sued as a co-plaintiff. He is not a petitioner herein.

summary judgment. After holding a hearing on the motions, the court determined that material issues of fact precluded summary judgment. (Final Judgment at 2.)[3] The parties then entered into a stipulation that the case would be resolved without the necessity of an evidentiary hearing, as follows:

> That each side would submit a brief arguing matters of law and citing appropriate cases. In addition, each side would attach to its brief any scientific data or research it desired and would likewise include this material in its argument. Each party would (and has) stipulated to waive objections of authenticity, relevancy, competency and lack of predicate or foundation as to each article submitted. The Court would then consider and weigh such data and research as if presented in person by the authors and researchers of the articles and papers.

(Id.) The court also requested the parties to brief the issue of whether the statute is unconstitutionally vague. (Id.)

The district court's opinion[4] includes as an appendix copies of all research submitted into the record pursuant to this stipulation. Plaintiffs submitted numerous articles, studies and reports, including the following: (1) Richard Green, Sexual Identity of 37 Children Raised by Homosexual or Transsexual Parents, 135 Am J. Psychiatry 692 (1978); (2) Dorothy I. Riddle, Relating to Children: Gays as Role Models, 34 Journal of Social Issues 38 (1978); and (3) Charlotte J. Patterson, Children of

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[3] The trial court's Final Judgment is included in the Appendix filed herewith.

[4] The district court's opinion, Cox v. HRS, 627 So. 2d 1210 (Fla. 2d DCA 1993), is also included in the Appendix to this brief.

Lesbian and Gay Parents, 63 Child Development 1025 (1992).[5] HRS submitted two articles: (1) Michael Ruse, Are There Gay Genes? Sociobiology and Homosexuality, 6 Journal of Homosexuality 5 (1981); and (2) Mary B. Harris and Pauline H. Turner, Gay and Lesbian Parents, 12 Journal of Homosexuality 101 (1985/86).

On March 5, 1993, in its ruling on the parties' cross motions for summary judgment, the trial court issued its Final Judgment striking down section 63.042(3) on its face and enjoining HRS from enforcing the provision. The court found that the challenged statute violated plaintiffs' rights to privacy, equal protection and due process, all as guaranteed by the Florida Constitution.

On March 31, 1993, HRS filed an appeal to the Second District Court of Appeal to review the trial court's decision. HRS also filed a Suggestion for Certification to the Supreme Court, with which plaintiffs concurred. The district court denied the suggestion for certification, and on its own motion determined to hear the appeal en banc.

The district court heard oral argument on September 9, 1993, and on December 1, 1993, reversed the order of the trial court and expressly upheld the constitutionality of section 63.042(3), Fla. Stat. Cox v. HRS, 627 So. 2d 1210 (Fla. 2d DCA 1993). The district court disapproved of the parties' stipulation to the admission of various factual matters in the

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[5] Petitioner has included each of these articles, as well as the two articles submitted by HRS, as part of the Appendix to this brief.

trial court, and found that "the trial court did not have a record to support summary judgment in favor of the plaintiffs on any issue." Id. at 1213. Despite its view of the limited nature of the record, the district court went on to consider the merits of the appeal, and rejected petitioner's claims under the Florida Constitution's right to privacy, equal protection and due process provisions. In this case of first impression, the district court construed each of these provisions adverse to the petitioner.

The petitioner's notice to invoke the discretionary jurisdiction of this Court was timely filed on December 29, 1993. On March 31, 1994, this Court accepted this case for discretionary review.

SUMMARY OF ARGUMENT

Section 63.042(3), Fla. Stat., prohibits all adoptions by homosexuals without any factual basis for doing so, and is in contravention of the State's interest in protecting the best interests of Florida's children. Because it violates Florida's rights to privacy, equal protection and due process, the statute should be stricken as unconstitutional, thereby permitting gay men and lesbians to apply to become adoptive parents and be considered on an individualized basis in the circuit court's determination of whether the best interests of the child would be served.

Petitioner has asserted claims arising solely under the Florida Constitution. This Court on numerous occasions has expressed the breadth of our state constitution in its protection

of individual liberties. This case goes to the heart of the constitutional guarantees of the right to privacy, equal protection and due process of law. The district court erred in construing each of these provisions.

First, the challenged statute violates Florida's right to privacy. Art. I, § 23 of the Florida Constitution protects all persons' autonomy interests, including their ability to make intimate decisions free from governmental intrusions. By denying petitioner the opportunity to apply to become an adoptive parent, the statute burdens his intimate decisionmaking. Petitioner is effectively forced to choose between the right to make private decisions free from governmental interference, and his desire to adopt a child.

Because the statute burdens the fundamental right to privacy, it is subject to strict scrutiny. Florida has a compelling interest in protecting the best interests of children; however, rather than serving that interest, the categorical exclusion of all homosexuals from the pool of prospective adoptive parents undermines it. The overwhelming weight of the evidence submitted in this case demonstrates that children raised by homosexual parents suffer no negative effects as a result of the sexual orientation of their parents. The individualized "best interests of the child" standard mandated by statute is a far more sensible, and far less restrictive, means of evaluating prospective adoptive parents. Using this approach, a court considering an adoption petition must examine all relevant

factors in determining what is in the child's best interest. The interests of children who need homes and of lesbians and gay men willing to provide them are best served by maximizing the limited opportunities for adopted children to enjoy a permanent and fulfilling family life.

Second, the challenged statute violates petitioner's right to equal protection of the law as guaranteed by Art. I, § 2 of the Florida Constitution. Not only does the statute fail strict scrutiny review based on violation of the fundamental right to privacy, it fails even minimal rational basis review. Because the evidence shows that children raised by lesbian or gay parents develop similarly to children raised by heterosexual parents, and suffer no negative effects as a result of their parents' sexual orientation, a categorical ban on all adoptions by homosexuals is not even rationally related to the state's interest in protecting the best interests of children. Furthermore, because the statute is based on prejudice toward gay men and lesbians, it cannot satisfy rational basis review.

Third, the statute violates petitioner's right to due process because it creates an irrebuttable presumption that homosexuals are unfit parents. By denying any opportunity to rebut that presumption, the statute violates Art. I, § 9 of the Florida Constitution. The statute is also unconstitutionally vague in violation of due process because it fails to define the term "homosexual," leaving prospective adoptive parents uncertain as to the reach of the statute, and allowing for arbitrary and

discriminatory enforcement by the circuit courts.

Finally, the district court erred in reversing the trial court and entering summary judgment for HRS. The court disapproved of the parties' stipulation in the trial court to the admission into the record of various research, studies and articles, and found insufficient evidence and disputed factual issues which failed to support a grant of summary judgment. The district court then improperly went on to reverse the trial court and enter judgment for HRS. If in fact the record was insufficient to resolve various factual disputes (petitioner does not agree that it was), the court should have remanded the case for trial on those disputed issues. Likewise, it was error for the court to substitute its view of the evidence in the record for the reasoned judgment of the trial court.

ARGUMENT

RELEVANT STATUTORY PROVISIONS

In Florida, the right of adoption is created by statute and was unknown at common law. The Florida Adoption Act appears at Chapter 63, Florida Statutes. Section 63.032(10), Fla. Stat., defines adoption as:

> . . . the act of creating the legal relationship between parent and child where it did not exist, thereby declaring the child to be legally the child of the adoptive parents and their heir at law and entitled to all the rights and privileges and subject to all the obligations of a child born to such adoptive parents in lawful wedlock.

Section 63.022(1), Fla. Stat., sets forth the following as the legislative intent of Florida's Adoption Act:

> . . . 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. . . .

Adoptions must be carried out in compliance with the statute. Section 63.022(2)(1), Fla. Stat., declares that the test to be used in any adoption proceeding is the "best interests of the person to be adopted." The statute includes numerous safeguards designed to ensure that a prospective adoption placement is, in fact, in the best interests of the child. For example, section 63.092, Fla. Stat., mandates that a preliminary study be conducted to determine suitability of the intended placement. Further, upon the filing of a Petition to Adopt with the circuit court, a complete investigation must be made to ascertain whether the adoption home is a suitable home for the child and whether the adoption is in the best interests of the child. § 63.122, Fla. Stat. Finally, before ruling on a petition for adoption, the court may order additional "observation, investigation or consideration" of any relevant facts, and may not enter a judgment of adoption without a finding that it is in the best interests of the child. § 63.142, Fla. Stat.

The Florida Adoption Act specifically identifies married adults, unmarried adults, unmarried minors and grandparents as eligible to adopt. §§ 63.042(2) and 63.045, Fla. Stat. Persons with disabilities are eligible to adopt, in the absence of an individualized determination "that such disability or handicap renders such person incapable of serving as an

effective parent." § 63.042(4), Fla. Stat. Even prospective parents whose names appear on the Abuse Registry, or who have felony convictions, are not absolutely prohibited from adopting in Florida. Fla. Admin. Code R. 10M-8.0053.

Notwithstanding the statute's requirement of an individualized determination of the suitability of a prospective adoptive placement and the best interests of the child, and Florida's goal of providing "to all children who can benefit by it a permanent family life," in 1977 the legislature removed an entire category of loving, caring persons from the pool of prospective adoptive parents. The statute forbids adoption by homosexuals even if they are fully eligible in all other respects. Indeed, Florida is one of only two states[6] imposing a categorical ban on all adoptions by homosexuals. The only group of persons categorically excluded from consideration are homosexuals. § 63.042(3), Fla. Stat. As a result, HRS is forbidden from investigating whether Cox's home would be suitable for a child and whether adoption by Cox would be in the best interests of the child.

I. THE DISTRICT COURT FAILED TO RECOGNIZE THE INDEPENDENT STATE CONSTITUTIONAL BASIS FOR PETITIONER'S RIGHTS TO PRIVACY, EQUAL PROTECTION, AND DUE PROCESS.

Under our federalist system, citizens' individual rights are protected by the federal Constitution, which assures a common level of protection for all persons. At the same time, we

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[6] New Hampshire also categorically prohibits adoption by homosexuals. N.H. Rev. Stat. Ann. 170-B:4 (Supp. 1989).

are also independently protected by our state constitution, which "express[es] the ultimate breadth of [our] common yearnings for freedom." Traylor v. State, 596 So. 2d 957, 962 (Fla. 1992). While states may not place greater restrictions on fundamental rights than allowed by the federal Constitution, they may adopt broader protections of those rights than the corresponding federal provisions supply. Id. at 961; Pruneyard Shopping Ctr. v. Robins, 447 U.S. 74, 100 S. Ct. 2035, 64 L.Ed.2d 741 (1980). "In any given state, the federal Constitution thus represents the floor for basic freedoms; the state constitution, the ceiling." Traylor, 596 So. 2d at 962.

In accordance with these federalist principles, the Florida Constitution protects citizens' individual rights independent of the United States Constitution. Id. Recognizing this critical role of our state constitution, this Court explicitly adopted a primacy approach to adjudicating state constitutional issues, and issued this directive to Florida's state courts:

> When called upon to decide matters of fundamental rights, Florida's state courts are bound under federalist principles to give primacy to our state constitution and to give independent legal import to every phrase and clause contained therein.

Id.

Article I of the Florida Constitution, entitled "Declaration of Rights", contains "a broad spectrum of enumerated and implied liberties that conjoin to form a single overarching freedom: They protect each individual within our borders from

the unjust encroachment of state authority -- from whatever official source -- into his or her life." Id. at 963. This Court must not diminish the importance of any of these protections.

> Every particular section of the Declaration of Rights stands on an equal footing with every other section. They recognize no distinction between citizens. Under them every citizen, the good and the bad, the just and the unjust, the rich and the poor, the saint and the sinner, the believer and the infidel, have equal rights before the law.

Boynton v. State, 64 So. 2d 536, 552-53 (Fla. 1953).

Petitioner has asserted claims only under the Florida Constitution. In evaluating these claims, this Court must "give independent import" to every constitutional provision, and it must "construe each provision freely in order to achieve the primary goal of individual freedom and autonomy." Traylor, 596 So. 2d at 962-63. The district court failed to apply these fundamental principles of Florida constitutional law, as evidenced by the court's repeated acceptance of federal precedent interpreting federal constitutional provisions, without any independent inquiry into the nature and scope of Florida's constitutional guarantees.[7]

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[7] References herein to federal precedent are made only for guidance in understanding the floor of protection afforded by the federal constitution, not for purposes of supporting a claim under the United States Constitution or suggesting that federal decisions limit the breadth of any state constitutional protection.

II. THE DISTRICT COURT ERRED IN REJECTING PETITIONER'S CLAIM FOR VIOLATION OF HIS RIGHT TO PRIVACY.

A. Article I, Section 23 of the Florida Constitution Protects The Right To Intimate Decisionmaking.

In 1980, Florida amended its Constitution to add to the Declaration of Rights the right to privacy, guaranteeing every natural person the right to be let alone and to be free from government intrusion into his or her private life. Art. I, § 23, Fla. Const. See, e.g., Public Health Trust v. Wons, 541 So. 2d 96 (Fla. 1989); Rasmussen v. South Florida Blood Service, 500 So. 2d 533 (Fla. 1987); Winfield v. Div. of Pari-Mutuel Wagering, 477 So. 2d 544 (Fla. 1985). This provision -- which was added three years after the legislature enacted the prohibition on adoptions by homosexuals -- guarantees individuals the right to be free from governmental interference with their intimate decisionmaking. Id. at 546.

The breadth of this protection cannot be overstated:

> The citizens of Florida opted for more protection from governmental intrusion when they approved Article I, Section 23, of the Florida Constitution. This amendment is an independent, freestanding constitutional provision which declares the fundamental right to privacy. Article I, Section 23, was intentionally phrased in strong terms. The drafters of the amendment rejected the use of the words "unreasonable" or "unwarranted" before the phrase "governmental intrusion" in order to make the privacy right as strong as possible. Since the people of this state exercised their prerogative and enacted an amendment to the Florida Constitution which expressly and succinctly provides for a strong right of privacy not found in the United States Constitution, it can only be concluded that the right is much broader in scope than that of the Federal Constitution.

Winfield, 477 So. 2d at 548. "In other words, the amendment embraces more privacy interests, and extends more protection to the individual in those interests, than does the federal Constitution." In re T.W., 551 So. 2d 1186, 1192 (Fla. 1989). It protects individual expectations of privacy so long as they are not "spurious or false". Mozo v. State, 19 Fla. L. Weekly D141, D145 (Fla. 4th DCA January 19, 1994) (quoting Shaktman v. State, 553 So. 2d 148, 153 (Fla. 1989) (Ehrlich, C.J. specially concurring). "[A]ny margin of error with regard to the interpretation of the right of privacy in Florida should be in favor of the individual." Id.

The right to privacy is founded on the guarantee that an individual has a fundamental right to lead a private life according to his or her own beliefs, free from government intrusions. Wons, 541 So. 2d 96. The right to privacy consistently has been interpreted by the Florida Supreme Court to include two distinct privacy interests: (1) the protection against public disclosure of personal matters;[8] and (2) the "decision-making or autonomy zone of privacy interests of the individual." Winfield, 477 So. 2d at 546. See also In re T.W., 551 So. 2d 1186; Rasmussen, 500 So. 2d 533.

The protection of an individual's autonomy or

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[8] At issue here is not Cox's disclosure of his sexual orientation. Cox voluntarily disclosed his sexual orientation before commencing the formal application process. Indeed, had he been permitted to enter the process like any other prospective adoptive parent, he would have been required to disclose a broad array of personal information, such as income, age, marital history, health history, etc. See Fla. Admin. Code R. 10M-8.005.

decisional privacy "encompasses an enormously broad and diverse field of personal action and belief," Rasmussen, 500 So. 2d at 536, including personal matters concerning: (1) child rearing; (2) family relationships; (3) marriage; (4) procreation; and (5) medical decisions. In re T.W., 551 So. 2d at 1191-92; Wons, 541 So. 2d at 97; Winfield, 477 So. 2d at 546. See also In re Florida Board of Bar Examiners, 358 So. 2d 7, 10 (Fla. 1978) ("Governmental regulation in the area of private morality is generally considered anachronistic . . ."") (quoting The Florida Bar v. Kay, 232 So. 2d 378, 379-81 (Fla. 1970)).

Here, the challenged statute implicates Florida's constitutional right to privacy because, in barring applicants based on their sexual orientation, it inevitably interferes with their intimate decisionmaking. By outlawing all adoptions by homosexuals, the state penalizes applicants who exercise their constitutionally protected right to pursue private interpersonal relationships. Just as intimate decisions made by persons with a heterosexual orientation -- such as decisions involving marriage and procreation -- clearly fall within the zone of autonomy interests protected by the Florida Constitution, so do those made by persons with a homosexual orientation. See In re T.W., 551 So. 2d at 1191-92; see also Commonwealth v. Wasson, 842 S.W.2d 487 (Ky. 1992) (invalidating statute criminalizing homosexual conduct under Kentucky constitution's right to privacy).

Although this Court has never directly addressed the issue of whether governmental interference with intimate

decisionmaking by homosexuals is covered by the Florida constitutional right to privacy, the Court has recognized -- even prior to the passage of the privacy amendment -- that governmental regulation of private morality is unlawful in the absence of a clear and convincing showing that there is a substantial connection between the private acts regulated and the public interest and welfare. In re Florida Board of Bar Examiners, 358 So. 2d at 9 (holding that a bar candidate's homosexual orientation could not provide the basis for denial of admission).

Florida's trial courts have also recognized that the right to privacy protects intimate decisionmaking, including matters relating to sexual orientation. For example, in Seebol v. Farie, 16 Fla. L. Weekly C52 (16th Cir. Ct. 1991),[9] the Circuit Court in Monroe County struck down the very statute at issue in the instant case, concluding that sexual orientation is protected by the right to privacy. Similarly, in Woodward v. Gallagher, 1 Fla. L. Weekly Supp. 17 (9th Cir. Ct. 1992), the court found that a deputy sheriff's right to privacy was violated when he was fired because of his sexual orientation. In Matthews v. Weinberg, No. 92-7131 (13th Cir. Ct. May 25, 1993), appeal pending, the court relied on Florida's right to privacy in rejecting the plaintiffs' sexual orientation as a basis for denying foster parent licensure.

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[9] The Seebol decision is appended to the district court's opinion in this case, which is included in the Appendix filed herewith.

B. The Challenged Statute Creates An Unconstitutional Burden On The Right To Intimate Decisionmaking.

The district court rejected Cox's claim under Article I, section 23 of the Florida Constitution, reasoning that the statute "does not limit anyone's private sexual life; it limits one's ability to adopt a child in Florida if the state knows that person is a homosexual. Many private decisions indirectly limit one's ability to obtain statutory privileges. Such indirect limitations do not render statutory privileges unconstitutional under the right to privacy." 627 So. 2d at 1216. This extremely narrow interpretation of the state constitution's guarantee of the right to privacy is not supported by prior decisions of this Court defining the scope of this protection. The challenged statute violates Florida's constitutional right to privacy because it substantially burdens Cox's autonomy interests -- namely, his private personal relationships and intimate decisionmaking. In re T.W., 551 So. 2d at 1193.

The challenged statute burdens Cox's intimate decisionmaking by denying him the privilege to apply to become an adoptive parent -- a privilege enjoyed by all other Florida citizens -- purely because Cox's intimate relationship is with another man. The statute effectively forces Cox to choose between his right to make private decisions free from governmental interference, and his desire to adopt a child. Such a burden on a fundamental right is unconstitutional even if it does not directly prohibit the exercise of that right.

Florida courts have recognized that a statute or

regulation need not act as an absolute prohibition on intimate decisionmaking in order to implicate the right to privacy. In Kurtz v. City of North Miami, 625 So. 2d 899 (Fla. 3d DCA 1993), review pending, the court considered a local regulation that required all job applicants to sign an affidavit stating that they had not used tobacco for at least one year preceding their application. In declaring the regulation unconstitutional under Florida's right to privacy, Art. I, § 23, Fla. Const., the court held that "an applicant . . . has a legitimate expectation of privacy when the government through its requirements for employment seeks to intrude into the applicant's personal life." 625 So. 2d at 902. In Kurtz, the challenged regulation did not operate as an outright prohibition on smoking -- Kurtz could have abandoned her job application and continued smoking as she saw fit. Nor did Kurtz have a right to a government job. However, neither of these factors in any way diminished her claim for violation of her constitutional right to privacy. See also Seebol v. Farie; Woodward v. Gallagher; Matthews v. Weinberg.

Federal cases also have long held that the government may not condition access to a privilege on relinquishment of a constitutional right. In Shapiro v. Thompson, 394 U.S. 618, 89 S. Ct. 1322, 22 L.Ed.2d 600 (1969), the Court considered the constitutionality of a one year in-state residency requirement for all welfare applicants. Although the residency requirement did not directly prohibit anyone from moving into the state, the Court nonetheless concluded that the requirement created an

unconstitutional burden on the fundamental right to travel. Id., 394 U.S. at 634. The Court went on to strike down the residency requirement because the state had failed to demonstrate that it was the least restrictive means to achieve a compelling state interest. Id.

The Supreme Court has also struck down government restraints that impose an unconstitutional burden on, but do not directly prohibit, exercise of the fundamental right to vote, to free expression, and to access to the courts. See, e.g., Perry v. Sindermann, 408 U.S. 593, 92 S. Ct. 2694, 33 L.Ed.2d 570 (1972) (freedom of expression); NAACP v. Button, 371 U.S. 415, 83 S. Ct. 328, 9 L.Ed.2d 405 (1963) (freedom of expression and association); Reynolds v. Sims, 377 U.S. 533, 84 S. Ct. 1362, 12 L.Ed.2d 506 (1964) (the right to vote); Griffin v. Illinois, 351 U.S. 12, 76 S. Ct. 585, 100 L.Ed. 891 (1956) (the right to access to the courts).

The federal courts also have applied this principle to restrictions that implicate the right to privacy. See, e.g., Manwani v. U.S. Dept. of Justice, 736 F. Supp. 1367 (W.D.N.C. 1990); Mindel v. United States Civil Service Commission, 312 F. Supp. 485 (N.D. Cal. 1970). These cases uniformly hold that a statute that imposes a penalty because of the exercise of a constitutionally protected right creates an unconstitutional burden that is subject to strict judicial scrutiny.

In Manwani v. U.S. Dept. of Justice, 736 F. Supp. 1367 (W.D.N.C. 1990), the court declared unconstitutional a section of

the Immigration Act imposing a mandatory two-year foreign residency requirement on all aliens who marry U.S. citizens during the pendency of deportation proceedings. While the law did not serve as an outright prohibition on marriage by those in deportation proceedings, it did act as a penalty on those exercising their constitutionally protected right to privacy.

> A governmental burden on the right to marry need not amount to an absolute prohibition in order to constitute an impermissible interference with marital association. . . . The [Act] imposes a penalty because a couple exercised its constitutional right to marry. The exile provision is triggered by the act of marriage, and therefore imposes a constitutionally suspect burden.

736 F. Supp. at 1379 (citations and footnote omitted). In Mindel v. United States Civil Service Commission, 312 F. Supp. 485 (N.D. Cal. 1970), the court held that a postal clerk's termination because he was living with a woman violated his right to privacy. "The government cannot condition employment on the waiver of a constitutional right . . . Here, of course, the Post Office has not even shown a rational reason, much less the 'compelling reason' required by Griswold to require Mindel to live according to its special moral code." 312 F. Supp. at 488. Similarly, in Drake v. Covington County Board of Education, 371 F. Supp. 974 (M.D. Ala. 1974), the court found that the school board violated a teacher's right to privacy when it terminated her after she became pregnant while unmarried.

C. The Challenged Statute Serves No Compelling State Interest.

Because the challenged statute burdens the fundamental

right to privacy, the statute is subject to strict scrutiny. The compelling interest standard applies, and requires the State to prove that the statute serves a compelling state interest and accomplishes its goal by the least intrusive means. Winfield, 477 So. 2d at 547. Since it was announced by the Florida Supreme Court in Winfield, this standard has been repeatedly reaffirmed in Rasmussen, 500 So. 2d at 535; Wons, 541 So. 2d at 98; and In re T.W., 551 So. 2d at 1192. It "is a highly stringent standard, emphasized by the fact that no government intrusion in the personal decisionmaking cases . . . has survived." Id.[10]

Florida does not have a compelling interest in barring all adoptions by homosexuals. In fact, the categorical exclusion of all homosexuals from the pool of prospective parents undermines the state's interest in protecting the best interests of children. It is therefore far from the least intrusive means of advancing the state's interest. In re T.W., 551 So. 2d at 1192.

1. A categorical ban on all adoptions by homosexuals abrogates the best interests of children.

By statute, the test to be used in any adoption or child custody proceeding is the "best interests of the person to be adopted." § 63.022(2)(l), Fla. Stat. In adoption proceedings, Florida courts consistently have recognized that their paramount concern is to serve the best interests of the

[10] Unlike Florida, New Hampshire does not have a state constitutional right to privacy. Accordingly, Opinion of the Justices, 129 N.H. 290 (1987) (upholding New Hampshire's ban on adoption by homosexuals), is not persuasive authority here.

child. In re Adoption of Doe, 543 So. 2d 741 (Fla.), cert. denied, 493 U.S. 964 (1989); Wallace v. Smith, 458 So. 2d 1127 (Fla. 1984); Sulman v. Sulman, 510 So. 2d 908, 909 (Fla. 4th DCA 1987); Bernstein v. Bernstein, 498 So. 2d 1270, 1272 (Fla. 4th DCA 1986); Seebol v. Farie. HRS likewise asserts that the interest served by the challenged statute is to "protect and promote the well-being of . . . children" and to provide "permanent family life to children." (HRS Initial Br. Part I at 6.) Cox agrees that protecting the best interests of children and providing to all children a permanent family life are among the most compelling of state interests. However, rather than serving these interests, the state's absolute ban on all adoptions by homosexuals undermines these interests. Categorical bans on groups of prospective adoptive parents cannot serve the best interests of children hoping to be adopted. See Hart v. Hart, 458 So. 2d 815, 816 (Fla. 4th DCA 1984) ("the best interests of a child are not served by denying the opportunity to present evidence which might have a bearing thereon").

In this context of protecting the best interests of children, decisions regarding fitness to adopt rarely have been challenged in Florida. In two such cases, prospective parents' advanced age and modest income have been rejected as grounds to deny adoption. In re Duke, 95 So. 2d 909 (Fla. 1957); In re Adoption of Christian, 184 So. 2d 657 (Fla. 4th DCA 1966). Likewise, with the best interests of the child in mind, a prospective parent's homosexual orientation has been rejected by

the lower courts as grounds to deny adoption, custody and licensure as a foster parent. Seebol v. Farie, 16 Fla. L. Weekly C52; In re Pearlman, No. 87-24926 D.A. (17th Cir. Ct. 1989); Matthews v. Weinberg, No. 92-7131 (13th Cir. Ct., May 25, 1993), appeal pending.

The social science research demonstrates that there is no basis for a categorical ban on adoptions by homosexuals. As the trial court found, the weight of evidence submitted in this case compels the conclusion that children raised by homosexual parents exhibit normal behavior patterns and suffer no negative effects as a result of the sexual orientation of their parents. See, e.g., Richard Green, Sexual Identity of 37 Children Raised by Homosexual or Transsexual Parents, 135 Am. J. Psychiatry 692, 696 (1978); Dorothy I. Riddle, Relating to Children: Gays as Role Models, 34 Journal of Social Science 38 (1978). The most recent findings confirm that children of homosexual parents are no more likely than children of heterosexual parents to become homosexuals, to develop sexual identity or gender identity problems, to be sexually abused, or to suffer any disadvantages relative to their peers from more traditional families in any cognitive, social, emotional or moral aspects of development. Charlotte J. Patterson, Children of Lesbian and Gay Parents, 63 Child Development 1025, 1032-1036 (1992). See also Seebol v. Farie, 16 Fla. L. Weekly at C53.

Studies by mental health experts have long recognized that the incidence of same-sex orientation among children who

have homosexual parents is as random and in the same proportion as is found among children in the general population. See Steve Susoeff, Assessing Children's Best Interests When a Parent is Gay or Lesbian: Toward a Rational Custody Standard, 32 UCLA L. Rev. 852, 882 (1985). The psychiatric findings that children adopt sexual orientations independently of their parents, Susoeff, supra, and that homosexual men and women do not learn sexual preference by observing the sexual orientation of their parents, are also well established. See Note, The Avowed Lesbian Mother and Her Right to Child Custody: A Constitutional Challenge That Can No Longer Be Denied, 12 San Diego L. Rev. 799, 861 (1975); see also Bezio v. Patenaude, 410 N.E.2d 1207, 1216 (Mass. 1980) (relying on psychologist testimony that sexual orientation of parent is irrelevant to the child's mental health).

In response to the overwhelming body of scientific research demonstrating that there is no evidence that a parent's homosexual orientation has any detrimental effect on children, HRS offers only two articles to support its position. Michael Ruse's article merely explores various genetic theories of the cause of homosexuality. Michael Ruse, Are There Gay Genes? Sociobiology and Homosexuality, 6 Journal of Homosexuality 5 (1981). The Harris and Turner study surveyed 39 homosexual and heterosexual parents to determine whether parents' homosexuality poses any special problems or benefits for their children. The authors conclude that "being gay is not incompatible with effective parenting." Mary B. Harris and Pauline H. Turner, Gay

and Lesbian Parents, 12 Journal of Homosexuality 101 (1985/86).

The district court disregarded the weight of the evidence in the record, and instead singled out and criticized Professor Charlotte Patterson's study on the ground that it "focuses not on adopted children, but the natural children of homosexuals." 627 So. 2d at 1213.[11] Patterson acknowledges that the research to date has been limited to those cases in which a child's biological parents separated (through death or divorce) and one later declared him or herself to be a homosexual, and to cases of children born to lesbians involved in ongoing relationships. Neither the district court nor HRS has shown why it is unreasonable to draw conclusions about the parenting ability of gay men and lesbians seeking to become adoptive parents from the wealth of research on the parenting ability of biological parents. The issues explored by this research -- including whether gay men and lesbians raise psychologically healthy children, and whether they serve as effective role models -- are equally applicable to adoptive families.

Professor Patterson's central finding, which is consistent with all other studies conducted in this area, remains the most relevant, compelling evidence on the effect of a parent's homosexual orientation on a child's best interests:

> There is no evidence to suggest that psychological development among children of gay men or lesbians is compromised in any

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[11] The district court also questions Patterson's credentials -- an objection which is foreclosed by the parties' stipulation. See p. 2, supra.

> respect relative to that among offspring of heterosexual parents. Despite long-standing legal presumptions against gay and lesbian parents in many states, despite dire predictions about children based on well-known theories of psychological development, and despite the accumulation of a substantial body of research investigating these issues, not a single study has found children of gay or lesbian parents to be disadvantaged in any significant respect relative to children of heterosexual parents. Indeed, the evidence to date suggests that home environments provided by gay and lesbian parents are as likely as those provided by heterosexual parents to support and enable children's psychological growth.

Patterson, supra, at 1036 (emphasis supplied).

The record is completely devoid of any evidence which suggests that lesbians or gay men cannot be good, caring parents. In fact, the research concludes just the opposite. In the face of this gross imbalance, the alleged lack of research findings specifically relating to adopted children of homosexual parents creates at most a speculative harm. Such an "inconclusive" or speculative risk cannot satisfy the state's burden under the compelling interest test. Tinker v. Des Moines Independent Community School District, 393 U.S. 503, 508-09, 89 S. Ct. 733, 21 L.Ed.2d 731 (1969). The record indicates that there is simply no reason to presume that a parent's sexual orientation will ever effect his or her parenting capabilities, much less that it will always effect those abilities.

Assuming the record contained any evidence to suggest that a parent's sexual orientation, standing alone, has any detrimental effect on his or her children, the challenged statute

is not the least restrictive means to protect the best interests of children, or to provide children with permanent family lives.

2. The statutorily required individualized "best interests of the child" determination serves the state's interest in a less restrictive way.

The Florida adoption statute requires that HRS (and ultimately the circuit court) make individualized determinations as to the best interests of the adoptive child. When making this determination, aspects of a prospective adoptive parent's life that may affect the child should (and must) be considered. This approach, also known as the "nexus" approach, demands that a prospective parent's sexual orientation be treated just like any other factor which may be considered in evaluating a potential adoptive home.[12]

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[12] This approach is consistent with the prevailing view in other jurisdictions that sexual orientation should not in and of itself dictate family law decisions. Numerous courts recently have determined that a parent's homosexual orientation should not be an absolute bar to either custody or visitation. S.N.E. v. R.L.B., 699 P.2d 875 (Alaska 1985) (consideration of mother's sexual orientation appropriate only when shown to have adverse impact on child's health); Hodson v. Moore, 464 N.W.2d 699 (Iowa App. 1990) (mother's lesbian relationship not a bar to custody when no direct harm to child results); Bezio v. Patenaude, 410 N.E.2d 1207 (Mass. 1980) (mother's sexual orientation irrelevant to determination of quality of parenting skills); M.A.B. v. R.B., 510 N.Y.S.2d 960 (N.Y. App. Div. 1986) (consideration of a parent's sexual orientation is appropriate only when the evidence supports a finding that the parent's conduct has, or reasonably will have, an adverse impact on the child and his interest); Matter of Marriage of Cabalquinto, 669 P.2d 886 (Wash. 1983). Each of these courts applied a "nexus test" to consider a parent's homosexual or heterosexual orientation only if it is shown adversely to affect the child. See In re Adoption of Charles B., 552 N.E.2d 884 (Ohio 1990); Note, Custody Determinations Involving the Homosexual Parent, XXII Family Law Quarterly 76 (1988) (no evidence presented that adoption by a homosexual parent would not be in the best interest of the child).

The nexus approach was also embraced by the Seebol court. Seebol v. Farie, 16 Fla. L. Weekly C52. But Seebol was not the first Florida decision to apply the nexus approach in a case involving lesbian or gay parents. In In re Pearlman, No. 87-24926 D.A. (17th Cir. Ct. 1989), the court recognized the prevailing view in other jurisdictions that homosexuality should not in and of itself render a parent or custodian unfit for custody of, or visitation with, a minor child, and applied the approach to award custody of a child to her deceased mother's lesbian partner. Even more recently, the Thirteenth Judicial Circuit found that a parent's homosexual orientation could not justify a refusal to deny foster care licensure absent evidence that "the homosexual status of the Plaintiff Matthews did or could directly and adversely affect the welfare and best interest of the minor child. . ." Matthews v. Weinberg, No. 92-7131 (13th Cir. Ct. May 25, 1993), appeal pending. Indeed, the adoption statute embodies the nexus approach by mandating individualized determinations of whether a prospective adoptive placement will be in the best interests of a particular child. See also A.C. v. C.B., 829 P.2d 660, 664 (N.M. 1992) (sexual orientation of biological mother's female partner, standing alone, "is not a permissible basis for denial of shared custody or visitation").

Florida's categorical ban on all adoptions by homosexuals does not serve the best interests of children seeking adoption. Using the nexus approach, a court considering an adoption petition must examine all relevant factors in

determining what is in the child's best interest. The least restrictive means of providing children with a permanent family life and protecting their best interests must include an individualized determination of parent suitability. The interests of children who need homes and of lesbians and gay men willing to provide them are best served by maximizing the limited opportunities for adopted children to enjoy a permanent and fulfilling family life.

The challenged statute interferes with Cox's right to intimate decisionmaking by creating an unconstitutional burden on his exercise of that right. As such, the statute is subject to strict scrutiny review. Because the statute fails to serve the state's interest in protecting the best interests of children -- and indeed contravenes that interest by denying an individualized determination of what is in a child's best interests when the prospective adoptive parent is a homosexual -- the statute is unconstitutional as violative of Florida's constitutional right to privacy. For these reasons, the statute must be stricken.

III. THE DISTRICT COURT ERRED IN REJECTING PETITIONER'S EQUAL PROTECTION CLAIM.

The equal protection clause of the Florida Constitution guarantees that "all natural persons are equal before the law . . . " Art. I, § 2, Fla. Const. Government regulations that target a suspect class or violate a fundamental right are subject to strict scrutiny and will be sustained only if narrowly tailored to serve a compelling state interest. City of Cleburne v. Cleburne Living Center, 473 U.S. 432, 439, 105 S. Ct. 3249, 87

L.Ed.2d 313 (1985); De Ayala v. Florida Farm Bureau Cas. Ins., 543 So. 2d 204, 206 (Fla. 1989); Palm Harbor Sp. Fire Control Dist. v. Kelly, 516 So. 2d 249 (Fla. 1987). Other classifications will be sustained where rationally related to a legitimate state purpose. Id.

Other state supreme courts have sustained equal protection challenges to statutes that discriminate on the basis of sexual orientation. For example, in Commonwealth v. Wasson, 842 S.W.2d 487 (Ky. 1992), the Supreme Court of Kentucky struck down a statute criminalizing "deviate sexual intercourse with a member of the same sex" as violative of state equal protection and privacy provisions. See also People v. Onofre, 415 N.E.2d 936 (N.Y. 1980) (holding similar statute unconstitutional); Commonwealth v. Bonadio, 415 A.2d 47 (Pa. 1980) (same). In another recent case, the Hawaii Supreme Court suggested that a statute prohibiting marriages between same-sex partners would be violative of Hawaii's equal protection clause. Baehr v. Lewin, 852 P.2d 44 (Haw. 1993). This Court has yet to address an equal protection challenge to a statute which denies a state-conferred right or privilege on the basis of sexual orientation.

A. Because It Infringes On The Fundamental Right To Privacy, The Challenged Statute Is Subject To Strict Scrutiny.

Under the Florida Constitution's equal protection provision, the appropriate standard of review in this case is strict scrutiny, because Florida's refusal to permit adoptions by homosexuals infringes on the fundamental right to privacy. See,

supra, pp. 12-19. This Court consistently has emphasized Florida's ". . . deeply imbedded belief, rooted in our constitutional traditions, that an individual has a fundamental right to be left alone so that he is free to lead his private life according to his own beliefs free from unreasonable governmental interference." Public Health Trust of Dade County v. Wons, 541 So. 2d 96 (Fla. 1989); In re T.W., 551 So. 2d 1186.[13] Accordingly, the strict scrutiny standard is applicable to this equal protection analysis. De Ayala, 543 So. 2d 203; Kelly, 516 So. 2d 249. As demonstrated above, the challenged statute fails strict scrutiny analysis and therefore should be stricken. (See pp. 19-28, supra.)[14]

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[13] Indeed, in its Initial Brief filed in the district court, HRS conceded that the right to privacy is a fundamental right. (HRS Initial Brief Part I at 10.)

[14] Petitioner also believes that strict scrutiny is appropriate because lesbians and gay men constitute a suspect classification for purposes of equal protection analysis. Each of the factors to be considered in determining whether heightened or strict scrutiny is appropriate -- whether the group has suffered historical discrimination, whether the class is defined by a trait that bears no relation to ability to perform or contribute to society, whether the class is saddled with unique disabilities because of prejudice -- is present here. See Watkins v. United States Army, 875 F.2d 699, 724-28 (9th Cir. 1989) (Norris, J., concurring), cert. denied, 498 U.S. 957, 111 S. Ct. 384, 112 L.Ed.2d 395 (1990). See also Rowland v. Mad River Local School District, 470 U.S. 1009, 1014, 105 S. Ct. 1373, 84 L.Ed.2d 392 (1985) (Brennan, J., dissenting from denial of certiorari). However, because the challenged statute fails even rational basis review (see pp. 31 - 36, infra), this Court need not reach the suspect class issue to strike down the challenged statute. For these reasons, petitioner relies on his briefs filed in the district court on this claim.

B. The Challenged Statute Is Not Even Rationally Related To A Legitimate State Purpose.

Even if this Court applies a lower level of scrutiny, the statute at issue fails because it is not even rationally related to a legitimate state purpose. All statutory classifications must at least be rationally related to a state interest; they cannot be "wholly arbitrary." Vildibill v. Johnson, 492 So. 2d 1047, 1050 (Fla. 1986); Bass v. General Development Corp., 374 So. 2d 479, 485 (Fla. 1979) (classification of certain land as nonagricultural for tax purposes had no "constitutionally justifiable reason," and therefore violated equal protection). As demonstrated above, see pp. 19-28, supra, the best interests of children are not served in any way by an outright prohibition on all adoptions by homosexuals. The record is completely devoid of any fact to suggest that a complete ban on adoptions by homosexuals is rationally related to the state's interest in serving the best interests of children.

The district court ignored this fact and instead created its own "rational basis" on which to uphold the statute:

> Perhaps the simplest argument in support of this position can be summarized as follows: whatever causes a person to become a homosexual, it is clear that the state cannot know the sexual preferences that a child will exhibit as an adult. Statistically, the state does know that a very high percentage of children available for adoption will develop heterosexual preferences. As a result, those children will need education and guidance after puberty concerning relationships with the opposite sex. In our society, we expect parents will provide this

> education to teenagers in the home. These subjects are often very embarrassing for teenagers and some aspects of the education are accomplished by the parents telling stories about their own adolescence and explaining their own experiences with the opposite sex. It 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. Given that adopted children tend to have some developmental problems arising from adoption or from their experiences prior to adoption, it is perhaps more important for adopted children than other children to have a stable heterosexual household during puberty and the teenage years.

627 So. 2d at 1220. In devising this "justification" for the challenged statute, the district court purports to apply Heller v. Doe, 113 S. Ct. 2637 (1993), in which the Supreme Court explained the application of the rational basis test under the federal constitution. 627 So. 2d at 1219-20. The district court's reliance on Heller, and its manufacture out of whole cloth of the above-quoted rationale for the challenged statute, must be rejected under Florida law and under federal constitutional principles.

First, and most importantly, this Court is not bound by Heller -- or by any other interpretation of the federal constitution -- because this action asserts claims only under the Florida Constitution. This Court's duty is to apply state constitutional guarantees more broadly than their federal counterparts, in a way that is more protective of individual rights. See Traylor v. State, 596 So. 2d 957 (Fla. 1992). "The Equal Protection Clause of our state Constitution was framed to

address all forms of invidious discrimination under the law . . ." Id. at 969 (emphasis supplied) (footnote omitted). For example, In re Florida Board of Bar Examiners, 358 So. 2d 7 (Fla. 1978), this Court applied the rational basis test to reject the Florida Bar's efforts to deny an applicant admission solely because of his homosexuality.

Indeed, prior decisions of this Court suggest that Heller's narrow interpretation of the rational basis test, at least as understood by the district court, is not the law in Florida. In De Ayala v. Florida Farm Bureau Cas. Ins., 543 So. 2d 204 (Fla. 1989), and Vildibill v. Johnson, 492 So. 2d 1047 (Fla. 1986), this Court suggested that the state bears the burden of articulating the purpose of a challenged statute. In De Ayala, the Court considered a statute that provided an insurance benefit to Canadian workers, while denying the same benefit to Mexican workers. "What possible state purpose would justify giving a benefit to nonresident Canadians that is denied Mexicans? The only answer suggested by respondent [arguing in favor of the statute] is . . ." 543 So. 2d at 207. Similarly, in Vildibill v. Johnson, 492 So. 2d 1047, the Court faulted the appellees (proponents of the statute) for failing to offer any justification or state interest upon which to uphold the statute. Moreover, under Florida law "[e]qual protection analysis requires that classifications be neither too narrow nor too broad to achieve the desired end. Such underinclusive and overinclusive classifications fail to meet even the minimal standards of the

rational basis test quoted above." Shriner's Hospital v. Zrillic, 563 So. 2d 64, 69-70 (Fla. 1990).[15] Thus, under Florida constitutional law the district court was without authority to create its own "rational basis" in the absence of any interest articulated by HRS.

Indeed, even Heller does not support the district court's "justification" of the statute under rational basis test. Heller requires a justification based on a "reasonably conceivable state of facts" before the court may defer to the legislature. 113 S. Ct. at 2642. Here, the district court's "justification" is based on no state of facts whatsoever.

In fact, the "justification" asserted by the district court is contradicted by the record in this case. The court's concern that children require parents who are "heterosexual role models" is unfounded. 627 So. 2d at 1220. The many studies discussed by Professor Patterson demonstrate that children with homosexual parents are as successful in their relationships with others as are children with heterosexual parents. Charlotte J. Patterson, Children of Lesbian and Gay Parents, 63 Child Development 1025, 1033-34 (1992). In addition, in 1978 Dorothy Riddle concluded that

> children growing up around openly self-identified gay adults have the opportunity to observe a mode of interpersonal relating which focuses on the quality of the relationship rather than on the sex of the

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[15] As demonstrated above, see pp. 19 - 28, supra, the challenged statute is far too broad to achieve the state's interest in protecting the best interests of children.

> partner or the social role to be played. Rather than posing a menace to children, gays may actually facilitate important development learning.

Dorothy I. Riddle, Relating to Children: Gays as Role Models, 34 Journal of Social Issues 38, 53 (1978). In fact, Riddle refutes the premise of the district court's "justification" (that adolescents seek the advice of their parents as role models regarding heterosexual relationships): "After early childhood, peers and significant adults (not necessarily parents) serve as primary role models." Id.

Even if the district court's asserted rationale were valid -- which petitioner has shown it is not -- banning all homosexuals from adopting is not rationally related to serving the goal of providing adopted children with parents who are able to relate personal incidences of adolescent experiences with the opposite sex. First, Florida adoption law does not require adoptive parents to have had sexual experiences with the opposite sex. Second, many lesbians and gay men may well have had such experiences, and, indeed, may have had successful heterosexual relationships. Third, many heterosexual adults have no adolescent dating experience to relate to their adopted children. Because the fit between the district court's asserted interest and the excluded group is so poor, it fails even rational basis review. The challenged statute therefore violates Cox's right to equal protection as guaranteed by the Florida Constitution and should be stricken.

C. The Challenged Statute Is Unconstitutional Because It Is Based On Prejudice.

If the district court's "justification" cannot provide a rational basis for the challenged statute, what can be the basis? The legislative history suggests the answer.[16] During hearings in the Senate Judiciary Committee on May 3, 1977, and again during debate on the Senate floor on May 11, 1977, Senator Chamberlin questioned the legislative purpose of the bill in light of the fact that the legislature had no demonstrable evidence that any problem existed in Florida with regard to adoptions by homosexuals. He argued that the purpose of the bill had nothing to do with adoption and everything to do with discrimination. No supporter of the bill disputed Senator Chamberlin's assessment. Instead, proponents of the bill expressed their concern for children of gay or lesbian parents, who would have to attend school with children of heterosexual parents, and for placing children in what may not be a "wholesome" family. These comments strongly suggest that the legislature was motivated by prejudice toward gay men and lesbians. See also Journal of the Senate at 370-71 (May 11,

[16] References herein to the legislative history of the challenged statute are paraphrased from cassette tapes of House and Senate debate received from the Florida State Archives. These tapes were also relied upon by the district court in its opinion. See Cox v. HRS, 627 So. 2d at 1314 n.6. Because of the difficulty in identifying speakers and the non-contemporaneous nature of the recordings, petitioner has been unable to obtain a certified transcription of these proceedings. Because petitioner believes this history is relevant to this Court's consideration of this case, and because it was relied on by the district court, petitioner respectfully requests that this Court review these tapes. The tapes are part of the court file in this case.

1977).

Even under the federal constitution, discrimination for its own sake can never be a legitimate state purpose. "[S]ome objectives -- such as 'a bare . . . desire to harm a politically unpopular group,' -- are not legitimate state interests." City of Cleburne v. Cleburne Living Center, 473 U.S. 432, 446-47, 105 S. Ct. 3249, 87 L.Ed.2d 313 (1985) (citation omitted). See also United States Dept. of Agriculture v. Moreno, 413 U.S. 528, 534, 93 S. Ct. 2821, 37 L.Ed.2d 782 (1973) ("a bare desire to harm a politically unpopular group cannot constitute a legitimate public interest"). In Cleburne, the Court struck down an ordinance which required only certain group homes (those for the mentally retarded) to apply for a special use zoning permit. Although the Court declined to apply heightened scrutiny, it nonetheless rejected the ordinance under rational basis review, concluding that "requiring the permit in this case appears to us to rest on an irrational prejudice against the mentally retarded . . ." 473 U.S. at 450.

Similarly, in Palmore v. Sidoti, 466 U.S. 429, 104 S. Ct. 1879, 80 L.Ed.2d 421 (1984), the Court reviewed a lower court ruling awarding custody of a child to the father, based on the fact that the mother was cohabitating with a black man. In a case originating in Florida, the State asserted its interest in protecting the best interests of the child. 466 U.S. at 433. Despite this compelling interest, the Court reversed:

> There is a risk that a child living with a stepparent of a different race may be subject

> to a variety of pressures and stresses not present if the child were living with parents of the same racial or ethnic origin. The question, however, is whether the reality of private biases and the possible injury they might inflict are permissible considerations for removal of an infant child from the custody of its natural mother. We have little difficulty concluding that they are not.

Id. "Private biases may be outside the reach of the law, but the law cannot, directly or indirectly, give them effect." Id. See also Pruitt v. Cheney, 963 F.2d 1160 (9th Cir. 1991) (rejecting exclusion of homosexuals from the military predicated on prejudice); Sullivan v. City of Pittsburgh, 811 F.2d 171 (3d Cir.), cert. denied, 484 U.S. 849, 108 S. Ct. 148, 98 L.Ed.2d 104 (1987) (striking down zoning ordinance predicated on prejudice against recovering alcoholics); Buttino v. FBI, 801 F. Supp. 298 (N.D. Cal. 1992) (finding in plaintiff's favor in light of proof of discrimination in employment against gay man); Burstyn v. City of Miami Beach, 663 F. Supp. 528 (S.D. Fla. 1987) (rejecting zoning provision grounded on prejudice against the elderly and disabled). The United States Supreme Court has consistently rejected attempts to justify discrimination on the basis of "archaic and overbroad" assumptions that rest on "old notions" and stereotypes. See, e.g., Frontiero v. Richardson, 411 U.S. 677, 93 S. Ct. 1764, 36 L.Ed.2d 583 (1973); Roberts v. United States Jaycees, 468 U.S. 609, 625, 104 S. Ct. 3244, 82 L.Ed.2d 462 (1984).

This principle is unaffected by the Supreme Court's decision in Heller v. Doe, 113 S. Ct. 2637 (1993). While Heller

involved the standards for rational basis review, it was not a case in which the statute was challenged as being based on prejudice. Heller in no way undermines the principle that prejudice can never provide a rational basis. In Dahl v. Secretary of the Navy, 62 U.S.L.W. 2153 (E.D. Cal. 1993), the court struck down a series of Navy regulations requiring discharge of admitted homosexuals. The court applied rational basis review in the wake of Heller: "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.

The evidence demonstrates that there was no non-discriminatory basis for categorically excluding homosexuals from consideration as adoptive parents. See p. 36, supra. Because it is based on prejudice, the challenged statute violates the equal protection guarantee of the Florida Constitution and should be stricken.

IV. THE DISTRICT COURT ERRED IN REJECTING PETITIONER'S DUE PROCESS CLAIM.

A. The Challenged Statute Violates Petitioner's Right to Due Process Because It Creates An Irrebuttable Presumption That Homosexuals Are Unfit Parents.

The United States Supreme Court has long held that statutory exclusions which create presumptions and deny the opportunity of proof violate the constitutional right to due process. "Statutes creating permanent irrebuttable presumptions have long been disfavored under the Due Process Clauses of the Fifth and Fourteenth Amendments." Vlandis v. Kline, 412 U.S.

441, 446, 93 S. Ct. 2230, 37 L.Ed.2d 63 (1973). In Vlandis the Court struck down a Connecticut statute establishing a conclusive presumption that students whose legal address was outside the state at the time of their application for admission would be forever classified as "out of state" students for tuition purposes. The Court concluded that

> [t]he State's interest in administrative ease and certainty cannot, in and of itself, save the conclusive presumption from invalidity under the Due Process Clause where there are other reasonable and practicable means of establishing the pertinent facts on which the State's objective is premised.

Id. at 451 (emphasis supplied). See also Stanley v. Illinois, 405 U.S. 645, 92 S. Ct. 1208, 31 L.Ed.2d 551 (1972) (invalidating statutory presumption of unmarried father's parental unfitness).

The Florida courts have applied this principle no less vigorously. In Straughn v. K & K Land Management, Inc., 326 So. 2d 421 (Fla. 1976), this Court articulated the following test for the constitutionality of statutory presumptions: "First, there must be a rational connection between the fact proved and the ultimate fact presumed. . . Second, there must be a right to rebut in a fair manner."[17] Id. at 424 (citations omitted). In

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[17] This test applies even where no fundamental right or interest is implicated by the statutory exclusion. See Bass v. General Development Corp., 372 So. 2d 479, 484 n.4 (Fla. 1979). In this case, however, fundamental liberty interests are at stake. "'[F]reedom of personal choice in matters of . . . family life is one of the liberties protected by the Due Process Clause,'" Smith v. Organization of Foster Families, 431 U.S. 816, 842, 97 S. Ct. 2094, 53 L. Ed. 2d 14 (1974). This "private realm of family life which the state cannot enter" has been afforded both substantive and procedural due process protection. Prince v. Massachusetts, 321 (continued...)

Bass v. General Development Corp., 372 So. 2d 479 (Fla. 1979), this Court struck down a statute classifying certain land as nonagricultural for tax purposes, concluding that the legislature's grant of the right to rebut to other categories of property owners under the same statute "demonstrates a reasonable alternative means of making the determination," other than through an irrebuttable presumption. Id. at 485. See also Public Health Trust of Dade County v. Valcin, 507 So. 2d 596, 599 (Fla. 1987) (holding that presumption of liability against doctor who removed medical records violates due process because it fails "to provide the adverse party any opportunity to rebut the presumption of negligence"); compare Cunningham v. Parikh, 493 So. 2d 999 (Fla. 1986) (applying Straughn test and upholding statutory presumption that allowed opportunity to rebut).

Here, as in Bass, the legislature has provided for an alternative means of determining fitness to adopt, other than by use of an irrebuttable presumption. Every other category of persons, including grandparents, the disabled, and convicted felons are judged on an individualized basis, with the best interests of the child in mind. See Hart v. Hart, 458 So. 2d 815, 816 (Fla. 4th DCA 1984) ("the best interests of a child are not served by denying the opportunity to present evidence which

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[17](...continued)
U.S. 158, 166, 64 S. Ct. 438, 88 L.Ed.2d 645 (1944); Shevin v. Byron, Harless, Schaffer, etc., 379 So. 2d 633 (Fla. 1980). Due process rights have been found to extend to prospective adoptive parents. Spielman v. Hildebrand, 873 F.2d 1377, 1384 (10th Cir. 1989). Therefore, strict scrutiny should apply to this due process analysis. See pp. 19 - 28, supra.

might have a bearing thereon"). Only homosexuals are subject to an irrebuttable presumption disqualifying them from even being considered as adoptive parents. The statute presumes, rather than proves, homosexuals' unfitness to adopt solely because it is more convenient to presume than to prove. Stanley, 405 U.S. at 658. The State's convenience is insufficient to justify refusing prospective adoptive parents, and children who may benefit from the adoption, the possibility of a permanent family relationship. Id. As the Supreme Court observed in Stanley:

> . . . 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.

Therefore, the statute presumptively forbidding adoption by homosexuals is not a reasonable means of determining suitability for adoption and must be stricken as violative of petitioner's right to due process of law.

B. The Challenged Statute Is Unconstitutionally Vague.

The statute suffers the further defect, first raised by the trial court,[18] of unconstitutional vagueness. Vague laws

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[18] In the instant case, Cox stated his sexual orientation at the outset. For this reason, he did not raise the vagueness challenge to the statute's constitutionality until requested to do so by the lower court. See Village of Hoffman Estates v. Flipside, Hoffman Estates, Inc., 455 U.S. 489, 495, 102 S. Ct. 1186, 71 L.Ed.2d 362 (1982) ("A plaintiff who engages in some conduct that is clearly proscribed cannot complain of the vagueness of the law as applied to the conduct of others." (footnotes omitted)). Nonetheless, Cox agrees with the conclusion of the lower court that (continued...)

offend due process because they do not give individuals fair notice of the proscribed conduct. Papachristou v. City of Jacksonville, 405 U.S. 156, 162, 92 S. Ct. 839, 843, 31 L.Ed.2d 110 (1972). Moreover, because they do not limit the exercise of discretion by those charged with their application, vague statutes engender the possibility of arbitrary and discriminatory enforcement. Grayned v. City of Rockford, 408 U.S. 104, 108-09, 92 S. Ct. 2294, 2298-99, 33 L.Ed.2d 222 (1972).

The United States Supreme Court has articulated the standard for vagueness as follows:

> [A] statute which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application violates the first essential element of due process.

Cramp v. Bd. of Pub. Instruction of Orange County, 368 U.S. 278, 287, 82 S. Ct. 275, 280, 7 L. Ed. 2d 285 (1961) (quoting Connally v. Gen. Constr. Co., 269 U.S. 385, 391, 46 S. Ct. 126, 127, 70 L. Ed. 322 (1926)). The standard under Florida's due process clause is the same. Webb v. Department of Prof. Regulation, 595 So. 2d 1103, 1104 (Fla. 5th DCA 1992). The challenged statute requires such guesswork, since nowhere in the State's statutory scheme is the term "homosexual" defined. This absence of a definition permits arbitrary and discriminatory application of the statute by HRS officials who are free to apply their own subjective determination of that term to prospective parents.

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[18](...continued)
the statute is unconstitutionally vague. (Final Judgment at 12-13.)

Homosexuality is a complex phenomenon incapable of being reduced to a single, precise definition. See generally, Marc A. 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, 532 (1992). At what point along the spectrum of human sexuality is one officially deemed to be a homosexual? Does a single experience, thought, or feeling make one homosexual? What about five, ten, or fifteen experiences? Are "bisexuals" to be included in the statute's prohibition? Many homosexuals do not come out until later in life, after marrying and raising children. Conversely, many people who later adopt a heterosexual lifestyle experiment with homosexuality when they are young. See, e.g., Rimer, Campus Lesbians Step Into Unfamiliar Light, N.Y. Times, June 5, 1993, at 6. Because sexual identity may not be constant for life, even the good-faith self-identification of a prospective parent may ultimately prove inaccurate.

The district court's conclusion that "an ordinary person would realize that the legislature had not created a rule concerning a person's thoughts, but rather a person's conduct", 627 So. 2d at 1214, is unsupported, and even contradicted, by the legislative history of the statute. In proceedings held before the Senate Judiciary Committee on May 3, 1977, committee staff cautioned that the term "homosexual" created definitional problems that could subject the statute to constitutional challenge. Committee members referred to the "dictionary"

definition of homosexual as one who is inclined toward or practices homosexuality. On the Senate floor during debate on May 11, 1977, legislators questioned the usefulness of a definition based on one's "inclination". Ultimately the Senate declined to resolve this definitional uncertainty and left it to the circuit courts making adoption decisions. Comments in the House Judiciary Committee on May 19, 1977 were similar.

The only prospective parents who definitely qualify as "homosexuals" under the existing statute are those who will confess belonging to this undefined category. The statute leaves prospective parents uncertain as to their opportunity to adopt, and leaves the circuit courts free to apply the statute arbitrarily. For these reasons, the statute is unconstitutionally vague in violation of Art. I, § 9, Fla. Const., and should be stricken.

V. THE DISTRICT COURT EXCEEDED ITS AUTHORITY IN REVERSING THE TRIAL COURT AND ENTERING JUDGMENT FOR HRS; IF FACTS WERE IN DISPUTE, REMAND WAS APPROPRIATE.

The district court ruled on the merits of plaintiffs' claims only after a lengthy discussion of what the court perceived to be a "problem of methodology" arising from the trial court proceedings:

> The trial court's opinion discusses the plaintiffs' "unrebutted and overwhelming evidence" establishing that homosexuals have normal abilities to rear children. In truth, there is virtually no evidence in the record. The parties merely submitted copies of law review articles and other reports in magazines and journals.

627 So. 2d at 1213 (emphasis in original). The district court

disapproved of this procedure, which it termed "trial by photocopy," and concluded that the "trial court did not have a record to support a summary judgment in favor of the plaintiffs on any issue." Id. Despite this disapproval, the record is clear that

> the parties stipulated that the case would be resolved without the necessity of an evidentiary hearing, as follows: That each side would submit a brief arguing matters of law and citing appropriate cases. In addition, each side would attach to its brief any scientific data or research it desired and would likewise include this material in its argument. Each party would (and has) stipulated to waive objections of authenticity, relevancy, competency and lack of predicate or foundation as to each article submitted. The Court would then consider and weigh such data and research as if presented in person by the authors and researchers of the articles and papers.

(Final Judgment at 2 n.1.)

The district court's rejection of the record in this case was erroneous for two reasons: (1) assuming the district court was correct in its assessment that there were "unproven and disputed issues of fact," 627 So. 2d at 1213, the district court should have remanded this case for trial on those disputed issues; and (2) the district court improperly substituted its judgment of the evidence in the record for the judgment of the trial court.

The district court's disapproval of the parties' stipulation led it to conclude that "the parties could not use this procedure simply to overlook or ignore unproven and disputed issues of fact." 627 So. 2d at 1213. If the court legitimately

viewed the record as insufficient to support summary judgment for the plaintiffs, its proper course should have been to reverse the trial court's judgment and remand for trial of the disputed issues of fact. In Pitts v. Fox, 591 So. 2d 1042 (Fla. 1st DCA 1991), the First District Court of Appeal reviewed a summary judgment entered following the parties' stipulation to the facts. There, as in the instant case, the district court found the stipulated facts insufficient to permit summary judgment. However, rather than reversing and entering judgment for the appellant as the district court did here, the Pitts court properly remanded the case to the trial court for further proceedings on the disputed issues. Id. at 1043. See also Hancock v. Department of Corrections, 585 So. 2d 1068 (Fla. 1st DCA 1991), rev. denied, 598 So. 2d 75 (1992); Berlanti Construction Co. v. Miami Beach Federal Savings and Loan Association, 183 So. 2d 746 (Fla. 3d DCA 1966); Sunday v. Ikinson, 103 So. 2d 669 (Fla. 3d DCA 1958).

Any insufficiency in the stipulated facts should have resulted in a remand to the trial court for trial on the disputed issues. Although petitioner believes this Court has an ample record on which to reverse the district court and reinstate judgment for the petitioner, at a minimum it should reverse the district court and remand for trial.

Rather than remand, the district court went on to rule on the merits of plaintiffs' claims. In the process, the court improperly reweighed the evidence in the record and overruled the

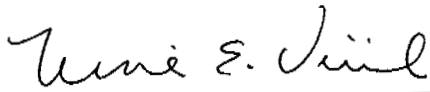
trial court's reasoned judgment based on that evidence. "First, it is not the function of an appellate court to reevaluate the evidence and substitute its judgment for that of the jury." Helman v. Seaboard Coast Line R. Co., 349 So. 2d 1187, 1189 (Fla. 1977). "Second, if there is any competent evidence to support a verdict, that verdict must be sustained regardless of the District Court's opinion as to its appropriateness." Id. These principles hold true when findings of fact are made by the trial court; they are entitled to the same weight as a jury verdict. Marsh v. Marsh, 419 So. 2d 629, 630 (Fla. 1982), rev. dismissed, 427 So. 2d 737 (1983).

The district court had no authority to substitute its judgment for that of the trier of fact. Horatio Enterprises, Inc. v. Rabin, 614 So. 2d 555 (Fla. 3d DCA 1993); Plaza Builders, Inc. v. Regis, 502 So. 2d 918 (Fla. 2d DCA 1987); Williams v. Dolphin Reef, Ltd., 455 So. 2d 640 (Fla. 2d DCA 1984). "It is not the prerogative of an appellate court, upon a de novo consideration of the record, to substitute its judgment for that of the trial court." Shaw v. Shaw, 334 So. 2d 13, 16 (Fla. 1976); Brandenburg Investment Corporation v. Farrell Realty, Inc., 463 So. 2d 558, 560 (Fla. 2d DCA 1985). The district court's rejection of the trial court's findings based on the evidence in the record, and of the parties' stipulation to admission of that evidence, was clearly error.

CONCLUSION

For the foregoing reasons, petitioner JAMES W. COX respectfully requests that this Court enter an order reversing the order of the district court and declaring § 63.042(3), Fla. Stat., unconstitutional as violative of the Florida Constitution's guarantees of the rights to privacy, equal protection and due process of law.

Respectfully submitted,



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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Initial Brief of Petitioner has been furnished by U.S. mail this 13th day of May, 1994 to Anthony N. DeLuccia, Jr., District Legal Counsel, Post Office Box 60085, Fort Myers, FL 33906; and Linda K. Harris, Dept. of Health and Rehabilitative Services, 1323 Winewood Blvd., Bldg One-Room 407, Tallahassee, FL 32399-0700.

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