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.
_____/

REPLY BRIEF OF PETITIONER

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

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TABLE OF CONTENTS

TABLE OF CITATIONS

STATUTES

CONSTITUTIONS

OTHER AUTHORITIES

INTRODUCTION

The best interests of children eligible for adoption are served by providing those children with caring and capable adoptive parents. Yet the statute at issue in this case, § 63.042(3), Fla. Stat., removes an entire category of caring and capable prospective parents from consideration as adoptive parents, thereby depriving children of the opportunity of a loving family life and at the same time infringing on the constitutional rights of the prospective parents. Respondent Department of Health and Rehabilitative Services ("HRS") does not -- and cannot -- claim that lesbians or gay men are less capable parents than heterosexuals. Nor does HRS claim that there is any evidence that children who grow up with lesbian or gay parents are less happy, well-adjusted or successful in life than children who grow up with heterosexual parents. And HRS never explains how it could possibly be in the best interests of children eligible for adoption in Florida to be denied families. Categorical exclusions of groups of prospective adoptive parents cannot serve the best interests of children hoping to be adopted. Because the record in this case disproves any basis for the challenged statute, § 63.042(3), Fla. Stat., violates petitioner's rights to privacy, equal protection and due process, all as guaranteed by the Florida Constitution.

ARGUMENT

I. THERE IS NO COMPELLING STATE INTEREST TO JUSTIFY VIOLATION OF PETITIONER'S RIGHT TO INTIMATE DECISIONMAKING AS PROTECTED BY FLORIDA'S RIGHT TO PRIVACY.

HRS does not refute petitioner's argument that the challenged statute violates his right to be free from governmental interference with his intimate decisionmaking as protected by Article I, Section 23 of the Florida Constitution. By prohibiting all adoptions by homosexuals, the challenged statute penalizes applicants who exercise their constitutionally protected right to pursue private interpersonal relationships with members of the same sex. The statute impermissibly burdens petitioner's exercise of his right to privacy by forcing him to choose between his desire to adopt a child and his right to make private decisions free from governmental interference.

Instead of disputing petitioner's claim to intimate decisionmaking free from government burden, HRS argues that adoption, as a "statutory privilege", is not protected by the right to privacy. (Answer Brief at 3.) But petitioner has never argued that his decision to apply to become an adoptive parent is protected by the right to privacy. Rather, it is his right to make intimate decisions that is unconstitutionally burdened by the challenged statute.

Because the challenged statute burdens petitioner's fundamental right to privacy, it is subject to strict scrutiny and may be upheld only if shown by HRS to serve a compelling state interest by the least restrictive means. Winfield v. Div.

of Pari-Mutuel Wagering, 477 So. 2d 544, 547 (Fla. 1985). The parties do not dispute that the state has an interest in protecting the best interests of children being adopted. Indeed, the central issue in this case is whether the challenged statute furthers that interest. Petitioner has clearly demonstrated, based on the record in this case, that the state's absolute ban on all adoptions by homosexuals does not serve -- and in fact undermines -- the best interests of children eligible for adoption.

In its Answer Brief, HRS does not argue that the statute is justified because of some lesser parenting ability of gay men and lesbians. Nor does HRS even attempt to defend the lower court's speculation that gay men and lesbians are somehow less capable of serving as effective role models. The reason for this is apparent. As petitioner has shown, the social science research uniformly proves that children raised by homosexual parents suffer no negative effects as a result of the sexual orientation of their parents. Instead, the only basis HRS asserts to explain how the challenged statute serves the state's interest in protecting the best interests of children is that "intimate conduct with another man . . . is subject to criminal prosecution" under § 800.02, Fla. Stat.[1] (Answer Brief at 6.)

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[1] HRS never suggests that petitioner has been arrested, charged, or convicted of violating § 800.02, Fla. Stat, or any other criminal statute. (He has not.) To disqualify applicants for a theoretical violation of a criminal statute flies in the face of due process protections. See generally 10 Fla. Jur. 2d Constitutional Law § 363 (1979).

This asserted justification for the statute fails.

First, as argued above and at pp. 12-19 of petitioner's Initial Brief, the right to privacy in Florida protects the right to intimate decisionmaking. Thus, section 800.02 is unconstitutional and cannot serve as a compelling state interest.

Second, even if section 800.02 is constitutional, it nonetheless fails to constitute a compelling state interest to justify the challenged statute. Section 800.02, Fla. Stat., classifies as a second degree misdemeanor "unnatural and lascivious" acts with another person. It does not specifically criminalize sexual contact between persons of homosexual orientation. Nor is the statute limited to homosexual sexual conduct -- it applies equally to "unnatural and lascivious" acts between persons of heterosexual orientation. Yet HRS does not categorically prohibit adoption by heterosexuals who may violate section 800.02.[2] Moreover, Florida law does not preclude persons who have actually been convicted of violating a wide variety of laws from adopting children. In fact, persons with felony convictions and persons whose names appear on the Abuse Registry are not absolutely prohibited from adopting. See Fla. Admin. Code R. 10M-8.0053.

In light of the state's failure to disqualify other

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[2] The "unnatural and lascivious" acts prohibited by section 800.02 include, for example, oral sex. Such a prohibition would bar the vast majority of heterosexual couples from adopting children in Florida. See Phillip Blumstein and Pepper Schwartz, American Couples 236 (1983) (finding that at least 90% of heterosexual couples had engaged in oral sex).

prospective adoptive parents who might violate section 800.02 -- or prospective parents who actually have been convicted of violating felony statutes -- this asserted justification cannot satisfy the state's burden under the compelling interest test.

In response to petitioner's argument that the individualized "best interests of the child" determination serves the state's interest in a less restrictive way, HRS seeks to support the categorical prohibition by arguing that it is less intrusive to prospective parents than an individualized "best interests" analysis. This argument is nonsensical because Florida's adoption statute requires HRS and the circuit courts to make individualized determinations as to the best interests of the adoptive child based on a wide variety of personal information obtained from prospective parents. Consistent with this well-founded legal requirement, petitioner only asks that an individualized determination be made in his case.

The categorical ban unconstitutionally burdens petitioner's right to privacy by forcing him to forfeit constitutionally protected activity to become an adoptive parent. The statutorily required "nexus" approach would remove this unconstitutional burden and better serve the state's interest in protecting the best interests of children by maximizing the limited opportunities for children to enjoy a permanent and

fulfilling family life.[3]

II. THERE IS NO RATIONAL BASIS ON WHICH THIS COURT CAN UPHOLD THE CHALLENGED STATUTE UNDER FLORIDA'S EQUAL PROTECTION GUARANTEE.

Because the challenged statute infringes on petitioner's fundamental right to privacy, it is subject to strict scrutiny under Florida's equal protection guarantee, Art. I, § 2, Fla. Const., and no compelling state interest has been shown to justify this infringement. HRS argues only that a rational relationship exists between the challenged statute and the state's interest in protecting the best interests of children, citing Stall v. State, 570 So. 2d 257 (Fla. 1990). (Answer Brief at 9.) But even under rational basis review, the statute violates the equal protection guarantee and HRS points to no authority to the contrary.

HRS grossly misrepresents the holding of Stall. First, Stall did not uphold a legislatively determined connection between "parental fitness and current homosexual conduct" as HRS claims. (Answer Brief at 9.) Indeed, the case had nothing to do with sexual orientation or adoption, but rather involved a challenge by vendors of obscene material to their convictions under Florida's RICO statute. The connection upheld by the Stall court was between "obscene material and antisocial behavior."

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[3] In addition to the cases cited in petitioner's Initial Brief applying the nexus approach to allow adoptions by gay men and lesbians, see also Bottoms v. Bottoms, 1994 Va. App. LEXIS 381 (Va. App. June 21, 1994) (returning custody of child to lesbian mother where no nexus was found between violation of "unnatural acts" statute and parenting ability).

Second, Stall was not brought under Florida's equal protection provision. Thus Stall offers no support for finding that any relationship exists between "parental fitness and current homosexual conduct", much less that it is a rational relationship. Therefore there is no authority in Florida for finding a rational relationship between parental fitness and sexual orientation, and as set forth in petitioner's Initial Brief, the evidence in this case shows that no such relationship exists.[4]

Moreover, HRS' reliance on petitioner's alleged violation of § 800.02, Fla. Stat., provides further independent grounds for invalidating the statute under the equal protection clause of the Florida Constitution. As discussed earlier (see p. 4, supra), section 800.02 does not differentiate between heterosexual and homosexual sexual conduct. Thus, to the extent that violation of section 800.02 is the basis for the adoption statute, the challenged statute deprives lesbians and gay men of

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[4] The United States Supreme Court did not hold in F.C.C. v. Beach Communications, Inc., 113 S. Ct. 2096 (1993), or Heller v. Doe, 113 S. Ct. 2637 (1993), that courts can defer to legislatures without any analysis of the basis for the statute. Rather, to survive federal equal protection rational basis review, a statute must have a justification based on a "reasonably conceivable state of facts." Heller, 113 S. Ct. at 2642. Even this requirement is only applicable "absent some reason to infer antipathy" toward a disfavored group. F.C.C., 113 S. Ct. at 2101 (citation omitted). In any event, F.C.C. and Heller were decided under the federal equal protection clause. For the reasons set forth in petitioner's Initial Brief, their analysis is not persuasive under Florida constitutional decisions. Likewise, Ostendorf v. Turner, 426 So. 2d 539 (Fla. 1982), cited by HRS, is not controlling as it was decided prior to this Court's decision in Traylor v. State, 596 So. 2d 957 (Fla. 1992), which governs interpretation of Florida's Declaration of Rights.

equal protection by distinguishing between homosexuals and heterosexuals who violate section 800.02. Such a distinction is "wholly arbitrary" because it is unrelated to any state interest. Vildibill v. Johnson, 492 So. 2d 1047, 1050 (Fla. 1986); Bass v. General Development Corp., 364 So. 2d 479, 485 (Fla. 1979).

In any event, HRS' selective reliance on § 800.02, Fla. Stat., only as to persons with a homosexual orientation provides further support for rejecting the challenged statute as based only on prejudice -- an argument HRS does not refute. HRS has failed to assert any non-discriminatory basis for excluding homosexuals who allegedly violate section 800.02, but not excluding heterosexuals who may violate the same statute, from consideration as adoptive parents. Because prejudice can never provide a legitimate state purpose under rational basis review, the statute must be struck down. See City of Cleburne v. Cleburne Living Center, 473 U.S. 432, 446-47, 105 S. Ct. 3249, 87 L.Ed.2d 313 (1985); United States Dept. of Agriculture v. Moreno, 413 U.S. 528, 534, 93 S. Ct. 2821, 37 L.Ed.2d 782 (1973); Dahl v. Secretary of the Navy, 830 F. Supp. 1319 (E.D. Cal. 1993); Cammermeyer v. Aspin, 1994 U.S. Dist. LEXIS 7289 (W.D. Wash. June 1, 1994).

III. RESPONDENT'S CONSTRUCTION OF THE CHALLENGED STATUTE DOES NOT DEFEAT PETITIONER'S DUE PROCESS CLAIM.

HRS argues that the challenged statute does not create an irrebutable presumption in violation of petitioner's right to due process under Art. I, § 9, Fla. Const., because it excludes only "currently practicing homosexuals." (Answer Brief at 7.)

Once again, HRS misunderstands petitioner's argument and the applicable caselaw. Conclusive presumptions against a category of persons -- no matter how the category is defined -- are invalid absent a right to rebut the presumption and a rational connection between the fact to be proved (current homosexual activity or conduct) and the ultimate fact presumed (unfitness to adopt). Straughn v. K & K Land Management, Inc., 326 So. 2d 421 (Fla. 1976). Petitioner has clearly established that there is no connection between a prospective adoptive parent's homosexuality (whether defined in terms of conduct or orientation) and his fitness to adopt. It is undisputed that Florida provides homosexuals no opportunity to rebut the statutory presumption. For these reasons, the statute violates Florida's due process provision.

HRS also argues that its definition of "homosexual" as applying only to "currently practicing homosexuals" defeats petitioner's vagueness challenge. However, HRS ignores the legislative history of the statute, which contradicts its purported definition. HRS similarly ignores the fact that prospective adoptive parents cannot be assumed to understand HRS' interpretation of the statute, nor will circuit courts have any idea how to enforce the statute as written. Therefore, HRS' purported definition in no way resolves the statute's vagueness.

IV. REMAND IS REQUIRED WHERE THERE ARE DISPUTED ISSUES OF FACT.

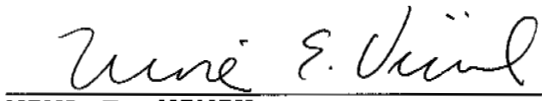
Assuming the district court was correct in its assessment that there were "unproven and disputed issues of

fact," Cox v. HRS, 627 So. 2d 1210, 1213 (Fla. 2d DCA 1993) -- an assumption with which petitioner disagrees -- the district court should have remanded for trial on these disputed issues rather than granting summary judgment for respondent. See, e.g., Pitts v. Fox, 591 So. 2d 1042 (Fla. 1st DCA 1991). The only case cited by HRS, Anderson v. Anderson, 617 So. 2d 1109 (Fla. 1st DCA 1993), is inapposite because it involved an appeal of a judgment entered after trial on the merits, not a decision entered on motions for summary judgment.

CONCLUSION

For the foregoing reasons, as well as the reasons set forth in the Initial Brief of Petitioner, 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 has been furnished by U.S. mail this 22d day of July, 1994 to Anthony N. DeLuccia, Jr., District Legal Counsel, Post Office Box 60085, Fort Myers, FL 33906; Linda K. Harris, Dept. of Health and Rehabilitative Services, 1323 Winewood Blvd., Bldg. One-Room 407, Tallahassee, FL 32399-0700; William J. Sanchez and Robert M. Brake, 1830 Ponce De Leon Blvd., Coral Gables, FL 33134; Thomas Horkan, Jr., P.O. Box 1638, Tallahassee, FL 32302; and Alexis Crow, The Rutherford Institute, P.O. Box 7482, Charlottesville, VA 22906.

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